

THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XI.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XI.

COMMONS AND RIGHTS OF COMMON. *CONFLICT OF LAWS.*
CONSTITUTIONAL LAW.
*COMPULSORY PURCHASE OF
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In this Volume English Cases reported up to 1st January, 1922, are included, and other cases are included so far as the Reports of the same were available in London on that date.

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COMPOSITION WITH CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

COMPOUNDING FELONY.

See CRIMINAL LAW AND PROCEDURE.

COMPROMISE.

See AGENCY ; BANKRUPTCY AND INSOLVENCY ; BARRISTERS ; CHARITIES ; COMPANIES ; HUSBAND AND WIFE ; INFANTS AND CHILDREN ; JUDGMENTS ; LUNATICS AND PERSONS OF UNSOUND MIND ; MISREPRESENTATION AND FRAUD ; MISTAKE ; PRACTICE AND PROCEDURE ; SOLICITORS.

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CONTAGIOUS DISEASES.

See ANIMALS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. O. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. O.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol. 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
	South African Law Reports, Appellate Division	S. Af.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	
Atk.	Atkins' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
& Ad.	Barber's Gold Law	S. Af.
& Ald.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
& C.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822	Eng.
& C. R. (preceded by late)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
& S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
C. R.	British Columbia Reports	Can.
	Bose's Digest	Ind.
L. R.	Bengal Law Reports	Ind.
L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
c. Abr.	Bacon's Abridgment	Eng.
all Ct. Cas	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

Baild. ...	Baildon's Select Cases in Chancery (Selden Society, Vol. X.) ...	Eng.
Ball & B. ...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814 ...	Ir.
Bankr. & Ins. R. ...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn. ...	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust. ...	Barron and Austin's Election Cases, 1 vol., 1842 ...	Eng.
Barn. Ch. ...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B. ...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734 ...	Eng.
Barnes ...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1782—1760 ...	Eng.
	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 ...	Ir.
	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav. ...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866 ...	Eng.
Beav. & Wal. ...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846 ...	Eng.
Beaw. ...	Beawes's Lex Mercatoria ...	Eng.
Bell, C. C. ...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860 ...	Eng.
Bell, Ct. of Sess. ...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792 ...	Scot.
Bell, Ct. of Sess. fol. ...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795 ...	Scot.
Bell, Dict. Dec. ...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833 ...	Scot.
Bell, Sc. App. ...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850 ...	Scot.
Bellewe ...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup. ...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756 ...	Eng.
Ben. & D. ...	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Benl. ...	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627 ...	Eng.
Ber. ...	New Brunswick Reports (Berton) ...	Can.
Bing. ...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. C. ...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm. ...	Bisset and Smith's Digest ...	S. Af.
Bitt. Prac. Cas. ...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876 ...	Eng.
Bitt. Rep. in Ch. ...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884 ...	Eng.
Bl. Com. ...	Blackstone's Commentaries ...	Eng.
Bl. D. & Osb. ...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848 ...	Ir.
	Bligh's Reports, House of Lords, 4 vols., 1819—1821 ...	Eng.
Bli. N. S. ...	Bligh's Reports, House of Lords, New Series 11 vols., 1827—1837 ...	Eng.
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Co. Ent. ...	Coke's Entries ...	Eng.
Co. Inst. ...	Coke's Institutes ...	Eng.
Co. L. J. ...	Colonial Law Journal ...	N.Z.
Co. Litt. ...	Coke on Littleton (1 Inst.) ...	Eng.
Co. Rep. ...	Coke's Reports, 13 parts, 1572—1616 ...	Eng.
Cochran ...	Nova Scotia Law Reports ...	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833 ...	Eng.
Coll. ...	Collyer's Reports, Chancery, 2 vols., 1844—1846 ...	Eng.
Coll. Jurid. ...	Collectanea Juridica, 2 vols. ...	Eng.
Colles ...	Colles' Cases in Parliament, 1 vol., 1697—1713 ...	Eng.
Colt. ...	Coltman's Registration Cases, 1 vol., 1879—1885 ...	Eng.
Com. ...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 ...	Eng.
Com. Cas. ...	Commercial Cases, 1895—(current) ...	Eng.
Com. Dig. ...	Comyns' Digest ...	Eng.
Comb. ...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698 ...	Eng.
Con. & Law. ...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ...	Ir.
Cong. Dig. ...	Congdon's Digest ...	Can.
Cooke & Al. ...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834 ...	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747 ...	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 ...	Eng.
Coop. G. ...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ...	Eng.
Coop. Pr. Cas. ...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838 ...	Eng.
Coop. temp. Brough.	C. P. Cooper's Cases <i>temp.</i> Brougham, Chancery, 1 vol., 1833—	Eng.
Coop. temp. Cott.	C. P. Cooper's Cases <i>temp.</i> Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) ...	Eng.
Cor. ...	Coryton's Reports ...	Ind.
Corb. & D. ...	Corbett and Daniell's Election Cases, 1 vol., 1819 ...	Eng.
Correspondances Jud. ...	Correspondances Judiciaires ...	Can.
Couper ...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout. ...	Coutlees' Unreported Cases ...	Can.
Cout. Dig. ...	Coutlees' Digest ...	Can.
Cowp. ...	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ...	Eng.
Cox & Atk. ...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846 ...	Eng.
Cox, C. C. ...	E. W. Cox's Criminal Law Cases, 1843—(current) ...	Eng.
Cox, Eq. Cas. ...	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ...	Eng.
Cox, M. & H. ...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852 ...	Eng.
Cr. & J. ...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M. ...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—	Eng.
Cr. & Ph. ...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. App. Rep. ...	Cohen's Criminal Appeal Reports, 1908—(current) ...	Eng.
Cr. M. & R. ...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ...	Eng.
Craw. & D. ...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846 ...	Ir.
Craw. & D. Abr. C. ...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas. ...	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ...	Eng.
Cripps' Church Cas. ...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ...	Eng.
Cro. Car. ...	Croke's Reports <i>temp.</i> Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ...	Eng.
Cro. Eliz. ...	Croke's Reports <i>temp.</i> Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ...	Eng.
Cro. Jac. ...	Croke's Reports <i>temp.</i> James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ...	Eng.
Crui. Dig. ...	Cruise's Digest of the Law of Real Property, 7 vols. ...	Eng.
Cunn. ...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt. ...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 ...	Eng.
D. C. A. ...	Duxbury's Reports of the High Court of the South African Republic ...	S. Af.
D. L. R. ...	Dorion's Queen's Bench Reports ...	Can.
Dalr. ...	Dominion Law Reports ...	Can.
Dan. ...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720 ...	Scot.
Dan. & Ll.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Dav. & Mer. ..	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844...	Eng.
Dav. Ir. ..	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—	Ir.
Dav. Pat. Cas. ..	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day ...	Day's Election Cases, 1 vol., 1892—1893 ...	Eng.
Dea. & Sw. ..	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch. .	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B. ...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. O. C. ...	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And. ...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832...	Scot.
De G. ...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
De G. & J. ...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm. ...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—	Eng.
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865...	Eng.
De G. M. & G. ...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols.,	Eng.
Delane ...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dig. ...	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl. ...	Justinian's Digest or Pandects ...	Eng.
	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677...	Scot.
Dods. ...	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly ...	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B. ...	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow ...	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl. ...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832...	Eng.
Dow. & L. ...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B.	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827...	Eng.
Dow. & Ry. M. C.	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827...	Eng.
Dow. & Ry. N. P.	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—	Eng.
Dowl. ...	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S. ...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal. ...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841...	Ir.
Dr. & War. ...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843...	Ir.
Dra. ...	Draper's King's Bench Reports ...	Can.
Drew. ...	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm. ...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater ...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap.	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859...	Ir.
Drury temp. Sug.	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844...	Ir.
Dugd. Orig. ...	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ot. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862...	Scot.
Dunning ...	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie ...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642...	Scot.
Dyer ...	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. & A. ...	Upper Canada Error and Appeal ...	Can.
E. & B. ...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—	Eng.
E. & E. ...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 ...	Eng.
E. B. & E. ...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol.,	Eng.
E. D. C. ...	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L. ...	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. L. R. ...	Eastern Law Reporter ...	Can.
E. R. (or Eng. Rep.)	English Reports ...	Eng.
E. R. ...	Ontario Election Reports ...	Can.
Eag. & Y. ...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.
East ...	East's Reports, King's Bench, 16 vols., 1800—1812 ...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

East, P. C. ...	East's Pleas of the Crown ...	Eng.
Ecc. & Ad. ...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.
Eden ...	Eden's Reports, Chancery, 2 vols., 1757—1766 ...	Eng.
Edgar ...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—	Scot.
Edw. ...	Edwards' Reports, Admiralty, 1 vol., 1808—1812 ...	Eng.
Elchies ...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—	Scot.
Emden's B. C. ...	Emden's Building Contracts, Building Leases and Building	Eng.
Eng. Pr. Cas. ...	Roscoe's English Prize Cases, 2 vols., 1745—1858 ...	Eng.
Eq. Cas. Abr. ...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ...	Eng.
Eq. Rep. ...	Equity Reports, 3 vols., 1853—1855 ...	Eng.
Esp. ...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810 ...	Eng.
Ex. D. ...	Law Reports, Exchequer Division, 5 vols., 1875—1880 ...	Eng.
Exch. ...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856 ...	Eng.
Exch. C. R. ...	Exchequer Court Reports ...	Can.
F. (Ot. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F. ...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880 ...	S. Af.
F. & F. ...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D. ...	Finnemore's Notes and Digest of Natal Cases, 1863—1867 ...	S. Af.
Fac. Coll. ...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841 ...	Scot.
Falc. ...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751 ...	Scot.
Falc. & Fitz. ...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838 ...	Eng.
Fenton ...	Fenton, Important Judgments ...	N.Z.
Ferg. ...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev.	Fitzherbert's Natura Brevium ...	Eng.
Fitz-G. ...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K. ...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842 ...	Ir.
Fonbl. ...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ...	Eng.
For. ...	Forrest's Reports, Exchequer, 1 vol., 1800—1801 ...	Eng.
Forb. ...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713 ...	Scot.
Fort. De Laud.	Fortesque, De Laudibus Legum Angliæ ...	Eng.
Fortes. Rep. ...	Fortescue's Reports, fol., 1 vol., 1692—1736 ...	Eng.
Fost. ...	Foster's Crown Cases, 1 vol., 1708—1760 ...	Eng.
Fount. ...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712 ...	Scot.
Fox & S. Ir. ...	M. O. Fox and T. B. O. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825 ...	Ir.
Fox & S. Reg. ...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895 ...	Eng.
Fras. ...	Fraser (Simon), Election Cases, 2 vols., 1793 ...	Eng.
Freem. Ch. ...	Freeman's Reports, Chancery, 1 vol., 1660—1706 ...	Eng.
Freem. K. B. ...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704 ...	Eng.
G. I. Dig.	Gregorowski's Reports of the High Court of the Orange Free State from 1883 ...	S. Af.
Gal. & Dav.	General Index Digest ...	Can.
Gale ...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843 ...	Eng.
Gaz. L. R.	Gale's Reports, Exchequer, 2 vols., 1835—1836 ...	N.Z.
Geld. Dig.	New Zealand Gazette Law Reports ...	Can.
Gib. Cod.	Geldert's Digest ...	Eng.
Giff. ...	Gibson's Codex Juris Ecclesiastici Anglicani ...	Eng.
Gilb. ...	Giffard's Reports, Chancery, 5 vols., 1857—1865 ...	Eng.
Gilb. O. P.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714 ...	Eng.
Gilb. Ch.	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilm. & F.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726 ...	Eng.
Gl. & J. ...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686 ...	Scot.
Glanv. ...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv. El. Cas.	Glanville, De Legibus et Consuetudinibus Regni Angliæ ...	Eng.
Glascoc	Glanville's Election Cases, 1 vol., 1623—1624 ...	Eng.
Godb. ...	Glascoc's Reports (Ireland), 1 vol., 1831—1832 ...	Ir.
	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637 ...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Gouldsb.	...	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	...	...	...	Eng.
Gr.	...	Upper Canada Chancery (Grant)	...	...	...	Can.
Griffin's Patent Cases	...	Griffin's Patent Cases, 1884—1886	...	...	...	Eng.
Gwill.	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	...	...	...	Eng.
H.	...	Hertzog's Reports of the High Court of the South African Republic, 1893	...	...	...	S. Af.
H. & C.	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	...	...	...	Eng.
H. & N.	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1866	...	...	...	Eng.
H. & Tw.	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	...	...	...	Eng.
H. & W.	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	...	...	...	Eng.
H. B. R. (preceded by date)	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	...	...	...	Eng.
H. C.	...	Reports of the High Court of Griqualand West	...	...	...	S. Af.
H. E. C.	...	Hodgin's Election Reports	...	...	...	Can.
H. L. Cas.	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	...	...	...	Eng.
Hag. Adm.	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	...	...	...	Eng.
Hag. Con.	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	...	...	...	Eng.
Hag. Ecc.	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	...	...	...	Eng.
Hailes	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	...	...	...	Scot.
Hale, C. L.	...	Hale's Common Law	...	...	...	Eng.
Hale, P. C.	...	Hale's Pleas of the Crown, 2 vols.	...	...	...	Eng.
Han.	...	New Brunswick Reports (Hannay)	...	...	...	Can.
Har. & Ruth.	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	...	...	...	Eng.
Har. & W.	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	...	...	...	Eng.
Harc.	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1744	...	...	...	Scot.
Hard.	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	...	...	...	Eng.
Hare	...	Hare's Reports, Chancery, 11 vols., 1841—1853	...	...	...	Eng.
Hawk. P. C.	...	Hawkins's Pleas of the Crown, 2 vols.	...	...	...	Eng.
Hay	...	Hay's Reports	...	...	...	Ind.
Hayes	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	...	...	...	Ir.
Hayes & Jo.	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	...	...	...	Ir.
Hem. & M.	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	...	...	...	Eng.
Het.	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	Eng.
Hob.	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	...	...	...	Eng.
Hodg.	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	...	...	...	Eng.
Holt, Adm.	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	...	...	...	Ir.
Holt, Eq.	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	...	...	...	Eng.
Holt, K. B.	...	W. Holt's Equity Reports, 2 vols., 1845	...	...	...	Eng.
Holt, N. P.	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	...	...	...	Eng.
Home, Ct. of Sess.	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	...	...	...	Eng.
Hong Kong L. R.	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	...	...	...	Scot.
Hop. & Colt.	...	Hong Kong Reports	...	...	...	Hong Kong.
Hop. & Ph.	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1867	...	...	...	Eng.
Horn & H.	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	...	...	...	Eng.
Hov. Supp.	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	...	...	...	Eng.
How. C.	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	...	...	...	Eng.
How. C. S.	...	Howard's Chancery Practico	...	...	...	Ir.
How. E. E.	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	...	...	...	Ir.
How. P. L.	...	Howard's Equity Exchequer	...	...	...	Ir.
Hud. & B.	...	Howard on the Popery Laws	...	...	...	Ir.
Hudson's B. C.	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	...	...	...	Ir.
Hume	...	Hudson on Building Contracts, 2 vols.	...	...	...	Eng.
Hut.	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—	...	...	...	Scot.
Hy. Bl	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	...	...	...	Eng.
Hyde	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	...	...	...	Eng.
	...	Hyde's Reports	...	...	...	Ind.

I. O. L. R.	...	Irish Common Law Reports, 17 vols., 1849—1866	...	Ir.
I. Ch. R.	...	Irish Chancery Reports, 17 vols., 1850—1867	...	Ir.
I. Eq. R.	...	Irish Equity Reports, 13 vols., 1838—1851	...	Ir.
I. L. R.	...	Irish Law Reports, 13 vols., 1838—1851	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	Ind.
I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	...	Ind.
I. L. R. (Vol.) Calc.	...	Indian Law Reports, Calcutta	...	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	Ind.
I. L. T.	...	Irish Law Times, 1867—(current)	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 (<i>e.g.</i> [1894] 1 I. R.)	...	Ir.
I. R. (Vol.) O. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	Ir.
Ir. Term Rep.	...	Irish Term Reports	...	Ir.
		Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	Scot.
J. Bridg.		Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—		Eng.
J. D. R.		Juta's Daily Reporter, reporting Cases in the Cape Provincial Division		S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	Eng.
J. R.	...	Jurist Reports	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	Eng.
James	...	Nova Scotia Law Reports (James)	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	Ir.
Jebb, C. O.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—		Ir.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols.,		Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	Eng.
Just. Inst.	...	Justinian's Institutes	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	...	Eng.
Kames Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	Eng.
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1827—1878	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Kerr ..	New Brunswick Reports (Kerr)	Can.
Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Konst. & W. Rat. App.	Knox's Reports	Aus.
Konst. Rat. App. ...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
	Konstam's Reports of Rating Appeals, 2 vols., 1894—1904	Eng.
L. & G. <i>temp.</i> Plunk.	Lloyd and Goold's Reports <i>temp.</i> Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. <i>temp.</i> Sugd.	Lloyd and Goold's Reports <i>temp.</i> Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz.	Local Courts and Municipal Gazette	Can.
L. C. J. ...	Lower Canada Jurist	Can.
L. C. L. J.	Lower Canada Law Journal	Can.
L. C. R.	Lower Canada Reports	Can.
L. G. R.	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	Law Journal, Bankruptcy, 1832—1880	
L. J. C. C.	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P. ...	Law Journal, Probate Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	Law Journal, Probat and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo. ...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	Leader Law Reports	S. Af.
L. M. & P.	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	Legal News	Can.
L. R. A. & E.	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	Law Reports, India Appeals, Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	Eng.
L. T.	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
Lane	La Themis	Can.
	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach ...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee <i>temp.</i> Hard.	T. Lee's Cases <i>temp.</i> Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.

xxiv **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Leg. Rep.	...	Legal Reporter	...	...	...	...	...	Ir.
Legge	..	Legge's Reports	...	...	...	...	...	Aus.
	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	...	...	...	...	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	...	...	...	...	Eng.
Lew. C. C.		Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	...	...	...	...	Eng.
Lib. Ass.	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	...	...	...	...	Eng.
Lilly	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	...	...	...	Eng.
Litt.	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	...	...	...	Eng.
Lloyd, L. R.	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	...	Eng.
Lloyd, Pr. Cas.	...	Lloyd's List Law Reports, 1919—(current)	...	...	...	...	...	Eng.
Lofft	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	...	...	...	...	Eng.
Long. & T.	...	Lofft's Reports, King's Bench, foll., 1 vol., 1772—1774	...	...	...	...	...	Eng.
		Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol.,	...	...	...	...	...	Ir.
Lords Journals	...	Journals of the House of Lords	...	...	...	...	...	Eng.
Lud. E. C.	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	...	...	...	Eng.
Lumley, P. L. C.	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	...	...	...	Eng.
Lush.	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	...	...	...	Eng.
		Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	...	...	...	...	Eng.
Lut. Reg. Cas.	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	...	...	...	Eng.
Lynd.	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	...	...	...	Eng.
		Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	...	...	S. Af.
M. & S.	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	...	...	...	Eng.
M. & W.	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	...	...	...	Can.
M. C. R.	...	Montreal Condensed Reports	...	...	...	...	...	Ind.
M. H. C. R.	...	Madras High Court Reports	...	...	...	...	...	Can.
M. L. R. (Vol.) K. B. or Q. B.	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	...	...	...	Can.
M. L. R. (Vol.) S. C.	...	Montreal Law Reports, Superior Court	...	...	...	...	...	Can.
M. M. Cas.	...	Martin's Reports of Mining Cases	...	...	...	...	...	Can.
Mac.	...	Macassey's New Zealand Reports	...	...	...	...	...	N.Z.
Mac. & G.	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	...	...	...	...	Eng.
Mac. & H.	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	...	...	...	Eng.
M'Cle	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	...	...	...	...	Eng.
M'Cle. & Yo.	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—	...	...	...	...	...	Eng.
Macfarlane	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts,	...	...	...	...	...	Scot.
Macl. & Rob.	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	...	...	...	Scot.
Macph. (Ct. of Sess.)	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols.,	...	...	...	...	...	Scot.
Macq.	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—	...	...	...	...	...	Scot.
		Macrory's Patent Cases, 2 parts, 1847—1856	...	...	...	...	...	Eng.
Mad.		Madras High Court Reports	...	...	...	...	...	Ind.
Madd		Maddock's Reports, Chancery, 6 vols., 1815—1821	...	...	...	...	...	Eng.
Madd. & G.	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	...	...	...	Eng.
Madox	...	Madox's Formulæ Anglicanum	...	...	...	...	...	Eng.
Madox, Exch.	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	...	...	...	Eng.
		Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	...	...	...	Eng.
Man. & G.	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—	...	...	...	...	...	Eng.
Man. & Ry. K. B.	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	...	...	...	Eng.
Man. & Ry. M. C.	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	...	...	...	Eng.
Man. L. J.	...	Manitoba Law Journal	...	...	...	...	...	Can.
Man. L. R.	...	Manitoba Law Reports	...	...	...	...	...	Can.
Man. R. temp. Wood	...	Manitoba Reports temp. Wood	...	...	...	...	...	Can.
		Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	...	...	...	Eng.
Mar. L. C.	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	...	...	...	Eng.
March	...	March's Reports, King's Bench and Common Pleas, 1 vol.,	...	...	...	...	...	Eng.
Marr.	...	Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	...	Eng.
Marsh.	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	...	...	...	Eng.
Marsh.	...	Marshall's Reports	...	...	...	...	...	Ind.
Mayn.	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	...	...	...	Eng.
Meg.	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Men. ...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer. ...	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw. ...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep. ...	Modern Reports, 12 vols., 1669—1755	Eng.
Mol. ...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	Ir.
Mont. ...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A. ...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.
Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G. ...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. O. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. O. C. N. S. ...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. O. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
Murd. Epit. ...	Murdoch's Epitome	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Myrne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ...	Myrne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania.
N. B. Dig. ...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ...	New Brunswick Equity Reports	Can.
N. B. R. ...	New Brunswick Reports	Can.
N. B. R. (All.) ...	New Brunswick Law Reports (Allen)	Can.
N. B. R. (Ber.) ...	New Brunswick Law Reports (Berton)	Can.
N. B. R. (Chip.) ...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr) ...	New Brunswick Law Reports (Kerr)	Can.
N. B. R. (P. & B.) ...	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.) ...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.) ...	New Brunswick Reports (Pugsley)	Can.
N. L. R. ...	Natal Law Reports	S. Af.
N. S. R. ...	Nova Scotia Reports	Can.
N. S. R. (James) ...	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & O.) ...	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.) ...	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.) ...	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad. ...	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas. ...	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas. ...	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ...	New South Wales Law Reports	Aus.
N. S. W. Land App. Ots. ...	New South Wales Land Appeal Courts	Aus.
N. S. W. S. O. R. ...	New South Wales Supreme Court Reports	Aus.
N. S. W. S. O. R. N. S. ...	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N. ...	New South Wales Weekly Notes	Aus.
N. W. ...	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ...	North-West Territories Reports	Can.
N. Z. Jur. ...	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law ...	New Zealand Jurist Mining Law	N.Z.
N. Z. Jur. N. S. ...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R. ...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. O. A. ...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.

xxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Nev. & M. K. B.	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836 ...	Eng.
Nev. & M. M. O.	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836 ...	Eng.
Nev. & P. K. B.	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. O.	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas.	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850 ...	Eng.
New Pract. Cas.	New Practice Cases (Bittleston and others), 3 vols., 1844—1848 ...	Eng.
New Rep. ...	New Reports, 6 vols., 1862—1865 ...	Eng.
New Sess. Cas. ...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ...	Eng.
Nfld. L. R.	Newfoundland Reports ...	Nfld.
Nolan ...	Nolan's Magistrates' Cases, 1 vol., 1791—1793 ...	Eng.
Notes of Cases ...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ...	Eng.
Noy ...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F. ...	Ollivier Bell and Fitzgerald's Reports ...	N.Z.
O. B. S. P. ...	Old Bailey Session Papers ...	Eng.
O. Bridg. ...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—	Eng.
O. F. S. ...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R. ...	Ontario Law Reports ...	Can.
O'M. & H. ...	O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	South African Law Reports, Orange Free State Provincial Division ...	S. Af.
O R. ...	Ontario Reports ...	Can.
O. R. ...	Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. O. ...	Reports of the High Court of the Orange River Colony ...	S. Af.
O. S. ...	Upper Canada Queen's Bench, Old Series ...	Can.
O. W. N. ...	Ontario Weekly Notes ...	Can.
O. W. R. ...	Ontario Weekly Reporter ...	Can.
Old. ...	Nova Scotia Reports (Oldrights) ...	Can.
Ont. Dig. ...	Digest of Ontario Case Law, 4 vols., 1823—1900 ...	Can.
Owen ...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ...	Eng.
P. (preceded by date) ...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.) ...	Eng.
P. & B. ...	New Brunswick Reports (Pugsley and Burbidge) ...	Can.
P. & T. ...	New Brunswick Law Reports (Pugsley and Trueman) ...	Can.
P. D. ...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ...	Eng.
P. E. I.	Prince Edward Island Reports ...	Can.
P. R.	Ontario Practice ...	Can.
P. Wms.	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735 ...	Eng.
P.	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park. ...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767 ...	Eng.
Pat. App.	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822 ...	Scot.
Pater. App.	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake, Add. Cas.	Peake's Reports, Nisi Prius, 1 vol., 1790—1794 ...	Eng.
	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
	Peckwell's Election Cases, 2 vols., 1803—1806 ...	Eng.
Pelham ...	Pelham (S. A.) Reports ...	Aus.
Per. & Dav.	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	Perry and Knapp's Election Cases, 1 vol., 1833 ...	Eng.
Per. C. S.	Perrault's Conseil Supérieur ...	Can.
Per. P. ...	Perrault's Prévosté de Quebec, 1726—1756 ...	Can.
Ph.	Phillips' Reports, Chancery, 2 vols., 1841—1849 ...	Eng.
Phil. El. Cas.	Philipps' Election Cases, 1 vol., 1780 ...	Eng.
Phillim.	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud.	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	Phipson's Digest of Natal Reports, 1858—1859 ...	S. Af.
Pig. & R.	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pitc.	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd.	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ...	Eng.
Poll.	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph.	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D.	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Prec. Ch.	Precedents in Chancery, fol., 1 vol., 1689—1722 ...	Eng.
Price ...	Price's Reports, Exchequer, 13 vols., 1814—1824 ...	Eng.
Price ...	Price's Mining Commissioners' Cases ...	Can.

Pug.	New Brunswick Reports (Pugsley)	Can.
Py. R.	Pykes' Lower Canada Reports	Can.
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	Eng.
Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	Eng.
Q. J. P.	Queensland Justice of Peace Reports	Aus.
Q. L. J.	Queensland Law Journal	Aus.
Q. L. R.	Quebec Law Reports	Can.
Q. L. R. (Beor)	Queensland Law Reports by Beor	Aus.
Q. P. R.	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. O.	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
Q. S. O. R.	Queensland Supreme Court Reports	Aus.
Q. S. R.	Queensland State Reports	Aus.
Q. W. N.	Weekly Notes, Queensland	Aus.
R.	The Reports, 15 vols., 1893—1895	Eng.
R. (Ct. of Sess.)	Roscoe's Reports of the Supreme Court of the Cape of Good Hope 1861—1867, 1871—1872, 1877—1878	S. Af.
R. A. C.	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. & O.	Ramsay, Appeal Cases	Can.
R. & G.	Nova Scotia Reports (Russell & Chesney)	Can.
R. C.	Nova Scotia Reports (Russell and Geldert)	Can.
R. de J.	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de L.	Revue de Jurisprudence	Can.
R. E. D.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	Aus.
R. J. R.	Ritchie's Equity Decisions (Russell)	Can.
R. L. N. S.	Quebec Revised Reports	Can.
R. L. O. S.	Revue Légale, New Series, 1895—(current)	Can.
R. P. C.	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
R. R.	Reports of Patent Cases, 1884—(current)	Eng.
Rast.	Revised Reports	Eng.
Rayn.	Rastell's Entries	Eng.
Real Prop. Cas.	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Rep. Ch.	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. in C. of A.	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Res. & Eq. Jud.	Reports in Courts of Appeal	N.Z.
Reserv. Cas.	New South Wales Reserved and Equity Judgments	Aus.
Rick. & M.	Reserved Cases	Ir.
Rick. & S.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Ridg. L. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. Parl. Rep.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Ridg. temp. H.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	Ir.
Ritch. Eq. Rep.	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Rob. Eccl.	Ritchie's Equity Reports	Can.
Rob. L. & W.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	Eng.
Robert. App.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol.,	Eng.
Robin. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Roll. Abr.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Rep.	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Rom.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	Eng.
Roscoe's B.C.	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	Eng.
Rose	Roscoe, Digest of Building Cases	Eng.
Ross, L. C.	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Rowe	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rul. Cas.	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	Eng.
Russ.	Campbell's Ruling Cases, 25 vols.	Eng.
Russ. & M.	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
Russ. & Ry.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	Eng.
Russ. E. R.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Ry. & Can. Cas.	Russell's Election Reports	Can.
Ry. & Can. Tr. Cas.	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & M.	Railway and Canal Traffic Cases, 1855—(current)	Eng.
	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Ryde & K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904...	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope ...	S. Af.
S. A. L. J.	South African Law Journal ...	S. Af.
S. A. L. R.	South Australian Law Reports ...	Aus.
S. A. L. R.	South African Law Reports ...	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—	S. Af.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880 ...	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date).	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date).	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. R.	Canada, Supreme Court Reports ...	Can.
S. L. T.	Scots Law Times, 1893 (current) ...	Scot.
S. R.	Queensland State Reports ...	Aus.
S. R. C.	Reports of the High Court of Southern Rhodesia ...	S. Af.
S. R. N. S. W.	Stuart's Lower Canada Reports ...	Can.
S. R. Q.	New South Wales, State Reports ...	Aus.
S. V. A. R.	Queensland Reports, Supreme Court ...	Aus.
	Stuart's Vice-Admiralty Reports ...	Can.
	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ...	Eng.
Sask. L. R.	Saskatchewan Law Reports ...	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ...	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873 ...	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—(current) ...	Scot.
Sc. R. R.	Scots Revised Reports ...	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ...	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ...	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ...	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ...	Eng.
Selwyn's N.P.	Selwyn's Abridgement of the Law of Nisi Prius ...	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ...	Scot.
Sh. & MacI.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ...	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ...	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ...	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances ...	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695 ...	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ...	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ...	Eng.
Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol.,	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 8 vols., 1803—1806	Eng.
Smith, L. O.	Smith's Leading Cases, 2 vols. ...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Smith, Reg. Cas.	O. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe ...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo. ...	Solicitors' Journal, 1856—(current)	Eng.
Spence ...	Spence's Equitable Jurisdiction of the Court of Chancery	Eng.
Spinks ...	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded date) ...	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep. ...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1601—1681	Scot.
Stark. ...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr. ...	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S. ...	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart ...	Stewart's Nova Scotia Admiralty Reports, 1803—1813	Can.
Stockton ...	Stockton's Vice-Admiralty Report and Digest	Can.
Story ...	Story's Commentaries on Equity Jurisprudence	Eng.
Stu. M. & P. ...	Strange's Reports, 2 vols., 1716—1747	Eng.
Stuart ...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart, Adm. ...	Sessions Cases (Stuart)	Scot.
Stuart, Adm. N. S. ...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	Can.
Stuart, K. B. ...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Sty. ...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sw. ...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw. & Tr. ...	Swabey's Reports, Admiralty, 1 vol., 1855—1859	Eng.
Swan. ...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swin. ...	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Syme ...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	Scot.
T. & M. ...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	Scot.
T. H. ...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. Jo. ...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. L. ...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L. R. ...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. P. ...	The Times Law Reports, 1884—(current)	Eng.
T. P. D. ...	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. Raym. ...	South African Law reports, Transvaal Provincial Division	S. Af.
T. S. ...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
Taml. ...	Reports of the Supreme Court of the Transvaal, 1902—1909	S. Af.
Tas. L. R. ...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Taunt. ...	Tasmanian Law Reports	Aus.
Tax Cas. ...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Temp. Wood ...	Tax Cases, 1875—(current)	Eng.
Term Rep. ...	Taylor's King's Bench Reports	Can.
Terr. L. R. ...	Manitoba Reports <i>temp.</i> Wood	Can.
Thom. ...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	Eng.
Toth. ...	Territories Law Reports	Can.
Town. St. Tr. ...	Nova Scotia Reports (Thomson)	Can.
Trist. ...	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Tudor, L. O. Merc. Law ...	Townsend, Modern State Trials	Eng.
Tudor, L. O. Real. Prop ...	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Turn. & R. ...	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Tyr. ...	Tudor's Leading Cases on Real Property	Eng.
Tyr. & Gr. ...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	Eng.
U. C. Jur. ...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
U. O. L. J. N. S. ...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. O. L. J. O. S. ...	Upper Canada Jurist	Can.
U. O. R. ...	Canada Law Journal, New Series, 1865—(current)	Can.
Udal ...	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
V. L. R. ...	Upper Canada Reports, Queen's Bench	Can.
V. R. ...	Fiji Law Reports (Udal)	Fiji.
V. R. (Adm.) ...	Victorian Law Reports	Aus.
V. R. (Eq.) ...	Victorian Reports	Aus.
V. R. (Law) ...	Victorian Reports (Admiralty)	Aus.
	Victorian Reports (Equity)	Aus.
	Victorian Reports (Law)	Aus.

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Vaugh. ...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent. ...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691 ...	Eng.
Vern. ...	Vernon's Reports, Chancery, 2 vols., 1680—1719 ...	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788 ...	Ir.
Ves. & B. ...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817 ...	Eng.
Ves. Sen. ...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814 ...	Eng.
Vin. Abr. ...	Vesey Sen.'s Reports, 2 vols., 1747—1756 ...	Eng.
Vin. Supp. ...	Viner's Abridgment of Law and Equity, fol., 22 vols. ...	Eng.
W. ...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W. A. L. R. ...	Watermeyer's Reports of the Supreme Court of the Cape of Good	S. Af.
W. A'B. & W. ...	West Australian Law Reports ...	Aus.
W. & W. ...	Webb, A'Beckett and Williams' Victorian Reports ...	Aus.
W. C. O. ...	Wyatt and Webb ...	Aus.
W. H. C. ...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907 ...	Eng.
W. Jo. ...	South African Law Reports, Witwatersrand High Court ...	S. Af.
W. L. D. ...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640 ...	Eng.
W. L. R. ...	South African Law Reports, Witwatersrand Local Division ...	S. Af.
W. L. T. ...	Western Law Reporter ...	Can.
W. N. (preceded by date)	Western Law Times ...	Can.
W. N. ...	Law Reports, Weekly notes, 1866—(current) (<i>e.g.</i> , [1866] W. N.)	Eng.
W. R. ...	Calcutta Weekly Notes ...	Ind.
W. R. ...	Weekly Reporter, 54 vols., 1852—1906 ...	Eng.
W. R. ...	Sutherland's Weekly Reporter ...	Ind.
W. R. ...	Weekly Reporter, reporting cases in the Cape Provincial Division ...	S. Af.
W. W. & A'B. ...	Wyatt, Webb and A'Beckett ...	Aus.
W. W. R. ...	Western Weekly Reports ...	Can.
Wallis ...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ...	Ir.
Web. Pat. Cas. ...	Webster's Patent Cases, 2 vols., 1602—1855 ...	Eng.
Welsh, Reg. Cas. ...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840 ...	Ir.
Went. Off. Ex. ...	Wentworth's Office and Duty of Executors ...	Eng.
West ...	West's Reports, House of Lords, 1 vol., 1839—1841 ...	Eng.
West temp. Hard. ...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740 ...	Eng.
West. Tithe Cas. ...	Western's London Tithe Cases, 1 vol., 1592—1822 ...	Eng.
White ...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C. ...	White and Tudor's Leading Cases in Equity, 2 vols. ...	Eng.
Will. Woll. & Dav. ...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811 ...	Eng.
Will. Woll. & H. ...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837 ...	Eng.
Willes ...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839 ...	Eng.
Wilm. ...	Willes' Reports, Common Pleas, 1 vol., 173 1758 ...	Eng.
Wils. ...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770 ...	Eng.
Wils & S. ...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774 ...	Eng.
Wils. Ch. ...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835 ...	Scot.
Wils. Ex. ...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819 ...	Eng.
Win. ...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Wm. Bl. ...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Rob. ...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779 ...	Eng.
Wms. Saund. ...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ...	Eng.
Wolf. & B. ...	Williams' Notes to Saunders' Reports, 2 vols. ...	Eng.
Wolf. & D. ...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864 ...	Eng.
Woll. ...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Wood ...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841 ...	Eng.
Y. A. D. ...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798 ...	Eng.
Y. & C. Ch. Cas. ...	Young's Vice-Admiralty Reports ...	Can.
Y. & C. Ex. ...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843 ...	Eng.
Y. & J. ...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841 ...	Eng.
Y. B. ...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Yelv. ...	Year Books ...	Eng.
You. ...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv.—xxx., *ante*.)

A.-G.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	„ Actiengesellschaft.
Admlty.	.	.	.	.	„ Admiralty.
Affd.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	„ Applied.
Appct.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	„ Application.
Appln.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	„ Article.
Assce.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	„ Association.
B. C.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	„ Central London Railway Co.
C. S. U. C.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Cale. Ry. Co.	.	.	.	.	„ Caledonian Railway Co.
Ct.	.	.	.	.	„ Court.
Ct. of Eq.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	„ Court of Review.
Co.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	„ Corporation.
D. C.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	„ Doubted.
Deft.	.	.	.	.	„ Defendant.
Distd.	.	.	.	.	„ Distinguished.
Eccl. Comrs.	.	.	.	.	„ Ecclesiastical Commissioners.
Eccl. Ct.	.	.	.	.	„ Ecclesiastical Court.

Ex. Ch.	for Exchequer Chamber.
<i>Ex p.</i> .	„ <i>Ex parte.</i>
Exch. .	„ Exchequer.
Exor. .	„ Executor.
Exorship.	„ Executorship.
Expld. .	„ Explained.
Extd. .	„ Extended.
Extrix.	Executrix.
Folld. .	Followed.
G. & S. W. Ry. Co. . . .	Glasgow & South Western Railway Co.
G. C. Ry. Co.	Great Central Railway Co.
G. E. Ry. Co.	Great Eastern Railway Co.
G. N. of Scotland Ry. Co. .	Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	Great Western Railway Co.
Govt.	Government.
Grdns.	Guardians or Guardians of the Poor.
H. C. of A.	High Court of Australia.
H. L.	House of Lords.
I. R. Comrs.	Inland Revenue Commissioners.
Insce.	Insurance.
Jud. Act	Justices.
	Judicature Act.
L. & B. Ry. Co.	London & Brighton Railway Co.
L. & N. W. Ry. Co.	London & North Western Railway Co.
L. & S. W. Ry. Co.	London & South Western Railway Co.
L. & Y. Ry. Co.	Lancashire & Yorkshire Railway Co.
L. B.	Local Board.
L. B. & S. C. Ry. Co.	London, Brighton & South Coast Railway Co.
L.C.	Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L.J.	Lord Justice.
L.JJ.	Lords Justices.
L. T. & S. Ry. Co.	London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	Manchester, Sheffield & Lincolnshire Railway Co.
Mentd.	Magistrates.
Met. Dist. Ry. Co.	„ Mentioned.
Met. Ry. Co.	„ Metropolitan District Railway Co.
Mid. G. W. Ry. Co	Metropolitan Railway Co.
Mid. Ry. Co.	Midland Great Western Railway Co.
Mtge.	„ Midland Railway Co.
Mtgee.	„ Mortgage.
Mtgor.	„ Mortgagee.
	„ Mortgagor.
N. B. Ry. Co.	North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.
O.	„ Order.
O. H.	„ Outer House.
Overd.	„ Overruled.
P. C.	„ Privy Council.
Petn.	Petition or Election Petition.
Pltf.	Plaintiff.
R. C.	„ Rural Council.
R. D. C.	Rural District Council.
R. S. A.	„ Rural Sanitary Authority.
R. S. C.	„ Revised Statutes of Canada.

ABBREVIATIONS.

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R. S. C.	for Rules of the Supreme Court, 1883.
Refd.	„ Referred.
Regn. of Trade Mk.	„ Registration of Trade Mark.
Regr. of Trade Mks.	Registrar of Trade Marks.
Resp.	Respondent.
Restg.	Restoring.
Revsd.	Reversed.
Revsg.	„ Reversing.
Ry. Co.	„ Rail. Co. or Railway Co.
S. C.	Same Case.
S. C. (name of colony following)	Supreme Court of a Colony.
S. E.	Settled Estates.
S. E. & O. Ry. Co	South Eastern & Chatham Railway Co.
S. E. Ry. Co.	South Eastern Railway Co.
S. P.	Same Point.
S.S. Co.	Steamship Co.
Sect.	Section.
Set. Land Act	Settled Land Act.
Settlmt.	„ Settlement.
Soc.	Society.
Soc. Anon.	Société Anonyme, etc.
Solr.	Solicitor.
Trade Mk.	Trade Mark.
Tram. Co.	Tramways Company.
U. C.	„ Urban Council.
U. D. C.	„ Urban District Council.
U. S. A.	„ United States of America.
Union Assmt. Com	„ Union Assessment Committee.
Urban S. A.	„ Urban Sanitary Authority.
V. A. C.	„ Vice-Admiralty Court.
V.-C.	„ Vice-Chancellor.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases are listed chronologically except such as are classified as " Referred to " or " Mentioned." These come at the end and are arranged *inter se* in chronological order. The terms used in classifying the annotating cases are as follows :—

- " APPLIED " (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- " APPROVED " (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- " CONSIDERED " (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- " DISTINGUISHED " (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- " DOUBTED " (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- " EXPLAINED " (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- " EXTENDED " (Extd.).—Compare " APPLIED," *supra*.
- " FOLLOWED " (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- " NOT FOLLOWED " (N.F.).—Compare " FOLLOWED," *supra*, to which it is the adverse.
- " OVERRULED " (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- " REFERRED " (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- " MENTIONED " (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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PART II.—DIFFERENT KINDS OF RIGHTS OF COMMON.

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Part I.—Distinction between a Profit à Prendre and an Easement.

1. Right of pasture.]—(1) Under Prescription Act, 1832 (c. 71), s. 1, proof of a thirty years' enjoyment of common of pasture is not complete if proof be given of an enjoyment for twenty-eight years immediately preceding an action in which the right is disputed, & it appear that twenty-eight years back the enjoyment was interrupted, but that the right was exercised before the interruption; & the party disputing the right is not bound to show that such interruption was adverse: it lies upon the party prescribing, under the Act, to prove thirty years' uninterrupted enjoyment.

(2) *Semble* : under sect. 2 of the Act, prescription for a right, every year, & at all times of the year, to put & turn the party's cattle into & upon a certain close, is too vague, & may be demurred to. If there be no demurrer, & the issue on such plea be tried, the party prescribing, & relying on sect. 2, must give proof applicable to some definite easement; & he will fail if the evidence entitle him not to an easement, but to a *profit à prendre*.

(3) A plea of prescription is supported if the party prove a right more extensive than that pleaded; but the right proved must be of such a nature that it may comprehend the right pleaded.

(4) A plea claiming a right of common of pasture & a plea claiming a right to put & turn cattle into a particular place, are essentially different, as the latter describes a mere right to an easement.—*BAILEY v. APPELEYARD* (1838), 8 Ad. & El. 161; 3 Nev. & P. K. B. 257; 7 L. J. Q. B. 145; 112 E. R. 798; *sub nom.* *BAYLEY v. APPELEYARD*, 2 Jur. 872; *sub nom.* *APPELEYARD v. BAYLEY*, 1 Will. Woll. & H. 208.

Annotations:—As to (1) Refd. Carr v. Foster (1842), 3 Q. B. 581; Lowe v. Carpenter (1851), 6 Exch. 825; Hammer v. Chance (1865), 4 De G. J. & S. 626; De la Warr v. Miles (1881), 17 Ch. D. 535; Hollins v. Verney (1884), 13 Q. B. D. 304; Mitcham Common Conservators v. Banks (1912), 76 J. P. 413. *As to (2) Refd.* Peter v. Daniel (1848), 5 C. B. 568.

See, also, Nos. 10, 321, post.

See, further, EASEMENTS & PROFITS A PRENDRE.

Part II.—Different Kinds of Rights of Common.

SECT. 1.—COMMON OF PASTURE.

SUB-SECT. 1.—IN GENERAL.

2. Right of pasture—On land of another—Free from distraint.]—PEEKE *v.* WYRRALL (1587), Cro. Eliz. 60 ; 78 E. R. 321.

3. — In wood—Eating of young shoots by cattle unavoidable—Not ground of action.]—*CLITHERO v. HIGGS* (1036), W. Jo. 388; 82 E. R. 203.

4. — Includes right to eat acorns on ground — Though no right of pannage.] — *BARNSTONE v. GALE* (1649), Sty. 213; 82 E. R. 655.

See, generally, Part III., Sect. 1, sub-sect. 1, post.

5. — "*Communia pasturae*"—Signifies right annexed to land.]—EAST v. ESSINGTON (1702), Gilb. 17; 93 E. R. 246.

6. Signifies common itself.]—JACKSON
v. LAVERIGHT (1713), 10 Mod. Rep. 184; Gilb. 13;
 88 E. R. 685.

7. — “Cum pertinentiis”—Not common in gross.]—BAKER v. ROE (1735), *Lec temp. Hard.* 127; 95 E. R. 80.

8. — **Nature of right need not be pleaded.]** — **MUSGRAVE v. GAVE** (1742), Willes, 319; 125 E. R. 1193.

9. — Formerly enjoyed by tenants & inhabitants of manor—Restricted to cattle levant & couchant—Construction of deed.]—BENSON v. CHESTER (1799), 8 Term Rep. 396; 101 E. R. 1453.

Annotations :—*Refd. A.-G. v. Mathias* (1858), 4 K. & J. 579 ;
A.-G. v. Reynolds, [1911] 2 K. B. 888.

Sect. 1.—Common of pasture: Sub-sects. 1 & 2, A.,

10. Not a tenement—To render pauper commoner irremovable.]—*R. v. WARKWORTH (INHABITANTS) (1813), 1 M. & S. 473; 105 E. R. 176. Annotation:—Mentd. R. v. Belford (1829), 10 B. & C. 54.*

See, also, No. 321, post.

11. Not right to grass cut by another.]—*STILE v. BUTS (1595), Moore, K. B. 411; Cro. Eliz. 434; 72 E. R. 662.*

12. Writ of admeasurement issued—For common appurtenant, not appendant—For common by specialty certain, not without number.]—*N. (PRIOR) CASE (1348), 22 Lib. Ass. fo. 100, pl. 65.*

See, further, Part X., Sect. 1, sub-sect. 2, D., post.

SUB-SECT. 2.—APPENDANT.

A. In General.

13. Commencement of right.]—Common of pasture appendant must have commenced before time of memory.—*UGHRED v. C. (1331), 5 Lib. Ass. fo. 8, pl. 2.*

Presumption of lost grant.]—*See Part VI., Sect. 2, sub-sect. 2, E., post.*

14. By prescription—Pleading—Implied from claim for common appendant.]—*— v. T (1426), Y. B. 4 Hen. 6, fo. 13, pl. 10.*

Annotations:—Refd. Tyrringham's Case (1584), 4 Co. Rep. 36 b. Mentd. Dewell v. Sanders (1618), Cro. Jac. 490.

15. ———.]—*CARVIL v. HOLT (1622), Palm. 360; 81 E. R. 1123.*

16. ———.]—*TYRRINGHAM'S CASE, No. 22, post.*

17. ——— Implied from allegation of selsin of tenement with right appertaining.]—*JOHNSON v. THOROWGOOD (1614), Brownl. 177; 123 E. R. 739. Annotation:—Apld. Burgess v. Steer (1692), 12 Mod. Rep. 25.*

18. No general common law right.]—On an issue, whether close C. was or was not pltf.'s close, the following evidence was rejected. That the close was within the manor of O.; & pltf., by lease from the lord, was possessed of the manor & all the common & waste lands within same; that M. was immemorially common & waste of & in the manor, & of great extent; that, adjoining to & surrounding M., & within the manor, were & immemorially had been "very many distinct messuages, lands & tenements, severally held of the same manor by several tenants thereof, respectively, which said tenants, for the time being, of the said messuages, etc., respectively, had, in respect thereof, severally & respectively, always had, exercised & enjoyed, & been entitled to have," etc., "rights of common for all their commonable cattle in, upon & throughout M."; & that, *ante litem motam*, certain of such tenants, deceased, well acquainted with M. & its neighbourhood, & the manor, & who, as such tenants, had always had, etc., & been entitled to have, etc., such rights of common, did, while they were such tenants, & were in the exercise, etc., & so entitled, declare that C. was parcel of M., & waste of the manor. On bill of exceptions, stating as above:—*Held*: (1) the evidence was rightly rejected, for that the rights to which the declarations referred were not of a public nature; (2) the

evidence was not the less admissible because no evidence had been offered of actual exercise of the right of common on the *locus in quo*; (3) there was no objection to it on the ground that the parties making the declaration had not competent knowledge, or were interested; (4) there is no general common law right of tenants of a manor to common appendant on the waste.—*DUNRAVEN (EARL) v. LLEWELLYN (1850), 15 Q. B. 791; 19 L. J. Q. B. 388; 15 L. T. O. S. 543; 14 Jur. 1089; 117 E. R. 657, Ex. Ch.*

Annotations:—As to (1) & (2) Consd. R. v. Bedfordshire (1855), 4 E. & B. 535; Evans v. Merthyr Tydfil U. C., [1899] 1 Ch. 241. Refd. Dendy v. Simpson (1856), 18 C. B. 831; Heath v. Deane, [1905] 2 Ch. 86. As to (4) Consd. Warrick v. Queen's College, Oxford (1871), 6 Ch. App. 716. Refd. Broome v. Wenham (1893), 68 L. T. 651.

Whether severable.]—*See Part VII., Sect. 1, post.*

Apportionment.]—*See Part VII., Sect. 2, post.*

B. Nature of Right.

19. Not in gross.]—*ANON. (1489), Y. B. 5 Hen. 7, fo. 7, pl. 15.*

Annotation:—Refd. Spooner v. Day & Mason (1636), Cro. Car. 432.

20. Distinguished from common appurtenant—Tenancy of manor.]—Pltf. filed a bill to establish a right of common of vicinage over a common within a manor of which deft. was lord. By his answer, deft. denied pltf.'s right:—*Held*: pltf., though not a tenant of the manor, was entitled to production of all documents which might tend to support his claim.

But there are in the English law two different sorts of rights of common, one being the right of common appendant & the other being the right of common appurtenant. The right of common appendant depends upon being tenant of the manor & having a right in respect of the tenement held of the manor. The right of common appurtenant depends upon a grant from the lord, & includes common of vicinage (*LORD ROMILLY, M.R.*).—*MINET v. MORGAN (1871), L. R. 11 Eq. 284; 23 L. T. 280; 18 W. R. 1015.*

C. In respect of what Tenements.

21. Arable land—Not house or land other than arable.]—*ANON. (1534), Y. B. 26 Hen. 8, fo. 4, pl. 15.*

Annotations:—Refd. Baring v. Abingdon (1892), 62 L. J. Ch. 105. Mentd. Cattley v. Arnold (1858), 4 K. & J. 595.

22. ——— House built or land changed to pasture.]—S. seised of a house, land, meadows & pasture, to which he & all those whose estate he had, agreed to have common of pasture for oxen, cows & heifers levant & couchant upon the house, land, meadow & pasture, as well in thirty acres in the same town, of which A. was seised in fee, as in forty acres of land, whereof B. was seised in fee, to the house, land, meadow & pasture, appertaining. Afterwards B. purchased the house, land, meadow & pasture, to which all, etc., to him & his heirs, & demised same to pltf. who put his cattle into the thirty acres to common, & they were driven out by deft., farmer of A.:—*Held*: prescription did not make a thing appendant to another, unless it agreed in nature & quality with it, as a thing corporeal could not be appendant

PART II. SECT. 1, SUB-SECT. 2.—A.

14 i. By prescription—Pleading.]—Appendancy being incident & of common right, commencing by operation of law & implying prescription, the person who claims it need not specially state that he prescribes for it; but an

appurtenancy may be claimed either by grant or prescription & the word appurtenant does not imply which of these modes is rested upon, wherefore, as it is against common right, the law requires the mode to be stated.—*HAYES v. BRIDGES & GUESS (1795), Ridg. L. & S. 390.—IR.*

PART II. SECT. 1, SUB-SECT. 2.—C.

21 i. Arable land—Not appurtenant.]—Common of pasture can be appendant only to arable land; but it may be appurtenant to other land.—*HAYES v. BRIDGES & GUESS (1795), Ridg. L. & S. 390.—IR.*

to another corporeal thing, nor *vice versa*; but a thing incorporeal might be appendant to a thing corporeal, or *e converso*; though a thing incorporeal could not be appendant to a corporeal, which did not agree with it in nature, as a common of turbary could not be appendant to land, but to a house; (2) common appendant only belonged to ancient arable land, & for horses & oxen to plough, & cows & sheep to manure the land; it could not be appendant to meadow or pasture; (3) common appendant was of common right, & need not be prescribed for; (4) the prescription being for common appendant time out of mind, to a house, meadow & pasture, as well as to arable land, the common was appurtenant, & not appendant; (5) common appendant, being of common right, was apportionable by the commoner's purchasing part of the land in which, etc., as rent was, on the lord's purchasing part of the tenancy, so by his alienation of part of the land to which the common was appendant; but, common appurtenant being against common right, by the purchase all the common was extinguished; (6) unity of possession of the whole land was an extinguishment of common appendant; (7) common by vicinage was not common appendant, but, inasmuch as it ought to be by prescription time out of mind, it was, in this respect, resembled to common appendant, & one may enclose against the other, for one cannot put his cattle into the lands of the other but they must escape thither, in which case the trespass is excused by reason of the ancient usage; (8) common appendant remained, though a house was afterwards built on the land, or the arable land was converted to pasture; but in pleading it ought to be prescribed for as appendant to land, so it might be appendant to a manor, carve of land, etc., though it comprehended a house, meadow, etc.

(9) When common appendant is apportionable by purchase of part of the land, the commoner ought to prescribe for the whole, till such a day when he purchased, when by sale the alienor may prescribe for common appendant to his parcel.

(10) Common being apportioned by purchase of part, if an assise be brought, the terretenant of the land charged with the residue of the common shall be only charged.

(11) Common appurtenant, & in gross, may commence either by grant at this day, or by prescription.

(12) In case of common by vicinage between adjoining manors, the lord of one manor may enclose against the others, & thereby take away such common.—*TYRRINGHAM'S CASE* (1584), 4 Co. Rep. 36 b; 76 E. R. 973.

Annotations:—As to (1) *Refd.* Knight's Case (1623), Godb. 352; A.-G. v. Reynolds, [1911] 2 K. B. 888. As to (2) *Refd.* Rumsey v. Rawson (1668), 2 Keb. 410; Bennett v. Reeve (1740), Willes, 227; Warrick v. Queen's College, Oxford (1871), 40 L. J. Ch. 780; Baring v. Abingdon, [1892] 2 Ch. 374. As to (3) *Refd.* Wild's Case (1609), 8 Co. Rep. 78 b. As to (6) *Refd.* Shury v. Piggot (1626), 3 Bulst. 339. As to (7) *Refd.* Millen v. Pandrye (1625), Poph. 161; King v. Rose (1673), Freem. K. B. 347; Wells v. Percy (1835), 1 Bing. N. C. 556; Rea v. Sheward (1837), 2 M. & W. 424; Prichard v. Powell (1845), 10 Q. B. 589; Jones v. Robin (1847), 10 Q. B. 620. As to (8) *Refd.* Wild's Case (1609), 8 Co. Rep. 78 b; Reynoldson v. Blake (1697), 1 Ld. Raym. 192; Barwick v. Matthews (1814), 5 Taunt. 365. As to (12) *Consd.* Jones v. Robin (1845), 10 Q. B. 581.

23. ——— Afterwards park.]—SAVIL'S CASE (1638), Clay. 64.

24. ———.]—Common appendant only belongs to arable land.—BENNETT v. REEVE (1740), Willes 227; 4 Vin. Abr. 583, pl. 6; 125 E. R. 1144.

Annotations:—*Refd.* Cheesman v. Hardham (1818), 1 B. & Ald. 706; Dunraven v. Llewellyn (1850), 15 Q. B.

25. Not demesne lands.]—ASKEW v. WILKINSON, No. 992, *post*.

See, also, No. 787, *post*.

26. Messuage, etc., in fee.]—JOHNSON v. THOROWGOOD (1614), Brownl. 177; 123 E. R. 739. *Annotations*:—*Mentd.* Burges v. Steer (1692), 12 Mod. Rep. 25; Taylor v. Walker (1729), Bunb. 267.

27. Cottage—Curtillage assumed.]—EMERTON v. SELBY (1704), 1 Salk. 169; 2 Ld. Raym. 1015; Holt, K. B. 174; 6 Mod. Rep. 114; 91 E. R. 156. *Annotations*:—*Consd.* Scholes v. Hargreaves (1792), 5 Term Rep. 46. *Refd.* A.-G. v. Reynolds, [1911] 2 K. B. 888.

D. Kind and Number of Animals.

28. Kind of animals—In general.]—A man shall have common appendant to his arable land, & for such beasts of his as plough & manure that land; that is to say horses & oxen to plough it; cows & sheep to manure it. He shall not use this common with goats, or geese, or such like; for these animals are not comprised within the usage of this common (PRISOT, C.J. C.P.).—ANON. (1459), Y. B. 37 Hen. 6, fo. 34, pl. 20.

29. ———.]—An objection that pigs, goats & geese were not commonable under a right of common appendant was not allowed.—DE BELLO CAMPO v. ST. ANDREW (DEAN) (1351), 25 Lib. Ass. fo. 116, pl. 8.

Annotation:—*Refd.* Sutton's Hospital Case (1612), 10 Co. Rep. 23 a.

30. ——— Animals to plough & manure the land.]—TYRRINGHAM'S CASE, No. 22, *ante*.

See, further, Sub-sect. 8, *post*.

31. Number of animals—Certain.]—CHICHLY v. ——— (1658), Hard. 117; 145 E. R. 409.

32. ——— Fraction of animal.]—To an action on the case for disturbance of a right of common by putting cows on the common field, deft. pleaded that he was possessed of certain land, the occupiers whereof had, for thirty years before the suit, etc., enjoyed common of pasture in the field for "one cow & three fourth parts of a right of common of pasture for another cow;" & that one L. was possessed of other land, the occupiers whereof had for thirty years, etc., enjoyed "one fourth part of a right of common of pasture for one cow," etc.: that deft., in respect of his right of common of pasture for one cow & three fourth parts of the right of common of pasture for another cow in his own right, & in respect of one fourth part of the right of common of pasture for one cow, as the servant of L., put two cows & no more on the common:—*Held*: the plea was unintelligible & bad.

Qu.: whether a man can prescribe for a right of common for a fractional part of a cow.—*NICHOLS v. CHAPMAN* (1860), 5 H. & N. 643; 29 L. J. Ex. 461; 2 L. T. 568; 24 J. P. 695; 8 W. R. 664; 157 E. R. 1337.

See, also, No. 64, *post*.

33. ——— Levancy & couchancy.]—TYRRINGHAM'S CASE, No. 22, *ante*.

34. ——— Cattle capable of being supported on tenement in winter.]—SMITH v. BENSALL (1597), Gouldsb. 117; 75 E. R. 1034.

Annotation:—*Refd.* Robertson v. Hartopp (1889), 43 Ch. D. 484.

35. ——— Capable of ascertainment.]—CHICHLY v. ——— (1658), Hard. 117; 145 E. R. 409.

36. ———.]—CHEDLE v. MILLER (1666), 2 Keb. 108, 120; 84 E. R. 69, 76; *sub nom.* CHEALDLE v. MILLER, 1 Lev. 196; *sub nom.* CHIEDLEY v. MILLOR, 1 Sid. 313.

Annotations:—*Refd.* Ivatt v. Mann (1842), 3 Man. & G. 691; Chesterfield v. Harris, [1908] 2 Ch. 397.

37. ——— As many sheep as land will maintain.]—LEECH v. WIDSLEY (1670), 1 Vent.

Sect. 1.—Common of pasture: Sub-sect. 2, D., E., F. & G.; sub-sect. 3, A., B. & C.]

54; 2 Keb. 590, 601; 1 Lev. 283; 86 E. R. 38; *sub nom.* ANON., T. Raym. 185.

*Annotations:—*Refd. Gates v. Bayley (1766), 2 Wils. 313; Cheesman v. Hardham (1818), 1 B. & Ald. 706; Robertson v. Hartopp (1889), 43 Ch. D. 484.

38. ———.]—LENIEL v. HARSLOP (1672), 3 Keb. 66; 84 E. R. 597; *sub nom.* DANIEL v. HANSLIP, 2 Lev. 67.

39. ———.]—Cattle to plough & manure arable land.]—Common appendant can only be claimed for so many cattle as are necessary to plough & manure the tenant's arable land.—BENNETT v. REEVE (1740), Willes, 227; 4 Vin. Abr. 583, pl. 6; 125 E. R. 1144.

*Annotations:—*Consd. Cheesman v. Hardham (1818), 1 B. & Ald. 706. Refd. Dunraven v. Llewellyn (1850), 15 Q. B. 791.

40. ———.]—Including cattle agisted.]—JASON v. HELLYARD (1634), 4 Vin. Abr. 585.

E. Transfer of Right.

See Part VII., Sect. 1, post.

F. Apportionment of Right.

See Part VII., Sect. 2, post.

G. Determination of Right.

See Part XI., post.

SUB-SECT. 3.—APPURTENANT.

A. Origin of Right.

41. By grant or prescription.]—TYRRINGHAM'S CASE, No. 22, *ante*.

42. ———.]—Common appurtenant is claimable by an existing grant as well as by prescription.—SACHEVERELL v. PORTER (1637), Cro. Car. 482; W. Jo. 396; 79 E. R. 1016.

*Annotations:—*Folld. Cowlam v. Slack (1812), 15 East, 108. Consd. Baring v. Abingdon, [1892] 2 Ch. 374.

43. ———.]—Common appurtenant may be claimed, as well by grant within time of memory, as by prescription: & after a unity of possession in the lord of the land, in respect of which the right of common was claimed, with the soil & freehold of the waste, evidence that the lord's tenant of the land had for fifty years past enjoyed the right of common on the waste is evidence for the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common, declaring upon his possession of the messuage & land, with the appurtenances, & that by reason thereof he was entitled of right to the common of pasture as belonging & appertaining to his messuage & land: & also to support another count, in substance the same, alleging his possession of the messuage & land, & that by reason thereof he was entitled to common of pasture, etc.—COWLAM v. SLACK (1812), 15 East, 108; 104 E. R. 785.

*Annotations:—*Refd. Baring v. Abingdon, [1892] 2 Ch. 374; Derry v. Sanders (1919), 88 L. J. K. B. 410.

Who may prescribe.]—*See Part VI., Sect. 2, sub-sect. 2, C., post.*

44. Grant.]—PRETTY v. BUTLER (1658), 2 Sid. 87; 82 E. R. 1272.

45. ———.]—MINET v. MORGAN, No. 20, *ante*.

Effect of new grant—After extinguishment of common rights.]—*See Part VI., Sect. 1, post.*

46. Appurtenancy assumed after verdict—Though common strictly neither appendant nor appurtenant.]—STONESBY v. MUSENDEN (1658), 2 Sid. 87; 82 E. R. 1272.

*Annotation:—*Refd. Hopkins v. Robinson (1671), 1 Mod. Rep.

B. Nature of Right.

47. May be in gross.]—ANON. (1480), Y. B. 5 Hen. 7, fo. 7, pl. 15.

*Annotations:—*Refd. Spooner v. Day (1636), Cro. Car. 432.

Mentd. Hartop v. Hoare (1743), 1 Wils. 8.

48. Distinguished from common appendant—Includes common of vicinage.]—MINET v. MORGAN, No. 20, *ante*.

See, also, No. 351, post.

49. Must be connected with enjoyment of land.]—Pltfs. alleged in their statement of claim that they were owners & occupiers of lands & houses in a parish in which were certain lammas lands, partly freehold & partly copyhold of two manors, & over which the owners & occupiers of lands & tenements in the parish had from time immemorial enjoyed as appurtenant to their respective lands & tenements in the parish a right of pasture for the cattle commonable thereon during the season between the removal of the crops in each year & the time of preparing the land for sowing in the next succeeding year; that the precise commencement & close of the season were regulated by bye-laws made by the homage of one of the manors, the number of cattle which each owner or occupier was entitled to turn out in respect of his tenement being proportioned to the annual value of the tenement according to a scale fixed by the homage; & that deft., the lord of the manor & tenant for life of the lammas lands, had recently inclosed parts of such lands, & had destroyed the pasture thereof, thereby depriving pltfs. & the other owners & occupiers of their rights of pasture. On demurrer:—*Held*: (1) in order to make a right of pasture over common or lammas lands appurtenant to particular lands there must be some relation between the enjoyment of the right & the enjoyment of the particular lands: that is, there must be some connection between the beasts used on those particular lands & the number or description of beasts that may be depastured on the common or lammas lands; as, for instance, where the right claimed is for the beasts which plough the particular lands; or, for every beast used on such lands not exceeding a certain number; (2) in an action claiming rights of pasture, or rights of a like nature, it is the duty of the ct., as far as possible, to attribute a legal origin to such rights, where there is evidence of long-continued user, but that duty can only be discharged at the trial; (3) it was unreasonable that either the stint or the commencement & close of the season should be fixed by the person entitled.—BAYLIS v. TYSEN-AMHURST (1877), 6 Ch. D. 500; 46 L. J. Ch. 718; 37 L. T. 493.

*Annotation:—*As to (1) Consd. A.-G. v. Reynolds, [1911] 2 K. B. 888.

50. In manor of another—For number certain—Without regard to levancy & couchancy.]—If common of pasture be claimed by the lord of a manor in the soil of another for a certain number of cattle, without regard to levancy & couchancy, & be not claimed as incident to arable land, it will be taken to be common appurtenant.—MUSGRAVE v. GAVE (1742), Willes, 319; 125 E. R. 1193.

C. Measure of Right.

51. Number—Cattle levant & couchant.]—BOTELER v. BRISTOW, CITY OF COVENTRY CASE (1475), Y. B. 15 Edw. 4, fo. 29, pl. 7, fo. 32, pl. 16.

*Annotations:—*Refd. Jeffry v. Boys, (*temp.* 1558–1648), Noy. 145; Gateward's Case (1607), 6 Co. Rep. 59 b; Mellor v. Spateman (1669), 1 Saund. 343; Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633; *Re* Christchurch Inclosure Act (1887), 35 Ch. D. 355. Mentd. Wakefield v. Costard (1586), 1 And. 151; Foiston v. Crachroode (1587), 4 Co. Rep. 31b; Gerard v. Dickenson (1590), 4 Co. Rep. 18a;

Goodday v. Michell (1595), Cro. Eliz. 441; *Harrison v. Rooke* (1626), Palm. 420; *Baker v. Brereman* (1635), Cro. Car. 418; *Popham v. Woolcot* (1666), 1 Sid. 291; *White v. Coleman* (1673), Freem. K. B. 134; *Race v. Ward* (1855), 24 L. J. Q. B. 153; *Mercer v. Denne* (1904), 91 L. T. 513.

52. —.]—*HOSKINS v. ROBINS*, No. 140, *post*.

53. —.]—*CLERKE v. JOHNSON* (1687), Lut. 1355; 125 E. R. 749.

54. —.]—Levancy & couchancy are incident to common appurtenant as well as to common appurtenant.—*BENNETT v. REEVE* (1740), Willes, 227; 4 Vin. Abr. 583, pl. 6; 125 E. R. 1144.

Annotations:—*Refd.* *Cheesman v. Hardham* (1818), 1 B. & Ald. 706. *Mentd.* *Dunraven v. Llewellyn* (1850), 15 Q. B. 791.

55. —.]—*Qu.* common of pasture appurtenant to a messuage, for cattle not levant & couchant on the messuage.—*BUNN v. CHANNEN* (1813), 5 Taunt. 244; 128 E. R. 683.

56. —.]—*Or number certain.*—A prescription for pasturage of two geldings in a thousand acres of meadow, until it be cut for hay, as appurtenant to a manor, is good, & it need not be averred that they were levant & couchant.—*THORNE v. LASSELS* (1604), Cro. Jac. 26; 79 E. R. 21.

Annotation:—*Mentd.* *Bullythorpe v. Turner* (1744), Willes, 475.

57. —.]—(1) One seised of land to which common of pasture was appurtenant, demised part of the land for years. In replevin for taking commonable cattle on the common, the freehold of which was in one under whom deft. made consuance, plff., to whom the lands to which, &c. had descended as heir, pleaded the common by prescription, in bar of the avowry, & deft. traversed the prescription. Upon special verdict finding these facts:—*Held*: the issue ought to be found against deft., & he could not give the lease in evidence.

(2) By the lease for years the common is not suspended nor discharged, but apportioned.

(3) Common appurtenant to land is as much as to say, common for cattle levant & couchant upon the land to which, &c.

(4) There is no difference when the prescription is for cattle levant & couchant & when for a certain number of cattle levant & couchant: but (5) when the prescription is for common appurtenant to land without alleging that it is for cattle levant & couchant, a certain number of cattle ought to be expressed.—*MORSE & WEBB'S CASE* (1610), 13 Co. Rep. 65; 2 Brownl. 297; 77 E. R. 1474.

58. —.]—*PATRY v. WILSH* (1611), 1 Brownl. 198; 123 E. R. 752.

59. —.]—*PATRICK v. LOWRE* (1611), 2 Brownl. 101; 123 E. R. 838.

Annotation:—*Refd.* *Scholes v. Hargreaves* (1792), 5 Term Rep. 46.

60. —.]—*COBHAM v. WHITE* (1640), 1 Roll. Abr. 398.

Annotations:—*Consd.* *Morley v. Clifford* (1882), 20 Ch. D. 753. *Refd.* *Miller v. Spateman* (1669), 2 Keb. 570; *Bennett v. Reeve* (1740), Willes, 227.

61. —.]—*MANCHESTER (EARL) v. VALE* (1606), 1 Saund. 23; 85 E. R. 25.

Annotations:—*Mentd.* *Phillips v. Biron* (1722), 1 Stra. 509; *Smith v. Boucher* (1733), 7 Mod. Rep. 173; *Vivian v. Jenkin* (1835), 3 Ad. & El. 741; *Wise v. Hodson* (1840), 11 Ad. & El. 816; *Hudson v. Fawcett* (1844), 7 Man. & G. 348; *Trott v. Smith* (1844), 12 M. & W. 688; *Polkinhorn v. Wright* (1845), 8 Q. B. 197.

62. —.]—In prescribing for common for a certain number of cattle, it need not say they were levant & couchant.—*STEVENS v. AUSTIN* (1677), 2 Mod. Rep. 185; 86 E. R. 1015.

63. —.]—A copyholder cannot lawfully claim common appurtenant without stint

in respect of his copyhold tenement, but such common must be limited to the cattle levant & couchant on the tenement to which it is annexed, or the number must be ascertained by the court rolls or in some other manner.—*MORLEY v. CLIFFORD* (1882), 20 Ch. D. 753; 51 L. J. Ch. 687; 46 L. T. 561; 30 W. R. 606.

Annotation:—*Refd.* *Malvern Hills Conservators v. Whitmore* (1909), 100 L. T. 841.

64. —.]—*Fraction of animal.*—In replevin for a cow, the issue was upon a prescription that each "yard-land" in such a vill should have common therein for 12 cows & for quarter yard for 3 cows & for half quarter 1 cow & a half, & after verdict it was moved in arrest that a person could not prescribe to have common for half a cow:—*Held*: there being a verdict it should be intended as though it were for half a year or that two join when each of them had half a cow but granting that it was bad for it yet the replevin being only for one cow there was enough found for plff. for which cow the damages were only given but if part only had been found for plff. in a replevin it would be good.—*ELLARD v. HILL* (1664), 1 Sid. 226; 82 E. R. 1072; *sub nom.* *HILL v. ALLEN*, 1 Keb. 793; 1 Lev. 141.

See, also, No. 32, *ante*.

65. —.]—*Number certain*—*License to stranger.*—*HOSKINS v. ROBINS*, No. 140, *post*.

66. —.]—*Not confined to animals levant & couchant.*—*RICHARDS v. SQUIBB* (1698), 1 Ld. Raym. 726; 91 E. R. 1384, N. P.

Annotation:—*Refd.* *Nichols v. Chapman* (1860), 29 L. J. Ex. 461.

67. —.]—*Beasts of plough*—*Or number certain.*—*BAYLIS v. TYSEN-AMHURST*, No. 49, *ante*.

68. *Levancy & couchancy*—*Cattle supported on produce of land.*—*ROGERS v. BENSTEAD* (1727), 1 Selwyn's N. P. 13th. Ed. p. 388, N. P.

Annotations:—*Fold.* *Fulcher v. Scales* (1738), 1 Selwyn's N. P. 389. *Consd.* *Cheesman v. Hardham* (1818), 1 B. & Ald. 706.

69. —.]—*FULCHER v. SCALES* (1738), 1 Selwyn's N. P. 13th. Ed. p. 389, N. P.

70. —.]—In an action for disturbance of plff.'s right of common:—*Held*: (1) an averment in the declaration that plff. was entitled to common of pasture for all his cattle levant & couchant upon his land, was well supported by evidence that plff. was a part-owner with deft. & others of a common field, upon which, after the corn was reaped & the field cleared the custom was for the different occupiers to turn out in common their cattle, the number being in proportion to the extent of their respective lands within the common field; although such cattle were not maintained upon such land during the winter, & although the custom proved was to turn out in proportion to the extent & not to the produce of the land, in respect of which the right was claimed; (2) it was not necessary to state his right to be with the exception of his own land, but that it was well laid to be over the whole common.—*CHEESMAN v. HARDHAM* (1818), 1 B. & Ald. 706; 106 E. R. 260.

—.]—*WHITELOCK v. HUTCHINSON* (1839), 2 Mood. & R. 205, N. P.

Annotations:—*Refd.* *Lascelles v. Onslow* (1877), 2 Q. B. D. Robertson v. Hartopp (1889), 43 Ch. D. 484.

72. —.]—*Though common insufficient.*—*WILLIS v. WARD* (1818), 2 Chit. 297.

73. —.]—*After alteration of nature of commoner's tenement.*—*CARR v. LAMBERT*, No. 800, *post*.

74. —.]—*LENIEL v. HARSLOP* (1672), 3 Keb. 66; 84 E. R. 597; *sub nom.* *DANIEL v. HANSLIP*, 2 Lev. 67.

75. —.]—*Including cattle of licensee.*—

Sect. 1.—Common of pasture: Sub-sect. 3, C., D., E., F. & G.; sub-sect. 4, A.]

RUMSEY v. RAUSON (1669), 2 Keb. 501; 1 Vent. 25; 84 E. R. 316.

Annotation:—Mentd. *Hewlins v. Shippam* (1826), 5 B. & C.

76. ——— Agistment—Right of lord not to be prejudiced.]—Tenant of B. prescribed to have for himself & his tenants, etc., occupiers of the farm of B., the sole & exclusive right of pasture & feeding of sheep & lambs on L., as to the farm of B. belonging & appertaining:—*Held*: this did not entitle him to take in the sheep & lambs of other persons to pasture on L., for that, by the terms of the grant, some interest in the pasture was reserved to the lord, & the above practice was prejudicial to such interest.—*JONES v. RICHARD* (1837), 6 Ad. & El. 530; 1 Nev. & P. K. B. 747; Will. Woll. & Dav. 276; 6 L. J. K. B. 241; 1 J. P. 261; 112 E. R. 203.

77. ——— Right cannot be assigned.]—*HOSKINS v. ROBINS*, No. 140, *post*.

78. Pasturage & herbage—Not fern, heather, etc.]—Previous to the disafforestation & grant of A. Forest in 1677, the Crown was absolute owner of the soil of the forest, & possessed all the rights belonging to such ownership including vert & venison. The tenants of the adjoining manors had customary rights of common of pasture, herbage, & pannage, but the court rolls & other documents contained no evidence of any customary right in the commoners to cut & carry away from the forest brakes, fern, & litter, except by permission of the forest officers, & afforded negative evidence that no such right was ever claimed or lawfully exercised. In a suit instituted in 1691, for the purpose of determining how much of the forest might properly be inclosed having regard to the rights of common, the commoners by their answers claimed rights of pasturage, & pannage for swine & as to such of them as had houses, certain quantities of fuel wood for their houses, but made no claim in respect of any other estovers. By the decree made in 1693, after allotting to the owners for inclosure & improvement portions of the forest within which the commoners were to be excluded & debarred from any common of pasture, herbage or pannage, the residue of the forest, containing 6,400 acres, was allotted to remain open & uninclosed, “& defts., their heirs, tenants, & assigns, & all other persons having right of common in the forest according to their respective interests therein, shall from time to time have & take the sole common pasturage & herbage of all & every the lands allotted & left for common,” the owners, their heirs & assigns, tenants & farmers, being for ever excluded “from having or claiming any common of pasture or herbage upon or in the said lands so left for common.” In an action brought by the owner of the inheritance in 1878 to restrain one of the commoners from cutting & carrying away brakes, fern & litter from the 6,400 acres, for use upon the copyhold tenement in respect of which he had his right of common, deft. claimed this right as one of the commoners entitled to the benefit of the decree of 1693, & also alternatively by prescription in respect of his particular tenement:—*Held*: (1) upon the construction of the decree of 1693, the right of the commoners over the 6,400 acres was limited to common of pasturage & herbage, & did not include the right to cut & carry away the brakes, fern, heather & litter growing therein; (2) the existence at the date of

that decree of any special custom authorising the commoners to cut & carry away brakes, etc., & litter in that which had been a royal forest, had not been established, & was negatived by the absence of any claim to such a custom by the commoners in the suit in which that decree was made; (3) evidence of usage subsequent to the date of the decree of 1693 could not affect the construction of that decree, which in its terms was clear & unambiguous; (4) as the deft. & his predecessors in title were shown to have claimed to take, & to have actually taken, as of right & without any permission from the lord, litter from the 6,400 acres for the use of the tenement for upwards of sixty years immediately before the action, they had, under Prescription Act, 1832 (c. 71), acquired a right to do so, although they had claimed to do the acts complained of under the mistaken supposition that all the commoners were entitled to do them.—*DE LA WARR (EARL) v. MILES* (1881), 17 Ch. D. 535; 50 L. J. Ch. 754; 44 L. T. 487; 29 W. R. 809, C. A.

Annotations:—As to (4) Distd. *Lyell v. Hothfield*, [1914] 3 K. B. 911. *Refd.* *Lemaitre v. Davis* (1881), 19 Ch. D. 281; *Hollins v. Verney* (1884), 13 Q. B. D. 304; *Brocklebank v. Thompson*, [1903] 2 Ch. 344.

D. In respect of what Tenements.

79. Manor.]—*MUSGRAVE v. GAVE*, No. 50, *ante*.

80. Parcel of manor.]—(1) A prescription cannot be pleaded against a prescription; therefore, if a man prescribe for a common, the plea of a custom to inclose it is void.

(2) The commonage of a common appurtenant certain may be divided, or annexed to parcel of the manor.—*SPOONER v. DAY & MASON* (1636), Cro. Car. 432; 79 E. R. 975.

Annotation:—Generally, Mentd. *Hayward v. Cunningham* (1668), 1 Lev. 231.

81. Messuage—Meadow & pasture—Not arable land.]—*TYRRINGHAM'S CASE*, No. 22, *ante*.

82. ——— & appurtenances.]—*PATRY v. WILSH* (1611), 1 Brownl. 198; 123 E. R. 752.

83. ——— Curtilage assumed.]—*PATRICK v. LOWRE* (1611), 2 Brownl. 101; 123 E. R. 838.

Annotation:—Refd. *Scholes v. Hargreaves* (1792), 5 Term Rep. 46.

84. ————*SCAMBLER v. JOHNSON* (1682), 2 Show. 218; T. Jo. 227; 89 E. R. 919.

Annotations:—Mentd. *Fryer v. Coombs* (1840), 4 Per. & Dav. 119, n.; *Brooke v. Spong* (1816), 15 M. & W. 153.

85. ——— Not farm—Unless ancient.]—*HOCKLEY v. LAMB* (1698), 1 Ld. Raym. 726; 91 E. R. 1384.

86. ——— With yard & orchard—No right.]—*HER v. SCALES* (1738), 1 Selwyn's N. P. 13th ed. p. 389, N. P.

87. ——— Without curtilage or land—No right.]—Common for cattle levant & couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land.—*SCHOLES v. HARGREAVES* (1792), 5 Term Rep. 46; 101 E. R. 26.

Annotations:—Consd. *A.-G. v. Reynolds*, [1911] 2 K. B. 888. *Refd.* *Cheesman v. Hardham* (1818), 1 B. & Ald. 706. *Mentd.* *Lascelles v. Onslow* (1877), 2 Q. B. D. 433; *Robertson v. Hartopp* (1889), 43 Ch. D. 484.

88. ——— Land insufficient for levancy & couchancy—No right.]—*Qu.*: common of pasture appurtenant to a messuage, for cattle not levant & couchant on the messuage.—*BUNN v. CHANNEN* (1813), 5 Taunt. 244; 128 E. R. 683.

89. ——— Cottage—No right.]—A cottage cannot by the law claim to have common.—*ANON.* (1636), Clay. 48.

PART II. SECT. 1, SUB-SECT. 3.—D.

a. Land other than arable.]—Common

of pasture can be appendant only to arable land; but it may be appurtenant

to other land.—*HAYES v. BRIDGES & GUESS* (1795), Ridg. L. & S. 390.—**IR.**

90. — — — In Lincolnshire.]—LENIEL *v.* HARSLOP (1672), 3 Keb. 66; 84 E. R. 597.

91. New dwellinghouse—Built on same tenement as old dwellinghouse—Old dwellinghouse pulled down.]—(1) Trespass for breaking & entering pltf.'s close & treading down the grass, etc., & breaking & destroying the hedges & fences of pltf., etc. Deft., as to all the trespasses, pleaded that pltf.'s close was parcel of the manor of C., & that a certain messuage, & four acres of land, with the appurtenances, at the several times when, etc. were, & from time immemorial had been, within & parcel of the manor, & a customary tenement of that manor; & that within the manor there was, & from time whereof, etc. there had been an ancient custom that every customary tenant of the customary tenement, with the appurtenances, should have common of pasture upon pltf.'s close. That J. being seised of the customary tenement, having occasion to use his common of pasture, entered the close in which, etc., & put his cattle in, & because the hedges and fences had been improperly erected, threw them down. Replication, denying the custom for the customary tenant of the customary tenement to have common of pasture, upon which issue was joined. Second plea, a prescriptive right of common of turbary in respect of the customary tenement, consisting of a messuage & land. Replication, denying the custom in respect of such customary tenement, upon which issue was joined, & new assignment, that deft. entered for other purposes than those mentioned in the plea. It appeared in evidence, that at the time of the plea pleaded, there was an ancient customary tenement, consisting of a dwellinghouse & out-buildings, garden & a small quantity of land, the customary tenant whereof had immemorially enjoyed such common of pasture in the plea mentioned; that for many years deft. had been such customary tenant, & in 1812 had built a new dwellinghouse on a part of the garden: that both the old & new dwellinghouse continued to be occupied till 1823, when the former fell into decay, & was abandoned by the tenant, & then remained unoccupied until it was finally pulled down in 1825, from which time there had been no dwellinghouse on the tenement, except the one built by deft. in 1821. During the years in which both the old & new dwellinghouses were occupied, the tenant of the former continued to exercise such customary rights on the wastes of the manor in respect thereof as he had before, & during that period it did not appear that the occupier of the latter had exercised any customary rights on the wastes of the manor in respect thereof, but since the new dwellinghouse had been alone occupied, the customary tenant of the tenement had claimed & enjoyed all the same rights in respect thereof as had been claimed & enjoyed at any former period, & among others, the customary right stated in the second plea:—*Held*: deft. was entitled to have the issue joined upon the right of common of pasture found for him in respect of an ancient customary tenement.

(2) It appeared that defts. committed one trespass by breaking down a large portion of the fence which was standing upon pltf.'s close, which pltf. had then newly erected upon the common, & that defts. did so, really intending to assert & preserve their rights of common of pasture & of turbary; but that they broke down much more of the fence than was necessary for the convenient ingress & egress of men & commonable cattle into & upon part of the close which was inclosed by the fence, & that they did not intend, at the time of com-

mitting the trespass, to exercise any of the rights of common, nor had they with them any commonable cattle:—*Held*: defts. were entitled to have the issue found for them, upon the plea of "not guilty" to the new assignment.

(3) *Qu.*: whether defts. were entitled to have the issue on the right of common of turbary found for them.—*ARLETT v. ELLIS* (1829), 9 B. & C. 671; 109 E. R. 249.

Annotations:—As to (1) *Refd.* Pritchard *v.* Powell (1846), 10 Jur. 154. *Generally*, *Dbtd.* A.-G. *v.* Reynolds, [1911] 2 K. B. 888. No great weight attaches to the case of *Arlett v. Ellis*; If the facts had been gone into, the case could not have been maintained at all (HAMILTON, J.). *Refd.* Elwood *v.* Bullock (1844), 13 L. J. Q. B. 330.

92. Demesne lands—Quasi right of common.]—ASKEW *v.* WILKINSON, No. 992, *post*.

See, further, Part XIII., Sect. 7, sub-sect. 4, A, *post*.

93. — — —.]—(1) The release by the lord of a manor of his seigniorial rights over a freehold tenement held of the manor does not operate to extinguish rights of common over the lord's waste appendant to such tenement (STIRLING, J.).

(2) For many years before 1859, the tenants of a farm forming part of the demesne land of a manor had enjoyed, under the terms of their leases, rights of common over the waste of the manor. In 1859, while the farm was still in lease the lord sold a portion of it. In the general words of the conveyance to the purchaser were included "all commons to the said piece of land or any part thereof belonging." On the completion of the sale the tenant of the farm gave up possession to the purchaser of the piece of land sold; but no formal assignment was made, nor was the lease mentioned in the conveyance:—*Held*: in the absence of circumstances showing a special intention that a right of common should be enjoyed by the purchaser in respect of the land sold, the language of the conveyance was insufficient to pass or to create such a right.—*BARING v. ARINGDON*, [1892] 2 Ch. 374; 62 L. J. Ch. 105; 67 L. T. 6; 41 W. R. 22; 8 T. L. R. 576; 36 Sol. Jo. 522, C. A.

Annotations:—As to (1) *Consd.* Broome *v.* Wenham (1893), 68 L. T. 651. *Generally*, *Mentd.* Wallis *v.* Hands, [1893] 2 Ch. 75.

E. Transfer of Right.

See Part VII., Sect. 1, *post*.

F. Apportionment of Right.

See Part VII., Sect. 2, *post*.

G. Determination of Right.

See Part XI., *post*.

SUB-SECT. 4.—IN GROSS.

A. Origin of Right.

94. By grant—Or prescription—At present day.]—TYRRINGHAM'S CASE, No. 22, *ante*.

What rights may be prescribed for, *see, generally*, Part VI., Sect. 2, sub-sect. 2, *post*.

95. — — — Though without number.]—II. *v.* B. (1362), 36 Lib. Ass. fo. 211, pl. 3.

Annotation:—*Mentd.* Sacheverill *v.* Porter (1637), Cro. Car. 482.

96. — — —.]—A prescription for common in gross without number is a void prescription yet may be good by way of grant.—*MELLOR v. SPATEMAN* (1669), 1 Saund. 339; 85 E. R. 489; *sub nom.* *MELLER v. STAPLES*, 1 Mod. Rep. 6; *sub nom.* *MILLER v. SPATEMAN*, 2 Keb. 527, 550, 570.

Annotations:—*Consd.* Robertson *v.* Hartopp (1889), 43 Ch. D. 484. *Refd.* Hinkes *v.* Clarke (1679), 2 Show. 78; Weekly *v.* Wildman (1698), 1 Ld. Raym. 405; A.-G. *v.*

Sect. 1.—Common of pasture: Sub-sect. 4, A., B., C. & D.; sub-sect. 5, A., B., C. & D.; sub-sect. 6, A.]

Gauntlett (1829), 3 Y. & J. 93; Carr v. Lambert (1865), 3 H. & C. 499; Harrop v. Hirst (1868), L. R. 4 Exch. 43. **Mentd.** Ashby v. White (1703), 2 Ld. Raym. 938; Hardy v. Hollyday (1765), cited in 4 Term Rep. 718; Colchester Corp'n. v. Seaber (1766), 3 Burr. 1866; R. v. Pasmore (1789), 3 Term Rep. 199; R. v. Churchill (1825), 4 B. & C. 750; Bowen v. Jenkin (1837), 6 Ad. & El. 911; Richards v. Fry (1838), 7 Ad. & El. 698; R. v. Joint Stock Cos. Registrar (1847), 10 Q. B. 839; Cox v. Glue (1848), 5 C. B. 533; Thriceutt v. Martin (1849), 18 L. J. Ex. 291; Dunraven v. Llewellyn (1850), 15 Q. B. 791; Parry v. Thomas (1850), 5 Exch. 37; Davies v. Williams (1851), 16 Q. B. 546; Embrey v. Owen (1851), 6 Exch. 353; Bonomi v. Backhouse (1859), E. B. & E. 622; Constable v. Nicholson (1863), 14 C. B. N. S. 230; Johnson v. Barnes (1872), L. R. 7 C. P. 592; Goodman v. Saltash Corp'n. (1882), 7 App. Cas. 633; McCartney v. Londonderry & Lough Swilly Ry., [1901] A. C. 301; Bourne & Hollingsworth v. Marylebone B. C. (1908), 72 J. P. 129; Hamerton v. Dysart, [1916] 1 A. C. 57.

97. ———. ———. ———. ———. (1) A natural person cannot prescribe as inhabitant or occupier of a house in a town.

(2) A grant of common *sans nombre* in gross is good.

(3) A right of common is an interest in another's soil.—WEEKLY v. WILDMAN (1698), 1 Ld. Raym. 405; 91 E. R. 1169.

Annotations:—As to (1) Refd. Hill v. Tupper (1863), 2 New Rep. 201. As to (2) Refd. Ackroyd v. Smith (1850), 10 C. B. 164. As to (3) Refd. Race v. Ward (1855), 4 E. & B. 702.

See, also, No. 375, post.

98. ——— **All manner of cattle.]**—Where a man made a grant of common of pasture for all manner of cattle:—*Held*: such grant of common was in gross.—STAMFORD v. BURGESS (1675), Sheppard's Abridgement, 381.

99. Not by alienation & apportionment of common appurtenant.]—LENIEL v. HARSLOP (1672), 3 Keb. 66; 84 E. R. 597; *sub nom.* DANIEL v. HANSLIP, 2 Lev. 67.

100. By demise of common appurtenant.]—*Qu.*: common appurtenant converted to common in gross by demising it. BUNN v. CHANNEN (1813), 5 Taunt. 241; 128 E. R. 683.

Alienation of common.]—*See, generally, Part VII., Sect. 1, post.*

B. Who may take.

101. Corporation — By grant.]—PARRY v. THOMAS (1850), 5 Exch. 37; 19 L. J. Ex. 198; 155 E. R. 16.

By prescription.]—*See Part VI., Sect. 2, sub-sect. 2, C (c).*

102. In right of dower.]—Dower does not lie for a common in gross.—PRUETT v. DRAKE (1633), Cro. Car. 300; 79 E. R. 862; *sub nom.* BREWOOD v. DRAKE, W. Jo. 315.

Who may prescribe.]—*See Part VI., Sect. 2, sub-sect. 2, C, post.*

C. Nature and Extent of Right.

103. Not restricted to cattle levant & couchant.]—NAPLETON (PRIORESS) v. ——— (1348), 22 Lib. Ass. fo. 93, pl. 36.

Annotation:—Refd. Seymour's Case (1612), 10 Co. Rep. 95 b.

104. ——— Agistment.]———— v. STRODE (1133), Y. B. 11 Hen. 6, fo. 22, pl. 19.

Annotations:—Refd. Ascough's Case (1611), 9 Co. Rep. 134 a. Mentd. Webb's Case (1608), 8 Co. Rep. 45 b.

105. ———.]—*Qu.*: if a commoner who has common for a certain number of beasts can put in the cattle of a stranger.—MONK v. BUTLER (1620), Cro. Jac. 574; 79 E. R. 491.

Annotations:—Refd. Rumsey v. Ranson (1669), 2 Keb. 504; Hewlin v. Shippam (1826), 5 B. & C. 221. Mentd. Perry v. Fitzhowe (1846), 8 Q. B. 757.

106. Whether appurtenant or appendant.]—A common appurtenant can be in gross but not a

common appendant.—ANON (1489), Y. B. 5 Hen. 7, fo. 7, pl. 15.

107. Cannot be granted to stranger.]—HOSKINS v. ROBINS, No. 110, *post*.

Sans nombre—By grant.]—*See Sub-sect. 3, A, ante.*

108. Temporary non-user—Right during such period forfeited—Right not cumulative.]—ANON. (1448), Y. B. 27 Hen. 6, fo. 10, pl. 5.

Annotations:—Refd. Coulter's Case (1598), 5 Co. Rep. 30 a. Mentd. Anon. (1562), Ben. & D. 44; Blackamore's Case (1610), 8 Co. Rep. 156 a.

D. Alienation and Apportionment of Right.

Alienation of right.]—*See Part VII., Sect. 1,*

Apportionment of right.]—*See Part VII., Sect. 2, post.*

SUB-SECT. 5.—BY VICINAGE.

A. Origin of Right.

109. By prescription.]—TYRRINGHAM'S CASE, No. 22, *ante*.

See, also, No. 119, post.

110. Custom — Of manor.]—*Qu.*: whether trespass may be justified by the custom of a manor for common of vicinage.—BROMFIELD v. KIRBER (1706), 11 Mod. Rep. 72; 88 E. R. 897.

Annotations:—Consd. Sewers Comrs. v. Glasco (1874), L. R. 19 Eq. 134. Refd. Wells v. Pearey (1835), 1 Bing. N. C. 556; Jones v. Robin (1847), 10 Q. B. 620.

111. ——— Or prescription.]—Common of vicinage may be claimed by prescription, but it is rather a matter of immemorial custom.—PRICHARD v. POWELL (1815), 10 Q. B. 589; 116 E. R. 221; *sub nom.* PRITCHARD v. POWELL, 15 L. J. Q. B. 166; 10 Jur. 151; *sub nom.* POWELL v. PRITCHARD, 5 L. T. O. S. 263.

Annotation:—Consd. Dunraven v. Llewellyn (1850), 15 Q. B. 791.

112. ——— Not over adjoining farms — Only by grant or prescription.]—JONES v. ROBIN (1817), 10 Q. B. 620; 17 L. J. Q. B. 121; 12 Jur. 308; 116 E. R. 235, Ex. Ch.; *affg.* (1845), 10 Q. B. 581. *Annotations:—Consd. Cape v. Scott (1874), L. R. 9 Q. B. 269. Refd. Clarke v. Tinker (1845), 10 Q. B. 604; Prichard v. Powell (1845), 10 Q. B. 589. Mentd. Kaye v. Sutherland (1887), 20 Q. B. D. 147.*

113. By grant.]—MINET v. MORGAN, No. 20, *ante*.

B. Nature and Extent of Right.

114. Contiguity necessary.]—ANON. (1540), Dyer, 47 b.; 73 E. R. 101.

Annotation:—Consd. & Apld. Sewers Comrs. v. Glasco (1874), L. R. 19 Eq. 131.

115. ———.]—(1) A right of common over any district, however large, may be claimed by prescription.

(2) In common because of vicinage the cattle must always be turned out in the commoner's own manor; therefore, if a right be proved to turn out in another manor, it proves a right of common direct, & not merely because of vicinage.

(3) The lords of manors within a forest contended that they had customs to enclose the wastes within their manors with the consent of the homages of their respective manors. It appeared that other persons, strangers to the manors, had rights of common over the lands claimed to be enclosed:—*Held*: the enclosures were bad as against the commoners.

(4) Where A., B. & C. are three vills with commons, B. lying between A. & C., there can be common of vicinage between A. & B. & between B. & C.; & *semble*, there cannot be common of vicinage between more than two townships.

(5) A claim of right of common of pasture may be made out by showing that for sixty years & upwards this right has been exercised, thereby proving immemorial user, which would imply a grant; but such right may be defeated by showing the origin of the user & that it is not in accordance with the right claimed.—SEWERS COMRS. v. GLASSE (1874), L. R. 19 Eq. 134; 44 L. J. Ch. 129; 31 L. T. 495; 23 W. R. 102.

Annotations:—As to (5) Consd. Baring v. Abingdon, [1892] 2 Ch. 374. *Refd.* Howard v. Maitland (1883), 11 Q. B. D. 695. *Generally, Refd.* Hall v. Byron (1876), 4 Ch. D. 667.

116. Appendant.]—Any common for cause of vicinage is appendant.—ANON. (1467), Y. B. 7 Edw. 4, fo. 26, pl. 3.

Annotations:—Consd. Jones v. Robin (1847), 10 Q. B. 620. *Refd.* Goodday v. Michell (1595), Cro. Eliz. 441; Smith v. Gatewood (1607), Cro. Jac. 152. *Mentd.* Cole v. Turner (1705), Holt, K. B. 108.

117. Not appendant.]—TYRRINGHAM'S CASE, No. 22, *ante*.

118. Appurtenant.]—MINET v. MORGAN, No. 20, *ante*.

119. Between private lands—Claim by prescription.]—OWEN v. PIERCE (1848), Cox, M. & H. 115; 12 J. P. Jo. 455.

120. Cannot be claimed for cattle straying from common—On to private lands—Though unfenced.]—Common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs. —HEATH v. ELLIOTT (1838), 4 Bing. N. C. 388; 1 Arn. 170; 6 Scott, 172; 7 L. J. C. P. 210; 132 E. R. 836.

Annotations:—Refd. Pritchard v. Powell (1845), 10 Q. B. 589; Jones v. Robin (1847), 10 Q. B. 620.

See, also, Nos. 128, 129, *post*.

121. Extent of—Limited to cattle turned out on commoner's own manor.]—CONWAY'S CASE (1572), 3 Dyer, 316 b; 73 E. R. 716.

Annotation:—Refd. Pritchard v. Powell (1845), 15 L. J. Q. B. 166.

122. ———.]—SEWERS COMRS. v. GLASSE, No. 115, *ante*.

See, also, Nos. 129, 559, *post*.

123. ——— Limited to cattle maintainable by commoner's common.]—CORBET'S CASE, No. 307,

124. ——— Boundaries undefined—Exercise of right a question of fact.]—HETHERINGTON v. VANE (1821), 4 B. & Ald. 428; 106 E. R. 993.

Annotation:—Distd. Lester v. Kemp (1824), 9 Moore, C. P. 85.

125. ——— Whether between more than two townships.]—SEWERS COMRS. v. GLASSE, No. 115, *ante*.

C. Evidence of Right.

126. Declaration of former tenant—Admissible though tenant living.]—WALKER v. BROADSTOCK (1795), 1 Esp. 158, N. P.

Annotations:—Overd. Papendick v. Bridgwater (1855), 5 E. & B. 166. *Refd.* R. v. Birmingham Overseers, (1861), 1 B. & S. 763.

127. Reputation—Admissible in support of plea of immemorial right.]—Reputation may be given in evidence in support of the immemorial right of common *pur cause de vicinage*. —PRICHARD v. POWELL (1845), 10 Q. B. 589; 116 E. R. 221; *sub nom.* PRITCHARD v. POWELL, 15 L. J. Q. B. 166; 10 Jur. 154; *sub nom.* POWELL v. PRITCHARD, 5 L. T. O. S. 263.

Annotation:—Consd. Dunraven v. Llewellyn (1850), 15 Q. B. 791.

Admissibility of evidence.]—*See, generally, Part VI., Sect. 3, post.*

128. Evidence to establish.]—(1) To establish a common *pur cause de vicinage*, an intercommoning between the two districts must be alleged & proved. It is not enough to show that there was no fence between the two districts, & that cattle strayed from one to the other, but were constantly either driven back by their own respective owners, or turned off by the owners of the land into which they had strayed.

(2) *Seemle*: a plea is bad, after verdict, which professes to show a common *pur cause de vicinage*, by usage, between the close of an individual & a waste or common.

(3) Admitted, that, where there is a common *pur cause de vicinage* between two wastes, & one of them is, under a private Act of Parliament, conveyed to allottees for the purpose of being inclosed, & the comrs. under the Act extinguish all rights of common on such one waste, these proceedings do not, of themselves, put an end to the common *pur cause de vicinage*. —CLARKE v. TINKER (1845), 10 Q. B. 604; 15 L. J. Q. B. 19; 6 L. T. O. S. 125; 10 J. P. 468; 10 Jur. 263; 116 E. R. 230.

Annotation:—As to (1) Refd. Jones v. Robin (1847), 10 Q. B. 620.

D. Determination of Right.

129. By inclosure—Inclosure of whole—No right to put in cattle—But cattle may break in.]—ANON. (1573), 3 Dyer, 316 b, pl. 4; 73 E. R. 716.

Annotation:—Refd. Pritchard v. Powell (1845), 10 Q. B. 589.

See, also, Nos. 115, 121, *ante*.

130. ———.]—TYRRINGHAM'S CASE, No. 22, *ante*.

131. ———.]—SMITH v. HOW & REDMAN (*circa* 1583), cited in 4 Co. Rep. 38 b; 76 E. R. 981.

132. ——— Access left—Common not determined.]—GULLETT v. LOPES (1811), 13 East, 348; 101 E. R. 104.

Annotations:—Consd. Wells v. Pearcey (1835), 1 Bing. N. C. 556. *Refd.* Pritchard v. Powell (1845), 10 Q. B. 589.

133. ——— Inclosure of part.]—In common for cause of vicinage if part of the land is enclosed all the common is extinguished.—BACON v. PALMER (1611), 1 Brownl. 171; 123 E. R. 737.

134. ———.]—HARDING v. BROOKS (1672), 3 Keb. 21; 84 E. R. 574.

135. Inclosure under Inclosure Act—Fence not erected.]—By a local Act all rights of common whatever in B. were extinguished; the wastes were divided; the owners of allotments were directed to inclose, & authorised to distrain the cattle of strangers trespassing, but no fence was made:—*Held*: the owner of an allotment in B. could not distrain cattle which had strayed into his allotment from a common in W., in pursuance of an alleged right of common *pur cause de vicinage* in the inhabitants of W.—WELLS v. PEARCEY (1835), 1 Bing. N. C. 556; 1 Scott, 426; 4 L. J. C. P. 111; 131 E. R. 1232.

Annotations:—Refd. Pritchard v. Powell (1845), 10 Q. B. 589; Jones v. Robin (1847), 10 Q. B. 620.

136. ———.]—CLARKE v. TINKER, No. 128, *ante*.

SUB-SECT. 6.—SOLE VESTURE, ETC.

A. Origin of Right.

137. By grant—For years.]—MOUNTJOY v. TERDRUE (1638), 2 Roll. Abr. 62 (E. 2).

138. ——— Or prescription.]—A man may lawfully grant the pasturage & the feeding of his land when that is not sowed, & by consequence, if that

Sect. 1.—Common of pasture: Sub-sect. 6, A., B., C. D.; sub-sect. 7.]

may be good by grant, it may be good by prescription.—SPARKE'S CASE (1621), Win. 6; 124 E. R. 5.

139. ———.]—In an action of trespass, for taking & impounding pltf.'s cattle, in P. & G. field, deft. pleaded, first, that T. & his ancestors had been immemorially used to have, for themselves, & their heirs & assigns, the sole & several pasturage in 217 acres of P. & G. field, in gross, for all his & their cattle, from Sept. 4 in one year, to Apr. 5 in the following year; that T. in 1755, by indenture granted the pasturage to S. his heirs & assigns for ever; that J. who claimed by descent from S. in 1836, demised the pasturage to deft. (not saying by deed), who seized pltf.'s cattle, because they were depasturing the land in question. Deft. pleaded secondly that for 30 years before suit commenced, J. & his ancestors had enjoyed of right, without interruption, for himself & themselves, his & their heirs & assigns, the sole pasturage in the field in question in gross, stating a demise, but not by deed, to deft. & concluding as in the first plea. The replication traversed specially the right of T. as alleged in the first plea, & traversed the enjoyment of J. as of right, without interruption, for thirty years, as alleged in the second plea. Within the last twenty years, encroachments had been made upon the 217 acres, by buildings & inclosures, & about forty acres had in this way been appropriated by individuals, but no encroachments had been made upon that part of the 217 acres, on which the alleged trespass took place:—*Held*: (1) these interruptions, being of modern date, did not prove that T. had no right to the pasturage in 1755; (2) the interruptions not having been made upon that part of the land where pltf.'s cattle were depasturing, they were not conclusive evidence of an interruption of deft.'s enjoyment of that part; (3) a lease & agreement made by the ancestors of the present owner, by which they demised the pasturage in question to one U, were admissible in evidence, as proving the seisin of T., the original grantor of the pasturage, by showing the enjoyment of parties who claimed under him; (4) the right of pasturage in question was capable of being conveyed, & did not necessarily descend to the heir.

Qu.: (5) whether the right of pasturage in question was within Prescription Act, 1832 (c. 71), s. 5; (6) whether a right of common in gross is within the equity of that sect.

Scmble: (7) the statement that T. demised the right of pasturage in question, without stating that he demised it by deed, was good after verdict.—WELCOME v. UPTON (1840), 6 M. & W. 536; 9 L. J. Ex. 154; 151 E. R. 524.

Annotations:—*As to* (1) & (2) **Consd.** Davies v. Williams (1851), 16 Q. B. 516. **Refd.** Shuttleworth v. Le Fleming (1865), 19 C. B. N. S. 687. *As to* (5) & (6) **Consd.** Mounsey v. Ismay (1865), 3 H. & C. 486. **Refd.** Bailey v. Stephens (1862), 12 C. B. N. S. 91; Shuttleworth v. Le Fleming (1865), 19 C. B. N. S. 687.

140. By custom — Manor.] — (1) The copyholders of a manor may have the sole & several pasture in the lord's soil & exclude him.

(2) Where copyholders claim common, or the several pasture in the lord's soil, it is not necessary to show what estate they have in their copyholds, because the custom annexes it as a profit to their estates for the time being.

(3) Copyholders may by custom have the sole pasture in exclusion of the lord.

(4) Where one claims common appurtenant it must be for his cattle levant & couchant, because it is the standard of the profit he is to have.

(5) But where copyholders claim the sole pasture in exclusion of the lord, it is not proper to limit it to their cattle levant & couchant.

(6) One who claims common in gross or for his cattle levant & couchant, cannot license a stranger to put his cattle on the common, but if he claims common only for a certain number of cattle, or the sole pasture he may.

(7) A licence by copyholders who have the sole pasture to a stranger to put in his cattle must be by deed.—HOSKINS v. ROBINS (1671), 2 Keb. 842; Poll. 13; 2 Saund. 319; 1 Vent. 123, 163; 84 E. R. 533; *sub nom.* ROBERTS v. HOSKINS, 2 Keb. 757; *sub nom.* HOPKINS v. ROBINSON, 2 Lev. 2; 1 Mod. Rep. 74.

Annotations:—*As to* (1) **Consd.** Bailey v. Stephens (1862), 12 C. B. N. S. 91. **Refd.** R. v. Churchill (1825), 4 B. & C. 750; Jones v. Richard (1837), 6 Ad. & El. 530; Welcome v. Upton (1840), 6 M. & W. 536; Davies v. Williams (1851), 16 Q. B. 516. *As to* (2) **Refd.** Crouther v. Oldfield (1706), 1 Salk. 364. *As to* (3) **Refd.** Jones v. Richard (1837), 6 Ad. & El. 530. *As to* (7) **Refd.** Hewlins v. Shippam (1826), 5 B. & C. 221; Perry v. Fitzhove (1846), 8 Q. B. 757; Holford v. Bailey (1849), 13 Q. B. 426.

B. Season of Year.

141. By prescription.—Part of year. —WALTON v. LATIMER (1309), Y. B. 2 Edw. 2 Sel. Soc. p. 81, pl. 27.

142. ——— **For different animals during different periods.]** —WHEATELAND v. PAYNE (1636), 2 Roll. Abr. 267 (L. 1).

143. ——— **Overrides right of lord of manor.]** —BENET v. MOUSE (1677), 3 Keb. 737; 84 E. R. 982.

144. ——— **Owner of soil—Has right of action for damage to soil—Not for damage to pasture.]**—A. is seised in fee of a close, upon which the burgesses of B. have a right, during a certain portion of the year, to depasture their cattle, & have, during that period, exclusive possession of the close:—*Held*: A. may maintain an action of trespass against a party who, during that period, commits a trespass in the subsoil by digging holes, but not against one who, during that period, merely rides over the close.—COX v. GLUE (1818), 5 C. B. 533; 17 L. J. C. P. 162; 10 L. T. O. S. 374; 12 Jur. 185; 136 E. R. 987.

Annotations:—**Consd.** Richards v. Davies, [1921] 1 Ch. 90. **Refd.** Pilgrim v. Southampton & Dorchester Ry. (1848), 12 L. T. O. S. 127.

145. ——— **Whole year.]**—A prescription to have the sole pasture of a close for the whole year held to be good.—NORTH v. COX (1668), 1 Lev. 253; Vaugh. 251; 83 E. R. 394.

Annotations:—**Refd.** Welcome v. Upton (1840), 6 M. & W. 536; Lonsdale v. Rigg (1856), 11 Exch. 654. **Mentd.** Crouther v. Oldfield (1706), 1 Salk. 364; Scholes v. Hargreaves (1792), 5 Term Rep. 46.

146. ———.]—A prescription to have the sole pasture of a close for all the year is good though it be to the exclusion of the lord; it is not like a prescription to have the whole common to the exclusion of the lord which would be repugnant & void.—PORTER v. NORTH (1669), 1 Lev. 268; 2 Keb. 513, 517; 1 Saund. 346; 1 Vent. 383; 83 E. R. 400.

Annotations:—**Apld.** Jones v. Richard (1837), 6 Ad. & El. 530. **Refd.** Hoskins v. Robins (1671), 2 Keb. 842; Roberts v. Hoskins (1671), 2 Keb. 757; Jones v. Maunsell (1779), 1 Doug. K. B. 302; R. v. Churchill (1825), 4 B. & C. 750; Welcome v. Upton (1840), 6 M. & W. 536. **Mentd.** Crouther v. Oldfield (1706), 1 Salk. 364; Lonsdale v. Rigg (1856), 25 L. J. Ex. 73; Dalton v. Angus (1881), 6 App. Cas. 740; Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633; A.-G. v. Antrobus, [1905] 2 Ch. 188; Derry v. Sanders, [1919] 1 K. B. 223.

147. Grant—Part of year.]—WRIGHT v. HOBERT (1723), 9 Mod. Rep. 64; 88 E. R. 318.

Annotations:—**Consd.** Saltash Corpn. v. Goodman (1881), 7 Q. B. D. 106. **Mentd.** Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633; Re Christchurch Inclosure Act (1888), 38 Ch. D. 520.

*C. Nature of Right.***148. Pasturage—Vested in corporation of borough—Distinguished from right of common.]—**

The corpn. of a borough had from time immemorial exercised, by actual enjoyment by the free burgesses or by way of receipt of rent or acknowledgment, a right of pasturage for all cattle, sheep & other commonable animals, levant & couchant within the borough, over lands in the neighbourhood of the borough, during a certain season of the year, & there was no evidence that during such season the owners or occupiers of the lands in question, or any other persons, had exercised the right of pasturage over such lands. The corpn. had from the time of Henry VIII. from time to time exercised the right of releasing for valuable consideration their rights of pasturage over portions of the land subject thereto, still continuing to exercise their rights over the rest as before, without any resistance thereto upon the ground that the release of the part of the land extinguished the right as to all, which would have been the case with a mere right of common. In the releases & other deeds of conveyance made by the corpn. in reference to their rights, they had always been described in terms which would be appropriate to rights of common strictly so called:—*Held*: according to the principle of law by which a legal origin is, if possible, to be presumed for a long established practice, it must be presumed that what the corpn. was entitled to was "*sola vestura*," or an exclusive right of pasturage over the lands in question, & not a right of common, which would have been extinguished by a release of part of the land, notwithstanding the description of the right as a right of common in a long series of documents. — *JOHNSON v. BARNES* (1873), L. R. 8 C. P. 527; 42 L. J. C. P. 259; 29 L. T. 65, Ex. Ch.

Annotations:—*Refd.* Saltash Corpn. v. Goodman (1880), 5 C. P. D. 431; *Simpson v. Godmanchester Corpn.* (1897), 77 L. T. 409; *Brookbank v. Thompson*, [1903] 2 Ch. 314; *A.-G. v. Horner*, [1913] 2 Ch. 140.

149. Grant of licence to stranger—Must be by deed.]—*HOSKINS v. ROBINS*, No. 140, *ante*.**150. No right of agistment—Proof of agistment not evidence of right.]—***JONES v. RICHARD*, No. 76, *ante*.**151. "Inhabitants able to buy three cows"—Every inhabitant owning three cows—Construction of grant.]—***WRIGHT v. HOBERT* (1723), 9 Mod. Rep. 64; 88 E. R. 318.

Annotations:—*Consd.* Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633; *Re Christchurch Inclosure Act* (1888), 38 Ch. D. 520.

D. Determination of Right.

See Nos. 148, *ante*, 773, *post*.

SUB-SECT. 7. —FOLDAGE AND FOLDCOURSE.

152. Foldage & foldcourse distinguished.]—*Faldagium* is [the right of a man] to have sheep folded in his ground, as *falda cursus* is a sheep walk or feed for his sheep.—*DICKMAN v. ALLEN* (1690), 2 Vent. 138; 86 E. R. 355.**153. Foldage or freefold—What is.]—**The right of freefold is the right to have the sheep of the tenants to manure the lands of the lord at night.—*ANON.* (1485), Y. B. 1 Hen. 7, fo. 24, pl. 17.

Annotation:—*Refd.* Punsany & Leaders Case (1583), 1 Leon. 11.

154. Does not extend to common.]—Prescription for foldage cannot extend to a common, for the nature of freefold is to have sheep to

manure the lands of the lord at night.—*SHARPE v. BECHENOWE* (1688), 2 Lut. 1249; 125 E. R. 692.

Annotation:—*Consd.* Robinson v. Duleep Singh (1879), 11 Ch. D. 798.

155. — May be combined with right of common by day.]—*BROOK v. WILLET* (1703), 2 Hy. Bl. 224; 126 E. R. 519.**156. Foldcourse or sheep walk—May be prescribed for.]—***PUNSANY & LEADERS CASE* (1583), 1 Leon. 11; 71 E. R. 10.

Annotation:—*Refd.* Wilkes v. Broadbent (1714), 2 Stra. 1224.

157. — Nature of.]—(1) A foldcourse is a right of common appurtenant of pasture for sheep, against which (2) the lord of the manor can approve under Stat. Merton (20 Hen. 3, c. 4).

(3) The proviso in the Stat. Westminster II. (13 Edw. 1, c. 46) does not prevent the lord from approving in such a case, for it only prevents derogation from an express grant.—*ROBINSON v. DULEEP SINGH* (1878), 11 Ch. D. 798; 39 L. T. 313; 27 W. R. 21, C. A.

Annotations:—*As to* (2) *Consd.* Robertson v. Hartopp (1889), 43 Ch. D. 484. *Generally, Refd.* Malvern Hills Conservators v. Whitmore (1909), 8 L. G. R. 179. *Mentd.* *Re May* (1883), 25 Ch. D. 231; *Chesterfield v. Harris*, [1908] 2 Ch. 397.

158. — Appendant—To leasehold land.]—*HUDDLESTON v. WOODROFFE* (1618), 2 Roll. Rep. 61; 81 E. R. 659.**159. — To tenement.]—***FIELDING v. WREN* (1559), Cary, 46; 21 E. R. 25.**160. — Appurtenant—To manor.]—***SPOONER v. DAY & MASON* (1636), Cro. Car. 132; 79 E. R. 975; *sub nom.* DAY v. SPOONER, W. Jo. 375; 4 Vin. Abr. 591, pl. 4.

Annotation:—*Refd.* Hayward v. Cunningham (1667), 1 Lev. 231.

161. — —.]—*ROBINSON v. DULEEP SINGH*, No. 157, *ante*.

162. — Extent of right.]—Upon the trial of a feigned issue to try whether A. was entitled for & in respect of B., to a separate right of feeding & folding an unlimited number of sheep over certain open fields & commons, it appeared that A. had a right of common over such open fields & commons in respect of sheep levant & couchant upon B.:—*Held*: (1) the evidence negatived the unlimited right claimed, & the verdict was properly found for defendant.

The claim put in by plaintiff before the court was in the form in which it had been stated in the issue, & his claim in respect of B. had been admitted by the court:—*Held*: (2) a rule for referring it to the master to amend the issue, & for a new trial to be had upon the issue so amended, should be discharged.

(3) Plaintiff claimed in respect of all the freehold which formerly belonged to the manor farm, a separate right of feeding & folding an unlimited number of sheep exclusively to his own use, called the manor flock, having & exercising equal rights of pasturage in every respect with the town flock, over, in & upon all the open fields & commons of R. This is not a claim of a right of common in respect of sheep levant & couchant on the land, but for any number of sheep so as not to exceed the right of pasturage exercised by the town flock. The argument urged on the part of plaintiff shows that such a right might, by proper proof, have been established (*FRISKINE, J.*).—*IVATT v. MANN* (1842), 3 Man. & G. 691; 4 Scott, N. R. 312; 11 L. J. C. P. 82; 133 E. R. 1318.

Annotation:—*Generally, Mentd.* Blackett v. Ridout, [1915] 2 K. B. 415.

163. — Inclosure against right—By copyholder.]—It is a custom, that no copyholder may

Sect. 1.—Common of pasture: Sub-sects. 7 & 8. Sect. 2. Sub-sects 1, 2, 3 & 4. Sect. 3: Sub-sect. 1.]

inclose any copyhold land without the license of the lord; & if any be inclosed without license, then a reasonable fine should be assessed by the lord or his steward, for the inclosure, if the lord would accept thereof. It is also a custom that if the lord will not accept thereof, then the copyholder which so incloseth shall be punished at every ct. after, until he open that inclosure:—*Held*: when the lord had a field course for 500 ewes, over the lands of his copyholders, a tenant who inclosed it did not incur a forfeiture.—*PASTON v. UTBER* (1629), *Hut.* 102; *Het* 5; *Litt.* 264; 123 E. R. 1131.

Annotation:—*Mentd.* R. v. Budd (1758), *Park.* 190.

Inclosure by custom, *see, generally*, Part XIII., *Sect. 2, post.*

164. ——— Approvement against right—By lord of manor—Statute of Merton.]—*ROBINSON v. DULKEP SINGH*, No. 157, *ante*.

165. Who may claim right—Corporation—In que estate.]—*DICKMAN v. ALLEN* (1690), 2 *Vent.* 138; 86 E. R. 355.

SUB-SECT. 8.—COMMONABLE BEASTS.

166. What are—Not pigs.]—*PORTE v. WALKER* (1557), *Beul.* 8, pl. 29; *Ben. & D.* 45; 73 E. R. 936.

167. ——— Horses—Include gelding.]—A prescription to have common for all horses, etc., will support replevin for a gelding, etc.—*STAPLETON v. MORSE* (1600), *Cro. Eliz.* 798; 78 E. R. 1027.

168. ——— Great beasts—Include gelding.]—*STANDRED v. SHORDITCH* (1620), *Cro. Jac.* 580; 79 E. R. 496.

169. Evidence of right—Prescription for all commonable cattle—Not supported by proof of common for sheep & horses only—Prescription for particular sort of cattle—Supported by proof of general common.]—*PRING v. HENLEY* (1700), *Bull's N. P.* 1772 ed., 58.

170. ——— Proof of exercise of right for all cattle kept—Question for jury.]—*Pltf.* claimed a right of common for all his commonable cattle. The proof was, that he had turned on all the cattle that he kept, but he had never kept any sheep:—*Held*: this was evidence of a right for all commonable cattle which ought to have been left to the consideration of the jury.—*MANIFOLD v. PENNINGTON* (1825), 4 B. & C. 161; 6 *Dow. & Ry. K. B.* 291; 3 L. J. O. S. K. B. 182; 107 E. R. 1019.

See Part II., *Sect. 1, sub-sects. 2, 3, ante*; Part III., *Sect. 1, post.*

SECT. 2.—COMMON OF TURBARY.

SUB-SECT. 1.—IN GENERAL.

171. By custom.]—Occupiers of houses may set up a custom to cut turves (*per Cur.*).—*BEAN v. BLOOM* (1773), 2 *Wm. Bl.* 926; 96 E. R. 547; *sub nom.* *BEAU v. BLOOM*, 3 *Wils.* 456.
Annotation:—*Refd.* *Austin v. Amhurst* (1877), 38 L. T. 217.

172. Appendant—To house, not to land.]—*TYRRINGHAM'S CASE*, No. 22, *ante*.

173. Whether a tenement.]—*R. v. WARKWORTH (INHABITANTS)*, No. 10, *ante*.

See, further, Sub-sect. 2, *post.*

Alienation.]—*See* Part VII., *Sect. 1, post.*

SUB-SECT. 2.—IN RESPECT OF WHAT TENEMENTS.

174. New house—In borough.]—*WHITE v. COLEMAN* (1673), 1 *Freem. K. B.* 134; 3 *Keb.* 247; 89 E. R. 98.

Annotations:—*Expld.* *Saltash Corpn. v. Goodman* (1881), 7 Q. B. D. 106. *Refd.* *Weekly v. Wildman* (1698), 1 *Ld. Raym.* 405; *Goodman v. Saltash Corpn.* (1882), 7 *App. Cas.* 633. *Mentd.* *Re Christchurch Inclosure Act* (1887), 35 *Ch. D.* 355.

175. ——— Ancient house rebuilt.]—The destruction of an ancient house, to which rights of common of estovers & turbary were appurtenant, does not necessarily operate as an abandonment of those rights. The rights may be enjoyed as appurtenant to a new house erected in continuance of the ancient house, provided that no greater burden is imposed upon the servient land. The question whether the new house is or is not in continuance of the ancient house is a question of fact. In order to be a continuance of the ancient house it is not necessary that the new house should be built upon the foundations of the ancient house.—*A.-G. v. REYNOLDS*, [1911] 2 *K. B.* 888; 80 L. J. K. B. 1073; 104 L. T. 852.

House enlarged or altered.]—*See* Nos. 183, 207, 209, 210, 211, *post.*

SUB-SECT. 3.—WHO MAY TAKE.

176. Mayor & burgesses—For inhabitants—Of old & new houses.]—*WHITE v. COLEMAN* (1673), 1 *Freem. K. B.* 134; 3 *Keb.* 247; 89 E. R. 98.

Annotations:—*Expld.* *Saltash Corpn. v. Goodman* (1881), 7 Q. B. D. 106. *Refd.* *Weekly v. Wildman* (1698), 1 *Ld. Raym.* 405; *Goodman v. Saltash Corpn.* (1882), 7 *App. Cas.* 633. *Mentd.* *Re Christchurch Inclosure Act* (1887), 35 *Ch. D.* 355.

177. Occupant.]—An occupant who is only a tenant at will, can never have a right to a common of turbary.

The nature of common of turbary is well known, which is nothing more than such a quantity of turfs as may be sufficient for the house to which the common is appendant, but here the custom is laid not only in the tenants, but the occupants, which is a very great absurdity, for an occupant who is no more than a tenant at will, can never have a right to take away the soil of the lord (*LORD HARDWICKE, C.*).—*ELY (DEAN & CHAPTER) v. WARREN* (1741), 2 *Atk.* 189; 26 E. R. 518, L. C. *Annotation*:—*Mentd.* *Scrutton v. Stone* (1893), 9 T. L. R. 478.

178. ———.]—*BEAN v. BLOOM*, No. 171, *ante*.

179. Freeholders of manor—Inhabitants.]—(1) Where rights have been exercised from time immemorial the ct. is bound, if possible, to find a legal origin for them.

From time immemorial the freeholders of a manor, in which there were no copyholders, had exercised various rights of common over the waste, but the ct. rolls showed that the rights had also been exercised by the "inhabitants" generally. On a bill filed by four persons claiming to be freeholders, on behalf of themselves & all other the freeholders of the manor, to establish the common rights:—*Held*: (2) the exercise of the rights by the inhabitants was to be accounted for on the supposition that the rights belonged originally to the freeholders, & were exercised by tenants & others occupying & interested in the land through them; (3) though, the rights being claimed by prescription, the freeholders must be supposed to have taken by separate grants, it was a reasonable way of accounting for the rights being exercised by all, that each grant was with such privileges as

were enjoyed by all the other freeholders; (4) a decree might be made in favour of one of plffs., who alone had made out a clear title, & all other freeholders, & such decree might establish all the different rights of common, though he was not shown to have exercised them all; (5) the neglect to pay a quit rent & do suit & service did not deprive him of his rights; (6) a right to take turf & furze & gorse for use for fuel in the freeholders' houses, subject to the power of the ct. leet to regulate the user by bye-laws, could be prescribed for.

(7) In another similar suit there were copyholders of the manor as well as freeholders, but none of them were parties. The bill was filed by freehold tenants of the manor on behalf of themselves and all other the freehold tenants, & all owners of freeholds within the ambit of the manor. The rights were proved to exist in the freehold tenants, but not in the owners of freeholds as such, & it appeared that the copyholders also were entitled to rights of common:—*Held*: a decree could be made in the copyholders' absence, & though there was in fact a misjoinder of plffs., relief could be given, as an amendment might have been ordered at the hearing.

(8) Where the lord of a manor asserted a right to inclose the waste of the manor & some of the freehold tenants under threat of legal proceedings, ceased to use the waste for depasturing cattle as they had theretofore done:—*Held*: this was not an interruption acquiesced in of right within Prescription Act, 1832 (c. 71), s. 4, so as to bar the right of the freeholders generally.—*WARRICK v. QUEEN'S COLLEGE, OXFORD* (1871), 6 Ch. App. 716; 40 L. J. Ch. 780; 25 L. T. 254; 19 W. R. 1098, L. C.

Annotations:—*As to* (2) *Consd.* Bedford v. Ellis, [1901] A. C. 1. *Refd.* London Sewers Comrs. v. Glasse, Epping Forest Case (1874), 44 L. J. Ch. 129; Evans v. Merthyr Tydfil U. C., [1899] 1 Ch. 241; A.-G. v. Reynolds, [1911] 2 K. B. 888. *As to* (6) *Consd.* De La Warr v. Miles (1881), 17 Ch. D. 535. *Refd.* Heath v. Deane, [1905] 2 Ch. 86. *As to* (7) *Consd.* Bedford v. Ellis, [1901] A. C. 1. *Refd.* A.-G. v. Barker (1872), L. R. 7 Exch. 177; Chesterfield v. Harris, [1908] 1 Ch. 230. *Generally, Mentd.* Hall v. Byron (1876), 4 Ch. D. 667.

SUB-SECT. 4.—EXTENT OF RIGHT.

180. User on premises entitled—Not for sale.]—Deft. claimed that he & his ancestors & all whose estate he had in a cottage had used to have common of turbary to dig & sell *ad libitum* as belonging to the house:—*Held*: bad, for a common appertaining to a house ought to be spent in the house & not sold abroad.—*VALENTINE v. PENNY* (1605), Noy, 145; 74 E. R. 1107.

Annotations:—*Refd.* Chesterfield v. Harris, [1908] 2 Ch. 397; A.-G. v. Reynolds, [1911] 2 K. B. 888.

181. — For fuel.]—A prescription in respect of an ancient house to have as many turves every year as two men could dig in a day is not good without showing that the turves were for burning in the house.—*HAYWARD v. CUNNINGTON* (1668), 1 Lev. 231; 2 Keb. 290, 311; 83 E. R. 383; *sub nom.* *HEYWARD v. CANNINGTON*, 1 Sid. 354.

Annotations:—*Refd.* Fawcett v. Strickland (1737), Willes, 57; Wilkes v. Broadbent (1744), 1 Wils. 63; Chesterfield v. Harris, [1908] 2 Ch. 397. *Mentd.* Spooner v. Day & Mason (1636), Cro. Car. 432.

182. — Regulation by bye-laws.]—*WARRICK v. QUEEN'S COLLEGE, OXFORD*, No. 179, *ante*.

See, also, No. 177, *ante*.

183. Limited to ancient requirements—New chimney built.]—*MOSELEY'S CASE* (1632), Clay. 8. *See, also*, Nos. 207, 209, 210, 211, *post*.

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184. — Effect of Forest Inclosure Act.]—*A.-G. v. GAUNTLETT* (1829), 3 Y. & J. 93; 148 E. R. 1107.

Annotations:—*Refd.* A.-G. v. Reynolds, [1911] 2 K. B. 888. *Mentd.* Salisbury v. Gladstone (1860), 6 Jur. N. S. 1209.

185. Returving gardens—Repair of hedges and banks—Custom too large & bad for uncertainty.]—Several customs pleaded for all tenants of a manor, their farmers & occupiers of tenements of the manor, having gardens, to take soil covered with grass, on a common, for making & repairing grass plots in gardens for the improvement thereof; & for the improvement of the gardens; & further, for the making & repairing of banks & mounds for the hedges & fences of tenements belonging to the manor; & further, for the improvement of such tenements, not saying agricultural improvement:—*Held*: to be too large & uncertain, & to be destructive of the right of common.—*WILSON (LADY) v. WILLES* (1806), 7 East, 121; 3 Smith, K. B. 167; 103 E. R. 46.

Annotations:—*Consd.* Clayton v. Corby (1843), 5 Q. B. 415; Salisbury v. Gladstone (1861), 9 H. L. Cas. 692; Hall v. Byron (1877), 4 Ch. D. 667. *Refd.* A.-G. v. Gauntlett (1829), 3 Y. & J. 93; Hall v. Nottingham (1875), 45 L. J. Q. B. 50. *Mentd.* Constable v. Nicholson (1863), 14 C. B. N. S. 230; Chesterfield v. Harris, [1908] 2 Ch. 397.

186. Part of common where no turf can be got—No inference of common of turbary over—Though exercised over common generally.]—Trespass for breaking & entering a close of plff. & breaking down a wall. Pleas, justifying the alleged trespass under the exercise of a right of common of turbary enjoyed by prescription in, upon & throughout G. Common, whereof the close in which, etc. was parcel, & from which it had been wrongfully inclosed. Replications, traversing the common of turbary in, upon & throughout the close in which, etc. *modo et formâ*. Common of turbary had existed & had been exercised over G. Common generally; but with respect to the spot in question, before it was inclosed, the jury found that within living memory it had not been capable of growing turf for fuel, or anything in the nature of turf:—*Held*: under the issues raised, the exercise of the right over the common generally was admissible evidence, from which it might have been inferred that the original presumed grant extended to the *locus in quo*, & defts. were not tied down to show an actual exercise of the right over the particular spot, but such inference could not be made, when it appeared in effect that from time immemorial it had been impossible to exercise the right over the *locus in quo*.—*PEARSON v. UNDERHILL* (1850), 16 Q. B. 120; 20 L. J. Q. B. 133; 16 L. T. O. S. 262; 15 J. P. 705; 15 Jur. 465; 117 E. R. 824.

Annotation:—*Mentd.* Scrutton v. Stone (1893), 9 T. L. R. 478.

SECT. 3.—COMMON OF ESTOVERS.

SUB-SECT. 1.—ORIGIN AND NATURE OF RIGHT.

187. Cannot be severed & made in gross.]—*ANON.* (1489), Y. B. 5 Hen. 7, fo. 7, pl. 15.

Annotation:—*Refd.* Spooner v. Day & Mason (1636), Cro. Car. 432.

188. Custom—Copyholders—Timber & wood.]—*AYRAY v. BELLINGHAM* (1675), Cas. temp. Finch, 199; 23 E. R. 109.

189. — Inhabitants—Rushes.]—A custom for all the inhabitants of T. to cut rushes on T. common is a good custom.—*RACKHAM v. JESUP & THOMSON* (1772), 3 Wils. 332; 95 E. R. 1084.

190. — — — — —.]—Occupier of a messuage & lands, who has common in the lord's waste

Sect. 3.—Common of estovers: Sub-sects. 1, 2, 3 & 4.

Sect. 4:

may set up a custom to cut rushes, as annexed to his right of common.—**BEAN v. BLOOM** (1773), 2 Wm. Bl. 926; 96 E. R. 547; *sub nom.* **BEAU v. BLOOM**, 3 Wils. 456.

*Annotation:—***Refd.** **Austin v. Amhurst** (1877), 38 L. T. 217.

191. Crown grant—Incorporating inhabitants.]—(1) A right claimed by the inhabitants of a parish to cut & carry away for use as fuel in their own houses fagots or haskets of the underwood growing upon a common belonging to the lord of the manor is a right to a *profit à prendre* in the soil of another. Such a right, therefore, cannot exist by custom, prescription, or grant, unless it be a Crown grant which incorporates the inhabitants.

(2) Such a Crown grant will not be presumed from proof of user by inhabitants if the presumption is inconsistent with the past existing state of things, & there is no trace of such a corp'n. having existed at any time. Such a presumption would, moreover, be wholly unreasonable in a case where at the time when the corp'n. was supposed to be in existence & entitled to the right, the tenants of the manor were exercising inconsistent rights & asserting their entire control over the underwood.

(3) The user must be connected with the right claimed. A prescriptive right to cut underwood in respect of a particular house is not established by proof of user when the only evidence is that the right was exercised in respect of the inhabitants of the parish generally.—**RIVERS (LORD) v. ADAMS** (1878), 3 Ex. D. 361; 48 L. J. Q. B. 47; 39 L. T. 39; 42 J. P. 728; 27 W. R. 381.

Annotations:—As to (1) Consd. **Goodman v. Saltash Corp'n.** (1882), 7 App. Cas. 633. **Refd.** **De La Warr v. Miles** (1881), 17 Ch. D. 535; **A.-G. v. Antrobus**, [1905] 2 Ch. 188. *As to (2) Refd.* **Saltash Corp'n. v. Goodman** (1880), 5 C. P. D. 431; **Turner v. Salmon** (1885), 1 T. L. R. 482; **Smith v. Andrews**, [1891] 2 Ch. 678; **Harris v. Chesterfield**, [1911] A. C. 623; **A.-G. v. Horner**, [1913] 2 Ch. 140. *As to (3) Refd.* **A.-G. v. Reynolds**, [1911] 2 K. B. 888; **A.-G. v. Horner**, [1913] 2 Ch. 140. *Generally, Mentd.* **Re De la Warr's Estates** (1881), 16 Ch. D. 587.

See, also, AGRICULTURE, Vol. II., p. 101, No. 816.

192. Prescription.]—**ANON.** (1611), Godb. 182; 78 E. R. 110.

—**DE LA WARR (EARL) v. MILES**, No. 78, *ante.*

Distinguished from grant of sole right.]—*See* No. 216, *post.*

SUB-SECT. 2.—IN RESPECT OF WHAT TENEMENTS.

194. House only.]—Estovers cannot be appertaining to lands but to houses only.—**CHICHESTER (BP.) & STRODWICK'S CASE** (1613), Godb. 234; 78 E. R. 136.

Annotation:—Consd. **A.-G. v. Reynolds**, [1911] 2 K. B. 888.

195. New house—Ancient house rebuilt.]—**BRYERS v. LAKE** (1655), Sty. 446; 82 E. R. 850.

Annotation:—Refd. **A.-G. v. Reynolds**, [1911] 2 K. B. 888.

196. ———.]—**A.-G. v. REYNOLDS**, No. 175, *ante.*

See, also, No. 397, post.

197. Church—Grass for strewing floor.]—A prescription for cutting of grass to strew the floor of a church is good.—**BOND'S CASE** (1639), March 16, pl. 38; 82 E. R. 391.

Annotation:—Dbtd. **Constable v. Nicholson** (1863), 14 C. B. N. S. 230.

SUB-SECT. 3.—WHO MAY TAKE.

198. Not apportionable in right of dower.]—**ANON.** (1309), Y. B. 2 Edw. 2, Sel. Soc. p. 58, pl. 11.

See, also, No. 102, ante.

199. Heir of grantee.]—(1) If a man be seised in fee of a house in right of his wife, & a grant be made to him & his heirs, to have estovers to burn in the house, the estovers shall descend to the issue of the husband & wife.

(2) If a man seised of a house *ex parte maternâ* has a grant of house-bote to be burnt in the house, it shall go with the house to the heir *ex parte maternâ*.—**SYMS' CASE** (1608), 8 Co. Rep. 51 a; 77 E. R. 549.

Annotations:—Generally, Mentd. **Shipley's Case** (1610), 8 Co. Rep. 134 a; **Fowle v. Dogle** (1674), Freem. K. B. 157.

200. Inhabitants — Custom.]—**RACKHAM v. JESUP & THOMSON**, No. 189, *ante.*

201. — Or freeholders—Of manor.]—**WAR-RICK v. QUEEN'S COLLEGE, OXFORD**, No. 179, *ante.*

202. — Of parish—Only by Crown grant—Grant not presumed.]—**CHILTON v. LONDON CORPN.** No. 272, *post.*

203. — — — — —.]—**RIVERS (LORD) v. ADAMS**, No. 191, *ante.*

See, also, AGRICULTURE, Vol. II., p. 101, Nos. 811, 816.

SUB-SECT. 4.—EXTENT OF RIGHT.

204. In general.]—A claim to have reasonable estovers in woods & house-bote & hay-bote for building & setting up enclosures & making ploughs & carts & for repairing old houses:—*Held*: good.—**De G. v. De B.** (1337), 11 Lib. Ass. fo. 30, pl. 13. *Annotation:—Refd.* **Webb's Case** (1608), 8 Co. Rep. 45 b.

205. — Must be certain—Claim to cut boughs of some trees, not all—Bad.]—**CROSSE v. ABBOT** (1605), Noy, 14; 74 E. R. 985.

Annotation:—Refd. **Ashmead v. Ranger** (1700), Fortes. Rep. 152.

206. For repairs—Of hedges—Must be certain.]—**ANON.** (1467), Y. B. 7 Edw. 4, fo. 27, pl. 8.

Annotations:—Refd. **Hill v. Cock** (1872), 26 L. T. 185; **A.-G. v. Reynolds**, [1911] 2 K. B. 888.

207. — & building new houses.]—A prescription to have estovers, not only for repairing, but building new houses on the land, is good.—**ARUNDEL (COUNTESS) v. STEERE** (1604), Cro. Jac. 25; 79 E. R. 19.

208. — “Without destruction”—Limited to necessities—Construction of grant.]—**STAMPE v. UGESSE** (1619), 2 Roll. Rep. 73; 81 E. R. 667. *Annotation:—Mentd.* **Lockwood v. Wood** (1841), 6 Q. B. 31.

209. Limited to ancient requirements—New chimney built.]—If a man has estovers by prescription to his house, although he alters the rooms & chambers in it, as to make a parlour where there was a hall, or a hall where the parlour was, & the like alteration of the qualities, not of the house itself, by which no prejudice accrues to the owner of the wood; it is not any destruction of the prescription. Although he builds new chimneys, or makes an addition to the old house, he shall not lose his prescription; but he cannot employ any of his estovers in the new chimneys, nor in the part newly added.—**LUTTREL'S CASE** (1601), 4 Co. Rep. 84 b; 76 E. R. 1063.

Annotations:—Consd. **Allan v. Gomme** (1840), 11 Ad. & El. 759; **Aynsley v. Glover** (1874), L. R. 18 Eq. 544; **A.-G. v. Reynolds**, [1911] 2 K. B. 888. **Refd.** **Brown & Tucker's Case** (1610), 4 Leon. 241; **Dowglas v. Kendall** (1610), 1 Bulst. 93; **Popham v. Woolcott** (1666), 1 Sid. 291; **Wilson v. Townend** (1860), 1 Drew. & Sm. 324; **Hill v. Cock** (1872), 26 L. T. 185; **Warren v. Brown**, [1900] 2 Q. B. 722; **Collis v. Home & Colonial Stores**, [1904] A. C. 179; **White v. Grand Hotel, Eastbourne**, [1913] 1 Ch. 113. **Mentd.** **R. v. Sorel** (1613), Cro. Jac. 324; **Burton v. Browne** (1622), Palm. 319; **Harrison v. Rooke** (1625), Palm. 420; **Rowden v. Maltster** (1626), Cro. Car. 42; **Shury v. Piggot** (1626), 3 Bulst. 339; **Colchester Corp'n.**

v. Seaber (1766), 3 Burr. 1866; *Renshaw v. Bean* (1852), 18 Q. B. 112; *Hutchinson v. Copestake* (1861), 8 Jur. N. S. 54.

210. ——— & house enlarged.]—BROWN & TUCKER'S CASE (1610), 4 Leon. 241; 74 E. R. 847. *See, also*, No. 175, *ante*.

211. User limited to premises entitled—House-bote—No right to sell—Or to use for enlargement of house—Or improvement of barn.]—PEMBROKE'S (EARL) CASE (1636), Clay. 47, N. P.

212. ——— Separate estates.]—Estovers from one estate not applicable to the exigencies of another.—*LEE v. ALSTON* (1783), 1 Bro. C. C. 194; 28 E. R. 1078, L. C.; *subsequent proceedings* (1789), 1 Ves. 78, L. C.

*Annotation:—*Mentd. *Parrott v. Palmer* (1834), 3 My. & K. 632.

213. Severed produce—No right to wood cut by another.]—STILE *v. BUTS* (1595), Moore, K. B. 411; Cro. Eliz. 434; 72 E. R. 662.

*Annotation:—*Mentd. *Palmer v. Brethton* (1672), Freem. K. B. 50.

214. ——— Part of wood cut by owner—Right confined to residue.]—BASSET *v. MAYNARD* (1601), Cro. Eliz. 819; 78 E. R. 1046; *sub nom.* PALMER'S CASE, 5 Co. Rep. 21 b.

*Annotations:—*Distd. *Moterton v. Jollin* (1675), Freem. K. B. 396. *Consd.* *Rackham v. Jesup & Thomson* (1772), 3 Wils. 332. *Refd.* *Dewclas & Kendall v. Kendall, Besson & Hands* (1610), Yelv. 187; *Heydon & Smith's Case* (1610), Godb. 172. *Mentd.* *Jones v. Cherney* (1680), Freem. K. B. 530; *Scattergood v. Edge* (1699), 12 Mod. Rep. 278; *Attersoll v. Stevens* (1808), 1 Taunt. 183; *Muskett v. Hill* (1839), 5 Bing. N. C. 694; *Kitson v. Hardwick* (1872), L. R. 7 C. P. 473.

215. ——— Whole of wood cut by owner—Remedy by action only.]—SPILMAN *v. HERMITAGE* (1619), 5 Vin. Abr. 35, pl. 9.

216. ——— Thorns.]—(1) If one has a right to estovers of thorns on another's land & the owner of the land cuts down the thorns the commoner cannot take them but must sue the owner on the case.

(2) If one claims all thorns growing on such a place, he may take them though cut by another.—*DOWGLAS v. KENDAL* (1610), 1 Brownl. 219; 1 Bulst. 93; Cro. Jac. 256; 123 E. R. 765; *sub nom.* DEWCLAS & KENDALL *v. KENDALL, BESSON & HANDS*, Yelv. 187.

*Annotations:—*As to (1) *Refd.* *Wilson v. Mackreth* (1766), 3 Burr. 1824; *Berriman v. Peacock* (1832), 9 Bing. 384. As to (2) *Distd.* *Bailey v. Stephens* (1862), 12 C. B. N. S. 91. *Generally, Refd.* *Chesterfield v. Harris*, [1908] 2 Ch. 397.

217. In forest—Law of forest ousting right must be pleaded.]—RUSSEL & BROKER'S CASE (1587), 2 Leon. 209; 74 E. R. 484.

218. Rushes.]—RACKHAM *v. JESUP & THOMSON*, No. 189, *ante*.

219. ——— Right to cut annexed to common in waste.]—BEAN *v. BLOOM* (1773), 2 Wm. Bl. 926; 96 E. R. 547; *sub nom.* BEAU *v. BLOOM*, 3 Wils. 456.

*Annotation:—*Refd. *Austin v. Amhurst* (1877), 38 L. T. 217.

SECT. 4.—COMMON OF PISCARY.

SUB-SECT. 1.—IN GENERAL.

220. Foundation of claim must be shown.]—FITZWALTER'S (LORD) CASE (1674), 1 Mod. Rep. 105; 3 Keb. 242; 86 E. R. 766.

*Annotations:—*Refd. *Ward v. Creswell* (1741), Willes, 265; *Blundell v. Catterall* (1821), 5 B. & Ald. 268. *Mentd.* *Pelham v. Pickersgill* (1787), 1 Term Rep. 660.

221. Custom—In favour of all inhabitants—Bad—Not a hereditament to deprive county court of jurisdiction.]—A claim to a right of fishing by the inhabitants of a town is not a question of title to an incorporeal hereditament within the proviso to County Courts Act, 1846 (c. 95), s. 58.—*LLOYD v.*

JONES (1848), 6 C. B. 81; 5 Dow. & L. 784; Cox, M. & H. 111; 17 L. J. C. P. 206; 11 L. T. O. S. 152; 12 J. P. 567; 12 Jur. 657; 136 E. R. 1182.

*Annotations:—*Refd. *Tomkins v. Jones* (1889), 22 Q. B. D. 599. *Mentd.* *Chew v. Holroyd* (1852), 8 Exch. 249; *Dixon v. Wilkinson* (1853), 22 L. J. Ch. 981; *Stephenson v. Raine* (1853), 2 E. & B. 744; *R. v. London County JJ.* & L. C. C. [1894] 1 Q. B. 453.

222. ——— ———.]—A custom for the commoners, copyholders & ancient freeholders of a manor & their tenants, & the dwellers in the parish & manor to have common of fishery over the lord's waters on the waste of the manor, & to take & carry away fish as a *profit à pendre*, is unreasonable & bad.—*ALLGOOD v. GIBSON* (1876), 34 L. T. 883; 25 W. R. 60.

223. ——— ———.]—Though no claim to carry away.]—*BLAND v. LIPSCOMBE* (1854), 4 E. & B. 713, n.; 24 L. J. Q. B. 155, n.; 24 L. T. O. S. 92; 19 J. P. 563; 1 Jur. N. S. 705, n.; 3 W. R. 57; 3 C. L. R. 261; 119 E. R. 263.

*Annotations:—*Refd. *Race v. Ward* (1855), 24 L. J. Q. B. 153; *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633. *Mentd.* *Mounsey v. Ismay* (1865), 3 H. & C. 486; *Hall v. Nottingham* (1875), 45 L. J. Q. B. 50.

224. Prescription—Without stint—Free inhabitants of ancient tenements—Long usage.]—An incorporated borough had enjoyed immemorially a several oyster fishery, in a navigable tidal river, qualified by an usage, also immemorial, for free inhabitants of ancient tenements in the borough to dredge for oysters without stint from Candlemas to Easter Eve in each year. The corp'n. claimed a several fishery discharged from the usage in favour of the inhabitants:—*Held*: (1) inasmuch as the claim of the corp'n. rested on prescriptive enjoyment, the whole user ought to be taken into account, & the right to a several fishery could not be maintained, unless it were consistent with the user by the free inhabitants; (2) the claim of the free inhabitants was not to a *profit à prendre in alieno solo*, but was a claim to which the law could & would give effect by presuming a grant to the corp'n., subject to a condition or charitable trust in favour of the free inhabitants.—*GOODMAN v. SALTASH CORPN.* (1882), 7 App. Cas. 633; 52 L. J. Q. B. 193; 48 L. T. 239; 47 J. P. 276; 31 W. R. 293, H. L.; *reversg. sub nom.* SALTASH CORPN. *v. GOODMAN*, (1881), 7 Q. B. D. 106, C. A.

*Annotations:—*As to (1) *Consd.* *A.-G. v. Antrobus*, [1905] 2 Ch. 188. *Refd.* *Blount v. Layard*, [1891] 2 Ch. 681, n. As to (2) *Consd.* *Re Free Fisherman of Faversham Co. or Fraternity* (1887), 36 Ch. D. 329; *Re Christchurch Inclosure Act* (1888), 38 Ch. D. 520. *Distd.* *Tilbury v. Silva* (1890), 45 Ch. D. 98. *Consd.* *Smith v. Andrews*, [1891] 2 Ch. 678. *Distd.* *A.-G. v. Simpson*, [1901] 2 Ch. 671; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139. *Consd.* *Harris v. Chesterfield*, [1911] A. C. 623; *Mitcham Common Conservators v. Banks* (1912), 76 J. P. 413; *A.-G. v. Horner*, [1913] 2 Ch. 140. *Refd.* *Neill v. Devonshire* (1882), 8 App. Cas. 135; *Haigh v. West*, [1893] 2 Q. B. 19; *Eliot v. Bristol Corp'n.* (1895), 72 L. T. 752; *Simpson v. Godmanchester Corp'n.* (1895), 65 L. J. Ch. 154; *A.-G. v. Wright*, [1897] 2 Q. B. 318; *A.-G. v. Tonkin* (1901), 18 T. L. R. 29; *Mercer v. Denne*, [1904] 2 Ch. 534; *Re Allen, Hargreaves v. Taylor*, [1905] 2 Ch. 400; *Johnston v. O'Neill*, [1911] A. C. 552; *Nesbitt v. Mablethorpe U. C.*, [1918] 2 K. B. 1. *Generally, Refd.* *I. R. Comrs. v. Scott*, *Re Bootham Ward Strays, York*, [1892] 2 Q. B. 152; *Foley's Charity v. Dudley Corp'n.*, [1910] 1 K. B. 317. *Mentd.* *Stanley v. Norwich Corp'n.* (1887), 3 T. L. R. 506; *Re Norwich Town Close Estate Charity* (1888), 40 Ch. D. 298; *Re St. Stephens, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492; *Wheaton v. Maple*, [1893] 3 Ch. 48; *Tyne Improvement Comrs. v. Imrie*; *A.-G. v. Tyne Improvement Comrs.* (1899), 81 L. T. 174; *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 2 Ch. 643; *R. v. Income Tax Special Comrs., Ex p. University College of North Wales* (1908), 98 L. T. 446; *Re Wedgwood, Allen v. Wedgwood*, [1915] 1 Ch. 113.

225. ——— ———.]—Freeholders—Not necessarily bad.]—*CHESTERFIELD v. FOUNTAINE* (1895), [1908] 1 Ch. 213, n.; 77 L. J. Ch. 114, n.; 98 L. T. 237, n., D. C.

*Annotation:—*Refd. *Harris v. Chesterfield*, [1911] A. C. 623.

Sect. 4.—Common of piscary: Sub-sects. 1, 2, 3 & 4.

Sect. 5 Sub-sects.

226. —.]—(1) A prescription in a *que* estate for a *profit à prendre in alieno solo* without stint & for commercial purposes is unknown to the law.

(2) Freeholders in parishes adjoining the river W. had been in the habit of fishing a non-tidal portion of the river for centuries, not by stealth or indulgence, but openly, continuously, as of right & without interruption, not merely for sport or pleasure, but commercially, in order to sell the fish & make a living by it. Riparian proprietors claiming to be owners of the bed of the river brought an action of trespass against the freeholders for fishing:—*Held*: a legal origin for the right claimed by the freeholders could not be presumed, & the action lay.—*HARRIS v. CHESTERFIELD (EARL)*, [1911] A. C. 623; 80 L. J. Ch. 626; 105 L. T. 453; 27 T. L. R. 548; 55 Sol. Jo. 686, H. L.; *affg. sub nom. CHESTERFIELD (LORD) v. HARRIS*, [1908] 2 Ch. 397, C. A.

Annotations:—*As to* (1) *Apld.* *Staffordshire & Worcestershire Canal Navigation v. Bradley*, [1912] 1 Ch. 91. *Refd.* *Malvern Hills Conservators v. Whitmore* (1909), 100 L. T. 841. *Generally, Refd.* *A.-G. v. Horner*, [1913] 2 Ch. 140.

227. Lost grant — Prescription — Enfranchised copyholds.—The practice in a manor was for the lords to grant copyholds for three lives, & to renew at a fine upon the dropping of any of the lives; but there was no custom binding them to renew. The copyhold grants did not mention a right of fishing; but from time immemorial the copyholders had enjoyed a right of angling in a stream which formed the boundary of the manor, & of passing along the bank over the lands of other tenants of the manor for that purpose. Subject to this, the right of fishing was in the lords. In 1845 the lords enfranchised a copyhold belonging to S., which adjoined the river, & released in the most ample terms all rights of fishing & all other rights they had over the enfranchised tenement. After this various other copyholds were enfranchised, & for nearly forty years the copyholders & the enfranchised copyholders exercised the same right as before of angling & going over the land of S. for that purpose. T. was the owner of several tenements formerly copyhold of the manor which had been enfranchised since 1845. In 1885 S. set up a gate & prevented T. from passing over his land to fish. T. acquiesced in the interruption until 1889, when he commenced an action, on behalf of himself & all other the owners & occupiers of copyholds or enfranchised copyholds, to establish the right of angling & of passing over the land of S. for that purpose:—*Held*: (1) by the enfranchisement deed of 1845 the lords gave up all their rights over the land of S., & no reservation or exception of a power to make to other tenants grants giving rights over that land could be implied, as there was no obligation on the lords to make such grants, & as the rights given up included the reversionary right of the lords to grant rights of fishing on the expiration of the lives for which the copyholds were held, the lords had no power to give to T. by his subsequent enfranchisement deeds any rights over the land of S., & T. had no title to maintain the action; (2) lost grants of the rights to the enfranchised copyholders could not be presumed; (3) the interruption of T.'s alleged right, acquiesced in by him, for four years before action brought, was a bar to that right under Prescription Act, 1832 (c. 71), s. 4, & such right, being in the nature of a *profit à prendre*, could not be claimed by prescription on behalf of a large & indefinite class such as owners & occupiers.

(4) Where a privilege has been exercised as of right for a long series of years, the ct. will make every presumption in favour of its legal origin, but the circumstances of the enjoyment must be carefully looked to; & as in the present case there were copyholders whose right of way & of fishing was not disputed, the ct. considered the case not to stand on the same footing as if the persons exercising the privilege formed only one class.—*TILBURY v. SILVA* (1890), 45 Ch. D. 98; 63 L. T. 141, C. A. *Annotations*:—*As to* (1) *Consd.* *Derry v. Sanders*, [1919] 1 K. B. 223. *As to* (4) *Refd.* *Ecroyd v. Coulthard*, [1898] 2 Ch. 358. *Generally, Mentd.* *London Land Tax Comrs. v. Central London Ry.*, [1913] A. C. 364.

228. Cannot be prescribed for in the sea—Right common to all the King's subjects.—*WARD v. URESWELL* (1741), Willes, 265; 125 E. R. 1165.

See, generally, FISHERIES; WATERS & WATER-COURSES.

SUB-SECT. 2.—NATURE OF RIGHT.

229. Must be appurtenant.—*ANON.* (1665), Hard. 407; 145 E. R. 521.

230. Not common fishery.—*BENNETT v. COSTAR* (1818), 8 Taunt. 183; 2 Moore, C. P. 83; 129 E. R. 353.

SUB-SECT. 3.—WHO MAY TAKE.

231. Inhabitants — Town — Custom — Bad.—A custom for all the inhabitants of B., as such, to enter the close of pltf. & take fish there without limit, is bad.—*LLOYD v. JONES* (1848), 6 C. B. 81; Cox, M. & H. 111; 17 L. J. C. P. 206; 11 L. T. O. S. 152; 12 J. P. 567; 12 Jur. 657; 136 E. R. 1182.

Annotations:—*Mentd.* *Chew v. Holroyd* (1852), 8 Exch. 219; *Dixon v. Wilkinson* (1853), 22 L. J. Ch. 981; *Stephenson v. Raine* (1853), 2 E. & B. 714; *Tomkins v. Jones* (1889), 22 Q. B. D. 599; *R. v. London County JJ. & L. C. C.*, [1894] 1 Q. B. 453.

232. — Incorporated borough—Prescription.—*GOODMAN v. SALTASH CORPN.*, No. 222, *ante*.

233. — Parish or manor.—*ALLGOOD v. GIBSON*, No. 222, *ante*.

234. Commoners, copyholders & ancient freeholders.—*ALLGOOD v. GIBSON*, No. 222, *ante*.

235. Copyholders—Release by lord of fishing rights—On enfranchisement of other tenements.—*TILBURY v. SILVA*, No. 227, *ante*.

236. Freehold tenants in parishes—Prescription to take without stint—Not necessarily bad.—*CHESTERFIELD v. FOUNTAINE* (1895), [1908] 1 Ch. 243, n.; 77 L. J. Ch. 114, n.; 98 L. T. 237, n., D. C. *Annotation*:—*Refd.* *Harris v. Chesterfield*, [1911] A. C. 623.

237. —.—*HARRIS v. CHESTERFIELD (EARL)*, No. 226, *ante*.

SUB-SECT. 4.—EXTENT OF RIGHT.

238. Unstinted—Custom—Bad—If destructive of subject-matter.—*BLAND v. LIPSCOMBE* (1854), 4 E. & B. 713, n.; 24 L. J. Q. B. 155, n.; 24 L. T. O. S. 92; 19 J. P. 563; 1 Jur. N. S. 705, n.; 3 W. R. 57; 3 C. L. R. 261; 119 E. R. 263.

Annotations:—*Expld.* *Saltash Corpn. v. Goodman & Blake* (1880), 5 C. P. D. 431. *Refd.* *Mounsey v. Ismay* (1865), 3 H. & C. 486; *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633. *Mentd.* *Race v. Ward* (1855), 24 L. J. Q. B. 153; *Hall v. Nottingham* (1875), 45 L. J. Q. B. 50.

239. —.—*—.*—The tenants on certain ancient copyhold messuages within a manor had since 1599 asserted a custom for them to fish in

certain waters within the manor, but there were continual protests by the lord of the manor. As far back as living memory went the tenants had habitually fished without interruption by the lord of the manor, & some of them had let the fishing & did not regard their right as limited to catching fish for their own consumption. In an action by the owner of two of the messuages, which had been turned into fee simple, against the lords of the manor & their fishing tenant, for a declaration that pltf. had a right of fishing for the consumption of the occupants of the messuages:—*Held*: on the evidence pltf. had failed to prove the existence of an immemorial usage amounting to a legal custom, & as the alleged usage had been without reference to the needs of the occupants of the messuages pltf. had failed to prove a reasonable usage, & he was not entitled to the declaration asked for.—*PAYNE v. ECCLESIASTICAL COMRS. & LONDON* (1913), 30 T. L. R. 167.

240. — Prescription — Inhabitants.—*GOODMAN v. SALTASH CORPN.*, No. 224, *ante*.

241. — — — — ——*CHESTERFIELD v. FOUNTAINE* (1895), [1908] 1 Ch. 243, n.; 77 L. J. Ch. 114, n.; 98 L. T. 237, n., D. C.

Annotations:—**Expld. & Distd.** *Chesterfield v. Harris*, [1908] 2 Ch. 397. **Refd.** *Harris v. Chesterfield*, [1911] A. C. 623.

242. — — — — ——*HARRIS v. CHESTERFIELD (EARL)*, No. 226, *ante*.

SECT. 5.—COMMON IN THE SOIL.

SUB-SECT. 1.—ORIGIN AND NATURE OF

243. Custom or prescription—Claim of profit in alieno solo—Drifted sea sand—Bad.—To an action of trespass for taking away sand from pltf.'s close, it was pleaded, that the close was contiguous to the sea-shore, in Cornwall; that the sand had from time to time, before the times, etc., drifted & been carried by the wind from the sea-shore upon the close, & been there deposited; that in the parish of E. there was a custom for all the inhabitants for the time being, occupying lands in E., to enter the close at seasonable times, & take therefrom reasonable quantities of all such sand as had so drifted, etc., for the purpose of manuring the lands in their occupation in the said county; deft. justified, as an inhabitant & occupier, etc.:—*Held*: the supposed custom was void, inasmuch as the sand, when drifted upon a close, became part of it, & the claim therefore was to take a profit in alieno solo.—*BLEWETT v. TREGONNING* (1835), 3 Ad. & El. 554; 1 Har. & W. 431, 432, n.; 5 Nev. & M. K. B. 234, 308; 4 L. J. K. B. 223, 234; 111 E. R. 524.

Annotations:—**Consd.** *Race v. Ward* (1855), 4 E. & B. 702. **Distd.** *De La Warr v. Miles* (1881), 17 Ch. D. 535. **Refd.** *Evans v. Rees* (1841), 2 Q. B. 334; *Clayton v. Corby* (1845), 14 L. J. Q. B. 364; *Rogers v. Brenton* (1847), 10 Q. B. 26; *A.-G. v. Mathias* (1858), 4 K. & J. 579; *Sowerby v. Coleman* (1867), L. R. 2 Exch. 96; *Brocklebank v. Thompson*, [1903] 2 Ch. 344. **Mentd.** *Richards v. Frankum* (1840), 9 L. J. Ex. 231.

244. — — — — — Gravel, sand, etc., from foreshore—Bad.—To an action of trespass for breaking & entering certain land of pltf., being part of the sea-shore between high & low water mark in or adjoining the township of O., & taking gravel, stones, sand, etc., deft. pleaded several pleas of justification, some setting up a right in the inhabitants of the township of O. to take the gravel, etc., to be used for the cultivation & improvement of their land; others claiming it for the necessary repairs of the highways in the township; others setting up a prescriptive right under a thirty or sixty years' user respectively; &

others claiming to exercise the right, as parish officer, for the repair of the highways:—*Held*: so far as the pleas were capable of being construed as justifying under a custom, such custom would be void, being a claim of a *profit à prendre in alieno solo*, which can only exist by grant or prescription; if the claim were founded on prescription, it would be equally bad, inasmuch as it was a claim by persons who, not being a corpn., were incapable of taking by grant, & not being claimed in a *que estate*.—*CONSTABLE v. NICHOLSON* (1863), 14 C. B. N. S. 230; 2 New Rep. 76; 32 L. J. C. P. 240; 11 W. R. 698; 143 E. R. 434.

Annotations:—**Consd.** *Rivers v. Adams* (1878), 3 Ex. D. 361; *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633. **Refd.** *Hough v. Clark & Hall* (1907), 23 T. L. R. 682. **Mentd.** *Austin v. Amhurst* (1877), 7 Ch. D. 689.

245. Custom—Public right—To dig tin in Cornwall—Good, if bonâ fide working compulsory.—*ROGERS v. BRENTON* (1847), 10 Q. B. 26; 17 L. J. Q. B. 34; 9 L. T. O. S. 352; 12 Jur. 263; 116 E. R. 10.

Annotations:—**Distd.** *Lloyd v. Jones* (1848), 6 C. B. 81. **Consd.** *A.-G. v. Mathias* (1858), 4 K. & J. 579. **Refd.** *Constable v. Nicholson* (1863), 14 C. B. N. S. 230; *Mills v. Colchester Corpn.* (1864), 17 C. B. N. S. 635; *Ivimey v. Stocker* (1865), 34 L. J. Ch. 633. **Mentd.** *Hilton v. Granville* (1845), 5 Q. B. 701.

SUB-SECT. 2.—WHO MAY TAKE.

246. Inhabitants—Of parish—Custom—Right to take drifted sea sand in alieno solo—Bad.—*BLEWETT v. TREGONNING* (1835), 3 Ad. & El. 554; 1 Har. & W. 431, 432, n.; 5 Nev. & M. K. B. 234, 308; 4 L. J. K. B. 223, 234; 111 E. R. 524.

Annotations:—**Consd.** *Race v. Ward* (1855), 4 E. & B. 702. **Distd.** *De La Warr v. Miles* (1881), 17 Ch. D. 535. **Refd.** *Evans v. Rees* (1841), 2 Q. B. 334; *Clayton v. Corby* (1844), 8 Jur. 212; *Rogers v. Brenton* (1847), 12 Jur. 263; *A.-G. v. Mathias* (1858), 4 K. & J. 579; *Sowerby v. Coleman* (1867), L. R. 2 Exch. 96; *Brocklebank v. Thompson*, [1903] 2 Ch. 344. **Mentd.** *Richards v. Frankum* (1840), 9 L. J. Ex. 231.

247. — — — — — Or prescription—To take stones from waste—Good.—*PADWICK v. KNIGHT* (1852), 7 Exch. 854; 22 L. J. Ex. 198; 19 L. T. O. S. 206; 16 J. P. Jo. 437; 155 E. R. 1196. *Annotations*:—**Dbtd.** *Austin v. Amhurst* (1877), 47 L. J. Ch. 467. **Refd.** *Constable v. Nicholson* (1863), 14 C. B. N. S. 230.

248. — — — — ——(1) An alleged right in the inhabitants of a parish to take gravel without stint from the bed of a river, the property in which was in pltf.:—*Held*: bad in law.

(2) In an action to restrain interference with a several fishery in a river, formerly flowing through the waste of a manor, by dredging gravel from the bed of the river, defts. set up a right to the bed of the river by reason of an inclosure award by which eight yards on each bank of the river were allotted to the inhabitants for the purpose of throwing mud & weeds thereon & for other purposes:—*Held*: defts. had no such right.—*HOUGH v. CLARK & HALL* (1907), 23 T. L. R. 682; 5 L. G. R. 1195.

249. — — — — — Of township—Custom or prescription—To take gravel, sand, etc. from foreshore—Bad.—*CONSTABLE v. NICHOLSON* (1863), 14 C. B. N. S. 230; 2 New Rep. 76; 32 L. J. C. P. 240; 11 W. R. 698; 143 E. R. 434.

Annotations:—**Consd.** *Rivers v. Adams* (1878), 3 Ex. D. 361. **Refd.** *Austin v. Amhurst* (1877), 7 Ch. D. 689; *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633; *Hough v. Clark & Hall* (1907), 23 T. L. R. 682.

250. Tenants of manor—Custom.—The customary of a manor, compiled within the period of legal memory, recognised a right in the tenants to dig coal *propriis usis*. It appeared, from subsequent documents, that the privilege of digging coal

Sect. 5.—Common in the soil: Sub-sects. 2 & 3.
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for their own consumption had been enjoyed by the tenants under the waste, but there was no evidence of a similar restricted enjoyment by the tenants under their customary inclosures. There was evidence of tenants having, during a long period, dug coal in their customary inclosures for sale:—*Held*: the custom was restricted to digging in the waste for coal for the tenants' own consumption.—**PORTLAND (DUKE) v. HILL** (1866), L. R. 2 Eq. 765; 35 L. J. Ch. 439; 15 W. R. 38.

Annotations:—**Consd.** *Coote v. Ford* (1900), 83 L. T. 482. **Refd.** *Heath v. Deane*, [1905] 2 Ch. 86. **Mentd.** *Morley v. Clifford* (1882), 20 Ch. D. 753; *Johnstone v. Spencer* (1885), 30 Ch. D. 581.

251. ———.]—In an action for an injunction to restrain deft. from trespassing on pltf.'s quarry, deft. pleaded that the quarry was part of the waste of a manor of which he was both a freehold & a copyhold tenant, & that by custom of the manor the tenants thereof had a right to get stone from the quarry to be used & spent on their respective tenements. Deft. put in evidence the ct. rolls which recorded a presentment, dated from 1695, that the freeholders of the manor had a right of getting stone from the waste to be used & spent on their respective tenements:—*Held*: (1) the entry on the rolls was admissible, & was good evidence of the alleged custom; (2) such a custom was not unreasonable.—**HEATH v. DEANE**, [1905] 2 Ch. 86; 74 L. J. Ch. 466; 92 L. T. 643; 21 T. L. R. 404.

252. The public—Custom—Right to dig tin in Cornwall—Good, if bonâ fide working compulsory.]—ROGERS v. BRENTON (1847), 10 Q. B. 26; 17 L. J. Q. B. 31; 9 L. T. O. S. 352; 12 Jur. 263; 116 E. R. 10.

Annotations:—**Distd.** *Lloyd v. Jones* (1848), 6 C. B. 81. **Consd.** *A.-G. v. Mathias* (1858), 4 K. & J. 579. **Refd.** *Constable v. Nicholson* (1863), 14 C. B. N. S. 230; *Mills v. Colchester Corp'n.* (1864), 17 C. B. N. S. 635; *Ivimey v. Stocker* (1865), 34 L. J. Ch. 633. **Mentd.** *Hilton v. Granville* (1845), 5 Q. B. 701.

SUB-SECT. 3.—EXTENT OF RIGHT.

253. Without stint—To dig for tin in Cornwall—Local custom—Good, if bonâ fide working compulsory.]—ROGERS v. BRENTON (1847), 10 Q. B. 26; 17 L. J. Q. B. 31; 9 L. T. O. S. 352; 12 Jur. 263; 116 E. R. 10.

Annotations:—**Distd.** *Lloyd v. Jones* (1848), 6 C. B. 81. **Expld.** *A.-G. v. Mathias* (1858), 4 K. & J. 579. **Refd.** *Constable v. Nicholson* (1863), 14 C. B. N. S. 230; *Ivimey v. Stocker* (1865), 34 L. J. Ch. 633. **Mentd.** *Hilton v. Granville* (1845), 5 Q. B. 701; *Mills v. Colchester Corp'n.* (1864), 17 C. B. N. S. 635.

254. ——— **Gravel from bed of river.]—HOUGH v. CLARK & HALL**, No. 248, *ante*.

255. Restricted to requirements of tenement—Tenants of manor—Stones for repair.]—INGLETON v. BURGESS (1689), Carth. 65; 1 Show. 27; 90 E. R. 642; *sub nom.* *INGLETON v. BURGESS*, Comb. 166.

Annotations:—**Mentd.** *Birch v. Leek* (1729), 1 Barn. K. B. 210; *Rafael v. Verelst* (1776), 2 Wm. Bl. 1055; *Outram v. Morewood* (1803), 3 East, 346.

256. ——— **Sand & gravel for repairs.]—In pleading a right to enter a common to dig for & carry away sand & gravel for the repairs of a house, it is necessary to allege that the house was out of repair, that the party entered for the purpose of digging for & carrying away sand & gravel for the necessary repairs of that house, & that the materials were used for that purpose.]—PEPPIN v. SHAKESPEAR** (1796), 6 Term Rep. 748; 101 E. R. 806.

Annotations:—**Consd.** *Clayton v. Corby* (1843), 5 Q. B. 415. **Refd.** *A.-G. v. Gauntlett* (1829), 3 Y. & J. 93.

257. ——— **Coals.]—PORTLAND (DUKE) v. HILL**, No. 250, *ante*.

258. ——— **Stones from quarry—Custom of manor.]—HEATH v. DEANE**, No. 251, *ante*.

259. Sand for manuring land—Inhabitants & occupiers of parish—Not by custom—Prescription.]—BLEWETT v. TREGONNING (1835), 3 Ad. & El. 554; 1 Har. & W. 431, 432, n.; 5 Nev. & M. K. B. 234, 308; 4 L. J. K. B. 223, 234; 111 E. R. 524.

Annotations:—**Consd.** *Race v. Ward* (1855), 4 E. & B. 702. **Distd.** *De La Warr v. Miles* (1881), 17 Ch. D. 535. **Refd.** *Evans v. Rees* (1841), 2 Q. B. 334; *Clayton v. Corby* (1845), 14 L. J. Q. B. 364; *Rogers v. Brenton* (1847), 10 Q. B. 26; *A.-G. v. Mathias* (1858), 4 K. & J. 579; *Sowerby v. Coleman* (1867), L. R. 2 Exch. 96; *Brookbank v. Thompson*, [1903] 2 Ch. 344. **Mentd.** *Richards v. Frankum* (1840), 9 L. J. Ex. 231.

260. Gravel etc. for cultivation & improvement of tenements—Inhabitants of township—Not by custom—Or prescription.]—CONSTABLE v. NICHOLSON (1863), 14 C. B. N. S. 230; 2 New Rep. 76; 32 L. J. C. P. 240; 11 W. R. 698; 143 E. R. 434.

Annotations:—**Consd.** *Rivers v. Adams* (1878), 3 Ex. D. 361; *Goodman v. Saltash Corp'n.* (1882), 7 App. Cas. 633. **Refd.** *Hough v. Clark & Hall* (1907), 23 T. L. R. 682. **Mentd.** *Austin v. Amhurst* (1877), 7 Ch. D. 689.

261. Stones for repairing highways—Inhabitants & surveyor of highways—By custom or prescription.]—PADWICK v. KNIGHT (1852), 7 Exch. 851; 22 L. J. Ex. 198; 19 L. T. O. S. 206; 16 J. P. Jo. 437; 155 E. R. 1196.

Annotations:—**Distd.** *Austin v. Amhurst* (1877), 47 L. J. Ch. 467. **Refd.** *Constable v. Nicholson* (1863), 14 C. B. N. S. 230.

262. Severed produce—No right to—If severed by another.]—STILE v. BUTS (1595), Moore, K. B. 411; Cro. Eliz. 434; 72 E. R. 662.

263. Onus of proof—On party alleging right.]—MAXWELL v. MARTIN (1830), 6 Bing. 522; 4 Moo. & P. 291; 8 L. J. O. S. C. P. 174; 130 E. R. 1382.

Annotations:—**Consd.** *Peardon v. Underhill* (1850), 16 Q. B. 120. **Mentd.** *Davies v. Williams* (1851), 20 L. J. Q. B. 330.

Part III.—Common Lands.

SECT. 1.—FORESTS AND WOODLANDS.

SUB-SECT. 1.—RIGHTS OF COMMON AND QUASI-COMMON.

264. Common of pasture—For sheep—By prescription.]—Warrens & sheep-walks in the King's forest may be prescribed for, & they are not forfeited by non-user.]—LEICESTER FOREST CASE (1607), Cro. Jac. 155; 79 E. R. 135.

Annotations:—**Refd.** *Grammer v. Watson* (1685), 1 Lut. 74; *Malvern Hills Conservators v. Whitmore* (1909), 100 L. T.

265. ——— ——— ——— **Not by forest law.]—**

WEBB'S HABEAS CORPUS CASE (1616), 3 Bulst. 213; 1 Roll. Rep. 411; 81 E. R. 180.

Annotations:—**Refd.** *Grammer v. Watson* (1685), 1 Lut. 74; *Malvern Hills Conservators v. Whitmore* (1909), 100 L. T. 841.

See, also, No. 268, *post*.

266. ——— **Without exception of fence month—By prescription.]—TRIGG v. TURNER** (1678), 2 Show. 9; 3 Keb. 746; 3 Lev. 98; Poll. 443; 89 E. R. 760.

Annotation:—**Folld.** *Brabrooke v. Carter* (1683), 3 Lev. 127.

267. ——— ——— ——— **Prescription for common in a forest per totum annum, fence month not**

excepted :—*Held* : good.—**BRABROOKE v. CARTER** (1683), 3 Lev. 127 ; 83 E. R. 612.

268. — Or sheep—By prescription.]—Prescription for common in a forest, without excepting the fence month or sheep :—*Held* : good.—**GRAMMER v. WATSON** (1685), 1 Lut. 74 ; 125 E. R. 39.

Annotation :—*Refd.* **Atkinson v. Teasdale** (1771), 2 Wm. Bl. 817.

269. — On behalf of all owners & occupiers within forest—Capable of legal origin.]—Pltfs. filed their bill on behalf of themselves & all other the owners & occupiers of lands within the Forest of E., other than the waste lands of the forest, except such of them as were defts., or alleged to be represented by defts., against the lords of the several manors within the forest & two persons who claimed to be owners & occupiers of portions of the waste lands which had been inclosed, & the A.-G. Pltfs. alleged that they were owners &, as to part, occupiers of a farm within the forest ; that the whole of the forest was subject to rights reserved by the Crown on granting the manors, & that the Crown had reserved an absolute right of disposition over the herbage ; that the lords of manors within the forest could not inclose with the consent of their respective homages without license from the Crown ; that the government of the forest was formerly administered by forest cts., whose jurisdiction embraced all matters touching the preservation of the rights of the Crown in the forest ; that by virtue of ancient forest laws, made by the Crown, the owners of lands & tenements within the forest had enjoyed rights of common of pasture over the wastes of the forest ; that such rights had from time immemorial been enjoyed by the owners & occupiers of such lands & tenements, without regard to the boundaries of the manors or parishes in which the lands & tenements were situate ; & that pltfs. & their predecessors in title, & their tenants, & the other owners & occupiers of lands & tenements within the forest, had from time immemorial enjoyed as of right by virtue of the forest laws, as appendant or appurtenant to their respective lands & tenements, common of pasture, for cattle levant & couchant on their respective tenements, over the waste lands of the forest. The bill prayed for a declaration of the right claimed, & for an injunction restraining defts. from inclosing any of the waste lands, & from allowing any parts which had been already inclosed to remain so :—*Held* : (1) the right alleged was one which might exist by law, & was sufficiently pleaded ; (2) the bill was not objectionable as being on behalf of occupiers as well as owners ; (3) the persons who claimed to be owners of the lands alleged to have been improperly inclosed were sufficiently represented ; (4) as the bill was filed to establish one general right, defts. could not successfully demur on the ground that they might have separate defences.—**SEWERS COMRS. OF LONDON v. GLASSE** (1872), 7 Ch. App. 456 ; 41 L. J. Ch. 409 ; 26 L. T. 647 ; 20 W. R. 515, L. J.J. ; *subsequent proceedings* (1873), L. R. 15 Eq. 302 ; *sub nom.* **SEWERS COMRS. v. GLASSE** (1874), L. R. 10 Eq. 134.

Annotations :—*As to* (1) *Distd.* **Allgood v. Gibson** (1876), 34 L. T. 883. *As to* (2) *Distd.* **Lascelles v. Onslow** (1877), 2 Q. B. D. 433. *As to* (3) *Refd.* **Howard v. Maitland** (1883), 11 Q. B. D. 695. *As to* (4) *Refd.* **London Sewers Comrs. v. Gellatly** (1876), 24 W. R. 1059. *Generally, Mntd.* **ry v. Lewis** (1882), 52 L. J. Ch. 16 ; **Temperton v.** (1893), 9 T. L. R. 298.

270. Warren — By prescription.] — LEICESTER FOREST CASE, No. 264, ante.

271. Lopping trees—Labouring or poor inhabitants of parish—By Crown grant.]—A grant by the Crown to the inhabitants of L., which was a

Crown manor & parish within a royal forest, that the labouring or poor people inhabiting the parish, & having families, might, during a certain period of every year, cut or lop the boughs & branches above seven feet from the ground on the trees growing on the waste lands of the manor & parish of L., for their own use & consumption, & for sale, for their own relief, to all or any of the inhabitants for their consumption within the parish as fuel :—*Held* : a valid grant.—**WILLINGALE v. MAITLAND** (1866), L. R. 3 Eq. 103 ; 36 L. J. Ch. 64 ; 31 J. P. 296 ; 12 Jur. N. S. 932 ; 15 W. R. 83.

Annotations :—*Distd.* **Austin v. Amhurst** (1877), 38 L. T. 217 ; **Rivers v. Adams** (1878), 3 Ex. D. 361. *Expld. & Distd.* **Chilton v. London Corpn.** (1878), 7 Ch. D. 735. *Refd.* **De La Warr v. Miles** (1881), 17 Ch. D. 535 ; **Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs.** (1899), 81 L. T. 174. *Mntd.* **Mills v. Colchester Corpn.** (1867), 16 L. T. 626 ; **Hyde Corpn. v. Bank of England** (1882), 21 Ch. D. 176.

272. — All inhabitants of parish—By Crown grant only.]—(1) A right of lopwood, lying within a manor, that is, a right in the inhabitants of a parish at certain periods of the year to lop for fuel the branches of trees growing upon the waste lands of the manor, cannot be created by custom or prescription, or otherwise than by Crown grant or Act of Parliament.

(2) A grant by the Crown of a *profit à prendre* out of Crown lands to the inhabitants of a parish, constitutes the inhabitants a corpn. quoad the grant, & an action to establish any such right is maintainable only by the inhabitants as a corpn. & not by an individual inhabitant suing on his own behalf alone.

(3) *Semble* : a grant to the “inhabitants” of a parish lying within a manor of a *profit à prendre* out of the manorial waste, means a grant to the inhabitants of houses lawfully erected within the parish, & does not extend to the inhabitants of houses which, through having been erected on the waste, illegally interfere with the right claimed.

(4) The ct. will not presume a non-existent Act of Parliament as an origin for an alleged right.—**CHILTON v. LONDON CORPN.** (1878), 7 Ch. D. 735 ; 47 L. J. Ch. 433 ; 38 L. T. 498 ; 26 W. R. 474.

Annotations :—*As to* (1) *Folld.* **Rivers v. Adams** (1878), 3 Ex. D. 361. *Consd.* **De La Warr v. Miles** (1881), 17 Ch. D. 535 ; **Goodman v. Saltash Corpn.** (1882), 7 App. Cas. 633. *Refd.* **Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs.** (1899), 81 L. T. 174 ; **Hough v. Clark & Hall** (1907), 23 T. L. R. 682.

273. Right of inclosure—Against commoners—Not under Inclosure of Woods in Forests Act, 1482–3 (c. 7).]—(1) The above Act does not extend to the woods of any subject, in which another has a right of common ; the commoners are not any of the parties between whom the Act was made, & their right is not taken away by it.

(2) If the Act had extended to woods in which others had a right of common, yet the woods could not be so inclosed as to exclude the commoners.

(3) Beasts & fowls of warren are hare, coney, pheasant & partridge.—**BARRINGTON'S CASE** (1610), 8 Co. Rep. 136 b ; 77 E. R. 681 ; *sub nom.* **CHOLKE v. PETER**, 2 Brownl. 289 ; *sub nom.* **CHALKE v. PETER**, 2 Brownl. 322 ; Godb. 167 ; *affd.* (1614), 1 Roll. Rep. 135.

Annotations :—*As to* (1) *Consd.* **Dibben v. Anglessea, Anglessea v. Dibben, Anglessea v. Peyton** (1834), 4 Tyr. 926. *Refd.* **Riddell v. White** (1794), 1 Anst. 281 ; **Nicholls v. Mitford** (1882), 20 Ch. D. 380. *As to* (2) *Refd.* **Lucy v. Levington** (1671), 1 Vent. 175 ; **Re Wilton's Settled Estates**, [1907] 1 Ch. 50. *Generally, Mntd.* **Liford's Case** (1615), 11 Co. Rep. 46 b. ; **Brewster v. Kitchin** (1697), 1 Ld. Raym. 317 ; **Dawson v. Paver** (1847), 5 Hare. 415 ; **Shrewsbury v. Scott** (1859), 6 C. B. N. S. 1 ; **Bailey v. Stephens** (1862), 12 C. B. N. S. 91 ; **Shuttleworth v. Le Fleming** (1865), 19 C. B. N. S. 687 ; **Western Counties Ry. v. Windsor & Annapolis Ry.** (1882), 7 App. Cas. 178.

274. — With consent of homage—By custom.]—There may be a valid custom in a

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manor within the limits of an ancient forest belonging to the Crown, for the lord, with the assent of the homage, to grant parcels of the waste to be held in severalty by copy of ct. roll & inclosed, in exclusion of persons having rights of common.—**BOULCOTT v. WINMILL** (1809), 2 Camp. 261.

Annotations:—Consd. Sewers Comrs. v. Glasco (1874), L. R. 19 Eq. 134; Ramsey v. Cruddas, [1893] 1 Q. B. 228. *Refd.* London Sewers Comrs. v. Glasco (1872), 7 Ch. App. 456.

275. ——— Custom not established.]—SEWERS COMRS. v. GLASSE, No. 115, *ante*.

276. Pannage—What is.]—Pannage or pannagium is the profit of acorns, nuts, hawes, hipps, etc., but not apples or crabs.—**ANON.** (1563), Moore, K. B. 46; 72 E. R. 431.

277. ——— Where right of pasture only—Commoner's beasts may eat fallen acorns.]—BARNSTONE v. GALE (1619), Sty. 213; 82 E. R. 655.

See, also, No. 3, *ante*.

278. ——— Owner not restrained from cutting timber—In proper course of management.]—A right of pannage is simply a right vested by express or implied grant in an owner of pigs, or an owner of land who keeps pigs, to go into the wood of the grantor & allow the pigs to eat the acorns or beechmast which have fallen to the ground, & does not prevent the owner of the wood from lopping the trees in the ordinary course of management, or from cutting them down for timber when ripe.—**CHILTON v. LONDON CORPN.** (1878), 7 Ch. D. 562; 47 L. J. Ch. 433; 26 W. R. 627.

See, also, AGRICULTURE, Vol. II., p. 75, No. 532.

279. Loss of right—By non-user—Warrens & sheep-walks.]—LEICESTER FOREST CASE, No. 264, *ante*.

SUB-SECT. 2.—EFFECT OF DISAFFORESTATION.

280. On common rights—Not lost.]—Right of common over land, parcel of a forest, is not lost

when the forest is disafforested.—**JENNINGS v. ROCKE** (1620), Palm. 93; 81 E. R. 904.

281. ——— Claim by prescription—Bad.]—**WOOLRIDGE v. DOVEY** (1656), Hard. 87; 145 E. R. 394.

282. ——— ———.]—R. v. RODLEY (INHABITANTS) (1666), Hard. 437; 145 E. R. 536.

SECT. 2.—WASTE LANDS.

283. Definition.]—Waste ground means such ground as no man doth challenge as his own, or no man can tell to whom it certainly appertain & lies unclosed & unfenced with hedge or ditch. Heath ground means such ground as is dispersed & lie as common.—**ANON.** (1549), Benl. 80; 123 E. R. 61.

Evidence as to waste of manor.]—See COPYHOLDS.

284. Foreshore—Soil between high & low water-mark.]—The word "waste," in a grant by letters patent is a sufficient description of the soil between high & low water-mark.—**A.-G. v. HANMER** (1858), 27 L. J. Ch. 837; 31 L. T. O. S. 379; 22 J. P. 513; 4 Jur. N. S. 751; 6 W. R. 804.

Annotation:—Consd. Ecroyd v. Coulthard, [1898] 2 Ch. 358.

See, further, WATERS & WATERCOURSES.

285. Not open fields—Construction of private Act.]—GRAND UNION CANAL CO. v. ASHBY (1861), 6 H. & N. 394; 30 L. J. Ex. 203; 3 L. T. 673; 158 E. R. 162.

Alienation of waste.]—See Nos. 512, 608-611, 613, *post*.

286. Grant of manor reserving wastes—Severance—Common not extinguished.]—(1) By a grant of a manor, with an exception of the wastes, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom.

(2) After a grant of the soil of those wastes to trustees for the use of the copyholders in free-socage, the lands, when inclosed will be freehold, & not copyhold.—**REVELL v. JODRELL** (1788), 2 Term Rep. 415; 100 E. R. 224.

Annotation:—Mentd. Doe d. Lowes v. Davidson (1813), 2 M. & S. 175.

Part IV.—Commonable Lands.

SECT. 1.—LAMMAS LANDS.

SUB-SECT. 1.—ORIGIN AND EXTENT OF RIGHT.

287. By prescription—Not by custom.]—HARDY v. HOLLYDAY (1765), cited in 4 Term Rep. 718; 100 E. R. 1261.

Annotation:—Folld. Grimstead v. Marlowe (1792), 4 Term Rep. 717.

288. ———.]—GRIMSTEAD v. MARLOWE (1792), 4 Term Rep. 717; 100 E. R. 1263.

Annotations:—Dbtd. Austin v. Auhurst (1877), 47 L. J. Ch. 467. *Mentd.* A.-G. v. Gauntlett (1829), 3 Y. & J. 93.

See, also, Nos. 293, 294, *post*.

289. Time of exercise of right—Must be certain.]—DA COSTA v. CLARKE (1806), 2 Bos. & P. 257; 126 E. R. 1268.

290. ——— Between reaping & sowing—Custom for sowing by consent of commoners—Good.]—HAWKS v. MOLLINEUX (1587), 1 Leon. 73; 74 E. R. 68.

291. ——— Land not sown for whole year—Common for whole year—Good by prescription.]—PITT v. CHICK (1620), Hut. 45; 123 E. R. 1089.

Annotation:—Mentd. Bailey v. Stephens (1862), 12 C. B. N. S. 91.

292. ——— Not unreasonable.]—WALTER v. CHAUNER (1669), 1 Vent. 21; 86 E. R. 15.

293. ——— Fallow year—Good by prescription.]—CHANDLER v. MELLAND (1669), 2 Keb. 491; 84 E. R. 308.

294. ———.]—MILLER v. WALKER (1672), 2 Keb. 676, 858, 876; 84 E. R. 425, 543, 554; *sub nom.* MILLER v. CLERKE, 2 Keb. 838; *sub nom.* MILLER v. WARD, 1 Vent. 92; *sub nom.* WALKER v. MILLER, 1 Freem. K. B. 23.

295. ——— Land not sown for seven years—Right of common until land resown.]—WALKER v. MILLER (1672), 1 Freem. K. B. 23; 89 E. R. 21; *sub nom.* MILLER v. CLERKE, 2 Keb. 838; *sub nom.* MILLER v. WALKER, 2 Keb. 676, 858, 876; *sub nom.* MILLER v. WARD, 1 Vent. 92.

296. ——— Time regulated by bye-law by persons entitled to right.]—BAYLIS v. TYSSSEN-AMHURST, No. 49, *ante*.

297. ——— Until resown with grain—Turnips sown—Right not barred.]—BRUERTON v. RIGHT (1672), 1 Freem. K. B. 51; 89 E. R. 40.

298. ——— Peas sown after corn carried—

Right not barred.]—ANON. (1702), 12 Mod. Rep. 648; 88 E. R. 1578.

299. — Every third year—Good by prescription.]—MILLER v. CLERKE (1672), 2 Keb. 838; 84 E. R. 530; *sub nom.* MILLER v. WALKER, 2 Keb. 676, 858, 876; *sub nom.* MILLER v. WARD, 1 Vent. 92; *sub nom.* WALKER v. MILLER, 1 Freem. K. B. 23.

300. Right of access—Restriction of entrances to land—Amounts to encroachment.]—KITCHEN v. KNIGHT (1824), M'Cle. 373; 148 E. R. 156.

Encroachment, *see, generally*, Part XII., *post*.

301. Rights of owner of soil—Against trespasser—During period of common right.]—COX v. GLUE, No. 144, *ante*.

SUB-SECT. 2.—PERSONS ENTITLED TO COMMON.

302. Tenants & inhabitants—Of ancient borough—By prescription.]—HARDY v. HOLLYDAY (1765), cited in 4 Term Rep. 718; 100 E. R. 1264. *Annotation*:—*Reid*. Grimstead v. Marlowe (1792), 4 Term Rep. 717.

303. Inhabitant of ancient messuage—Occupier—By prescription.]—GRIMSTEAD v. MARLOWE (1792), 4 Term Rep. 717; 100 E. R. 1263.

Annotations:—*Overd.* Austin v. Amhurst (1877), 47 L. J. Ch. 467. *Grimstead v. Marlowe* was overruled by *Constable v. Nicholson* (1863), 11 C. B. N. S. 230 (FRY, J.). *Reid*. A.-G. v. Gauntlett (1829), 3 Y. & J. 93.

304. Burgesses—& occupiers of ancient messuages.]—The burgesses of N. & the occupiers of ancient messuages there had, as such, for a certain portion of the year, a right to turn cattle into certain fields, & to exclude, during that period, the owner of the soil:—*Held*: this was a mere right of common. R. v. CHURCHILL (1825), 4 B. & C. 750; 6 Dow. & Ry. K. B. 635; 3 Dow. & Ry. M. C. 313; 107 E. R. 1210.

Annotations:—*Expld. & Distd.* Cox v. Glue, Cox v. Saint, Cox v. Mousley (1818), 12 Jur. 185. *Consd.* Johnson v. Barnes (1873), L. R. 8 C. P. 527. *Mentd.* Medland & Brown v. Paine (1858), 23 J. P. 39.

305. — Release of rights by corporation.]—JOHNSON v. BARNES, No. 148, *ante*.

306. Owners & occupiers.]—BAYLIS v. TYSEN-AMHURST, No. 49, *ante*.

SECT. 2.—SHACK.

307. Nature of right—Appendant or appurtenant.]—(1) Where one has purchased divers parcels of land in D. together, in which the inhabitants had shack, & long since has inclosed it; & notwithstanding always after harvest the inhabitants have had shack there, by passing into it by bars or gates with their cattle, there it shall be taken as common appendant or appurtenant, & the owner cannot exclude them of common, but if in the town of S. the custom & usage has been, that every owner in the same town has inclosed his own lands from time to time, & so has held it in severalty, any owner may inclose, & hold in severalty, & exclude himself from having shack with the others.

(2) If the commons of the town of A. & of the town of B. are adjoining, & one ought to have common with the other, by reason of vicinage, & in A. there are fifty acres, & in B. one hundred acres of common, the inhabitants of A. cannot put more cattle into their common of fifty acres than it will feed.—CORBET'S CASE (1585), 7 Co. Rep. 5 a; 77 E. R. 417.

Annotations:—*As to* (1) *Folld.* Barker v. Dixon (1744), 1 Wils. 44. *Consd.* Turner v. Blamire (1853), 22 L. J. Ch.

766. *Reid*. Hickman v. Thorny (1676), Freem. K. B. 210; R. v. Wyvill (1739), 7 Mod. Rep. 280. *As to* (2) *Consd.* Jones v. Robin (1847), 10 Q. B. 620. *Reid*. Prichard v. Powell (1845), 10 Q. B. 589. *Generally, Consd.* Cheesman v. Hardham (1818), 1 B. & Ald. 706. *Mentd.* Prince's Case (1606), 8 Co. Rep. 1 a; Gardner v. Sheldon (1671), 2 Keb. 781; Browster v. Kitchen (1698), Comb. 424; Coxe v. Phillips (1736), Lee temp. Hard. 237.

308. Measure of right—Pleading—Claim of common over whole good—Without excepting part owned by commoner in severalty.]—CHEESMAN v. HARDHAM, No. 70, *ante*.

309. Right to inclose—By custom—Common right of commoner inclosing determined.]—CORBET'S CASE, No. 307, *ante*.

310. — — — — —.]—HICKMAN v. THORNE (1676), 2 Mod. Rep. 104; 1 Freem. K. B. 210; 86 E. R. 967.

Annotation:—*Consd.* Cheesman v. Hardham (1818), 1 B. & Ald. 706.

311. — — — — —.]—A custom for one commoner [in a common field] to inclose against another is good.—BARKER v. DIXON (1744), 1 Wils. 11; 95 E. R. 183.

312. Effect of inclosure—Where right still exercised.]—CORBET'S CASE, No. 307, *ante*.

313. — — — — — Determines rights of commoner inclosing over uninclosed land.]—Replevin for taking the cattle of plff. in a certain place which had been inclosed by deft.:—*Held*: (1) the custom to inclose was fully & clearly proved; (2) the right of common before inclosure made, was for cattle levant & couchant upon each person's uninclosed lands; (3) as soon as any person had inclosed, he had excluded himself from any right of common on any of the uninclosed lands.—HOW v. STRODE (1765), 2 Wils. 269; 95 E. R. 804.

See, also, Nos. 70, 310, *ante*.

314. Right not extinguished—By unity of possession.]—LONDON (BP.) CASE (1614), 1 Roll. Abr. 935.

315. Determination of right—By consent—Or severance after thirty years.]—ANTROBUS v. BARWELL (1847), 9 L. T. O. S. 152; 11 J. P. 808.

— *By inclosure.]*—*See* Nos. 70, 310, 311, *ante*.

SECT. 3.—BALKS.

316. Presumption of ownership.]—An Inclosure Act directed, that comrs. should award to the corpn., who were owners of the soil of certain commons, a twentieth part of the commons by way of compensation. Plffs. having given evidence of acts of ownership in the *locus in quo*, deft., to show that plff's. right to it had been compensated for by allotments made by the comrs., gave evidence that these allotments amounted to a twentieth part of the commons. In contradiction to this evidence, plffs. proved that a part of the land, which they alleged to be the common, consisted of uncultivated strips of land between the cultivated parts of the common & the lands of private proprietors, called balks; & plffs. gave some evidence of property in these balks. The question of property in the *locus in quo* generally was left to the jury, who found for plffs.:—*Held*: it was not ground for a new trial, that the jury was not told that, in presumption of law, the balks belonged to the owners of the adjacent land, unless the contrary were proved.—GODMANCHESTER CORPN. v. PHILLIPS (1836), 4 Ad. & El. 550; 1 Har. & W. 686; 6 Nev. & M. K. B. 211; 5 L. J. K. B. 108; 111 E. R. 893.

Annotations:—*Mentd.* Quarterman v. Cox (1837), 8 C. & P. 97; Yeomans v. Leigh (1837), Murp. & H. 87.

SECT. 4.—GATED OR STINTED PASTURES.

317. Meaning of—In general.]—Cattlegate in this record is an insensible word & so we may reject it, but it must either be a synonymous word for pasture land or it must mean common of pasture for cattle & such common of pasture must, after verdict, be understood to mean common appurtenant (LORD HARDWICKE, C.J.).—METCALF v. ROE (1736), 1 *Lee temp. Hard.* 167; 95 E. R. 107.

*Annotations:—*Folld. Mellington v. Goodtitle (1738), Andr. 106. *Refd.* Lonsdale v. Rigg (1857), 3 Jur. N. S. 390.

318. ——— Beastgate.]—Ejectment lies for land & a beastgate, for it means either a certain quantity of land, or common appurtenant to the land mentioned.—MELLINGTON v. GOODTITLE (1738), Andr. 106; 95 E. R. 319; *sub nom.* BENNINGTON v. GOODTITLE, 2 Stra. 1084.

319. Nature of right—Ownership of soil in lord of manor—Rights of pasturage in commoners.]—GIBSON v. SMITH (1741), 2 Atk. 182; Barn. Ch. 491; 26 E. R. 514, L. C.

320. ——— ——— ——— Sporting rights in lord.]—B. Bank was a tract of inclosed pasture land within the manor of B. & had been from time immemorial subject to eighty customary rights called cattlegates. Pltf. was lord of the manor & deft. was seised of certain cattlegates as a customary estate of inheritance. Pltf. was also owner of a cattlegate which came to his predecessor, as lord of the manor, by seizure *quousque* for non-payment of a fine. Each cattlegate gave the owner thereof a right of depasturing on B. Bank a certain number of cattle & sheep during a certain period of the year. The whole of the cattle & sheep depastured B. Bank in common. A frithman was appointed by the cattlegate owners, whose duty it was to take care that B. Bank was properly stinted, & he was remunerated for his trouble by the cattle owners. A cattlegate owner having a house within the manor had also a right to cut peat for consumption in his house. By 46 Geo. 3, c. lxiv., authority was given to the lord of the manor to enfranchise any copyhold or customary messuages, cottages, lands, tenements or hereditaments, parcel of the manor; & several cattlegates were enfranchised under this Act: but there was no distinction in point of enjoyment between the enfranchised & the customary cattlegates. From time immemorial the cattlegates had been held of the lord of the manor as customary estates of inheritance by payment of fine certain, rents of small amount being payable annually for each cattlegate, & under dues, duties, suits & services of right accustomed. On the death of a cattlegate owner, the cattlegate descended by custom to the heir-at-law, who was admitted at the lord's ct., when he paid a fine. The cattlegates also passed by customary deed,

followed by admittance at the next lord's or out of ct. by the steward of the manor. The deed was brought into ct. by the alienee, & was presented by the jury or homage. A fine was payable on the admittance, but there was no heriot due. On the death of the lord of the manor, the owners of cattlegates could be compelled by the custom to be admitted by the new lord, & to pay a fine. The lord was entitled to seize *quousque* for nonpayment of fines. On alienation by a *feme covert*, the woman was examined apart from her husband. The lords of the manor had always searched for, pursued & killed grouse & other game on B. Bank, no other person having claimed to do so, or ever having done so except by their license. Since 1819 the lords of the manor had preserved the game. In an action by pltf. against deft. for shooting on B. Bank without pltf.'s permission:—*Held*: (1) the cattlegates gave the owners no right to the possession of the soil, but the ownership of the soil remained in the lord of the manor, subject to the right of several pasture upon it by the cattlegate owners, & the lord might maintain trespass against a cattlegate owner for sporting over it without his permission; (2) the fact that the lords of the manor had always killed game on the pasture land without obstruction by the cattlegate owners, that no other person claimed to do so, or did so except by stealth or by licence from the lord of the manor, & that one cattlegate owner had applied for & obtained leave from pltf. to shoot game there, that pltf. & his predecessors preserved the game & prevented other persons from searching for game there, did not support a claim by pltf. to an exclusive right of killing game there irrespective of his right as owner of the soil.—RIGG v. LONSDALE (EARL) (1857), 1 H. & N. 923; 28 L. T. O. S. 372; 156 E. R. 1475; *sub nom.* LONSDALE (EARL) v. RIGG, 26 L. J. Ex. 196; 21 J. P. 228; 3 Jur. N. S. 390; 5 W. R. 355, Ex. Ch.

*Annotations:—*As to (1) *Consd.* Bruce v. Helliwell (1860), 5 H. & N. 609. *Refd.* Fitzhardinge v. Purcell, [1908] 2 Ch. 139. As to (2) *Refd.* Blades v. Higgs (1865), 20 C. B. N. S. 211. *Generally, Mentd.* Bird v. G. E. Ry. (1865), 13 W. R. 989; R. v. Townley (1871), L. R. 1 C. C. R. 315.

321. A tenement—For purposes of settlement.]—cattlegate is a tenement within Poor Relief Act, 1662 (c. 12), for the purpose of gaining a settlement.—R. v. WHITLEY (INHABITANTS) (1786), 1 Term Rep. 137; 2 Bott, 6th ed. 85; 99 E. R. 1016.

*Annotations:—**Refd.* R. v. Tolpuddle (1792), Nolan 73; Lonsdale v. Rigg (1856), 11 Exch. 654. *Mentd.* R. v. St. Mary, Leicester (1835), 3 Ad. & El. 644; Houdington Union Grdns. v. Ipswich Union Grdns. (1890), 24 Q. B. D. 414.

See, also, No. 10, ante.

Part V.—Right of Free Warren.

SECT. 1.—IN GENERAL.

322. In the King's forest—May be prescribed for.]—LEICESTER FOREST CASE, No. 264, *ante*.

323. By royal grant—In land of which King seised in fee—Is warren in gross.]—MORRIS v. DIMES (1834), 1 Ad. & El. 654; 3 Nev. & M. K. B. 671; 3 L. J. K. B. 170; 110 E. R. 1357.

*Annotations:—**Refd.* Brecon Markets Co. v. Neath & Brecon Ry. (1872), L. R. 7 C. P. 505; Beauchamp v. Winn (1873), L. R. 6 H. L. 223; Sowerby v. Smith (1874), L. R. 9 C. P. 524. *Mentd.* Blewitt v. Tregonning (1835), 4 L. J. K. B. 234; Cooke v. Blake (1847), 1 Exch. 220; Whitstable Fishers v. Foreman (1867), L. R. 2 C. P. 688.

324. By prescription—Evidence of—Judgment in former action—Evidence both as to lands of tenants as well as demesne lands.]—CARNARVON (EARL) v. VILLEBOIS (1844), 13 M. & W. 313; 14 L. J. Ex. 233; 153 E. R. 130.

*Annotations:—**Refd.* Doe d. R. v. Roberts (1844), 13 M. & W. 520. *Mentd.* R. v. Bedfordshire (1855), 4 E. & B. 535.

325. Reputation—Recital in private inclosure Act—Declarations of deceased copyholder.]—CARNARVON (EARL) v. VILLEBOIS (1844), 13 M. & W. 313; 14 L. J. Ex. 233; 153 E. R. 130. *Annotations:—**Mentd.* Doe d. R. v. Roberts (1844), 13 M. & W. 520; R. v. Bedfordshire (1855), 4 E. & B. 535.

COMMONS AND RIGHTS OF COMMON.

Sect. 3.—Alienation and extinguishment of right.

or necessary for, the preserving & making profit of them.—**BEAUCHAMP (EARL) v. WINN** (1873), L. R. 8 H. L. 223; 22 W. R. 193, H. L.

Annotations:—**Consd.** *Robinson v. Dulcep Singh* (1879), 11 Ch. D. 798. **Mentd.** *Daniell v. Sinclair* (1881), 6 App. Cas. 181; *Bettyes v. Maynard* (1882), 46 L. T. 766; *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Wilding v. Sanderson* (1897), 77 L. T. 57; *Stanley v. Nuneaton Corp.* (1913), 108 L. T. 986.

346. ————.]—**ROBINSON v. DULCEP SINGH**, No. 579, *post*.

347. ———— **Of manor with all rights of "fowling, hawking, hunting & shooting," followed by general words—Does not pass right of free warren in gross.**—**MORRIS v. DIMES** (1831), 1 Ad. & El. 654; 3 Nev. & M. K. B. 671; 3 L. J. K. B. 170; 110 E. R. 1357.

Annotations:—**Consd.** *Sowerby v. Smith* (1874), L. R. 9 C. P. 521. **Refd.** *Whitstable Fishers v. Foreman* (1867), L. R. 2 C. P. 688; *Brecon Markets Co. v. Neath & Brecon Ry.* (1872), L. R. 7 C. P. 555; *Beauchamp v. Winn* (1873), L. R. 8 H. L. 223. **Mentd.** *Blewitt v. Tregonning* (1835), 4 L. J. K. B. 234; *Cooke v. Blake* (1847), 1 Exch. 220.

348. Extinguishment of right—Not by soil

vesting in Crown.—Free warrens are not extinguished by the soil coming into the hands of the Crown with the liberties.—**HEDDEY v. WELHOUSE** (1597), Moore, K. B. 474; Cro. Eliz. 591; 72 E. R. 705.

Annotations:—**Refd.** *Colchester Corp. v. Brooke* (1846), 7 Q. B. 339; *Northumberland v. Houghton* (1870), L. R. 5 Exch. 127; *Saltash Corp. v. Goodman* (1880), 5 C. P. D. 431; *Newcastle v. Workop U. C.*, [1902] 2 Ch. 145. **Mentd.** *Northampton Corp. v. Ward* (1745), 2 Stra. 1238; *R. v. Bell* (1816), 5 M. & S. 221; *Lowden v. Hierons* (1818), 2 Moore, C. P. 102; *Stamford Corp. v. Pawlett* (1830), 1 Cr. & J. 57; *Wright v. Bruister* (1832), 4 B. & Ad. 116; *Egremont v. Saul* (1837), 6 Ad. & El. 924; *Lockwood v. Wood* (1841), 6 Q. B. 31; *Young v. Thank* (1845), 6 L. T. O. S. 146; *Draper v. Sperring* (1861), 10 C. B. N. S. 113; *Great Yarmouth Corp. v. Groom*, *Great Yarmouth Corp. v. Daniel* (1862), 32 L. J. Ex. 74; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Penryn Corp. v. Best* (1878), 3 Ex. D. 292.

349. ———— **Not by non-user—Warren in King's forest.**—**LEICESTER FOREST CASE**, No. 264, *ante*.

350. ———— **Over demesne & tenemental lands by prescription—Not extinguished as to tenemental lands.—By subsequent royal grant as to demesne lands.**—**CARNARVON (EARL) v. VILLEBOIS** (1844), 13 M. & W. 313; 14 L. J. Ex. 233; 153 E. R. 130. *Annotations*:—**Mentd.** *Doe d. R. v. Roberts* (1844), 13 M. & W. 520; *R. v. Bedfordshire* (1855), 4 E. & B.

Part VI.—Creation and Proof of Rights of Common.

r. 1.—TIME AND MODE OF CREATION.

351. Rights which can be created at present day—Common appurtenant—Not common appendant.—**ANON.** (1531), Y. B. 26 Hen. 8, fo. 4, pl. 15. *Annotations*:—**Consd.** *Baring v. Abingdon* (1892), 62 L. J. Ch. 105. **Mentd.** *Cattley v. Arnold* (1858), 4 K. & J. 595.

352. ————.]—**PRETTY v. BUTLER** (1658), 2 Sid. 87; 82 E. R. 1272.

Common appurtenant.—*See, generally, Part II., Sect. 1, sub-sect. 2, ante.*

Common appurtenant.—*See, generally, Part II., Sect. 1, sub-sect. 3, ante.*

353. Common in gross—Not by limited grant.—**GAWEN v. STACIE** (1618), 1 Roll. Abr. 403 (S. 5).

354. Grant of common within manor—Good, though no waste within manor.—**STRINGER** (1640), Cro. Car. 599; 79 E. R. 1115.

Annotation:—**Refd.** *A.-G. v. Gauntlett* (1829), 3 Y. & J. 93.

355. How grant must be made—By deed.—**TANNER v. HOBBS** (1650), 2 Roll. Abr. 63 (G. 23).

356. ———— **Or other grant.**—**PRETTY v. BUTLER** (1658), 2 Sid. 87; 82 E. R. 1272.

357. How new grant can be made—After common appurtenant extinct by unity of possession—By grant with all commons used therewith—Lease.—If A. has a house with common appurtenant in the lands of B. & conveys it to B. the old right of common is extinguished by the unity of possession; but if B. leases it, with "all commons used therewith," it is a good grant of a new right of common during the term.—**BRADSHAW v. EYRE** (1597), Cro. Eliz. 570; 78 E. R. 814; *sub nom.* **BRADSHAWES CASE**, Moore, K. B. 462.

Annotations:—**Consd.** *Cowlam v. Slack* (1812), 15 East, 108. **Mentd.** *Hall v. Byron* (1877), 4 Ch. D. 667; *Baring v. Abingdon*, [1892] 2 Ch. 374.

358. ———— **Not by grant with all common appurtenant.**—**SAUNDEYS v. OLIFF** (1597), Moore, K. B. 467; 72 E. R. 700.

Annotations:—**Refd.** *Plant v. James* (1833), 5 B. & Ad. 791; *Baring v. Abingdon*, [1892] 2 Ch. 374.

359. ————.]—**GRYMES v. PEACOCK** (1610), 1 Bulst. 17; 80 E. R. 722.

Annotations:—**Refd.** *Barlow v. Rhodes* (1833), 1 Cr. & M. 439; *Plant v. James* (1833), 5 B. & Ad. 791.

360. ————.]—**CLEMENTS v. LAMBERT** (1808), 1 Taunt. 205; 127 E. R. 811.

Annotations:—**Consd.** *Morris v. Edgington* (1810), 3 Taunt. 24; *Baring v. Abingdon*, [1892] 2 Ch. 374. **Refd.** *Barlow v. Rhodes* (1833), 3 Tyr. 280; *Plant v. James* (1833), 5 B. & Ad. 791; *Hall v. Byron* (1877), 4 Ch. D. 667.

Extinguishment of rights of common, see, generally, Part XI., post.

361. ———— **After escheat—By grant with common appurtenant.**—If a copyhold to which common belonged escheat, & the lord grants it with all common appurtenant, the grantee shall have common, though the ancient common was extinct.—**WORLEDGE v. KINGSWEL** (1600), Cro. Eliz. 794; 2 And. 168; 78 E. R. 1024.

Annotations:—**Consd.** *Derry v. Sanders*, [1919] 1 K. B. 223. **Refd.** *Hall v. Byron* (1877), 4 Ch. D. 667; *Baring v. Abingdon*, [1892] 2 Ch. 374.

362. ———— **After forfeiture—By grant with appurtenances.**—A copyhold tenement to which a right of common was annexed having vested in the lord by forfeiture he regranted it as copyhold, with the appurtenances:—**Held**: having always continued demisable while in the hands of the lord, it was a customary tenement, & as such, was still entitled to rights of common.—**BADGER v. FORD** (1819), 3 B. & Ald. 153; 106 E. R. 618.

Annotations:—**Consd.** *Arlott v. Ellis* (1827), 7 B. & C. 346. **Refd.** *Wakefield v. Buccleuch* (1867), L. R. 4 Eq. 613.

Escheat of copyhold generally, see COPYHOLDS.

363. ———— **After surrender of copyholds—Grant containing general words insufficient.**—(1) General words in a conveyance by the lord of a manor of, *inter alia*, a small parcel of land which had been copyhold & was afterwards surrendered to extinguish the copyhold tenure:—**Held**: not to recreate rights of common.

(2) The lord of a manor may take gravel, marl, loam & subsoil in the waste, for his own use & for the purpose of sale, so long as he does not infringe upon the rights of the commoners.

(3) On the question whether the loam is taken to such an extent as to interfere with right of common, the *onus probandi* is on the tenant & not on the lord as in the case of approvement.

(4) H. acquired by purchase ancient freeholds of a manor, out of a small parcel of which a quit rent issued:—*Held*: he was entitled to sue on behalf of the other freehold tenants of the manor.

(5) H. was also the owner of a small piece of freehold land which had formerly been copyhold, & had been enfranchised:—*Held*: he was entitled to sue on behalf of himself as owner of land formerly copyhold, & on behalf of other copyholders who had enfranchised in like manner, & of the copyhold tenants of the manor.—*HALL v. BYRON* (1877), 4 Ch. D. 667; 46 L. J. Ch. 297; 36 L. T. 367; 25 W. R. 317.

Annotations:—As to (1) *Consd.* *Roe v. Siddons* (1888), 22 Q. B. D. 224; *Baring v. Abingdon*, [1892] 2 Ch. 374. As to (2) & (3) *Refd.* *Robinson v. Duleep Singh* (1879), 11 Ch. D. 798; *Bell v. Love* (1883), 10 Q. B. D. 547; *A.-G. v. Welsh Granite Co.* (1887), 35 W. R. 617; *Robertson v. Hartopp* (1889), 43 Ch. D. 484; *Malvern Hills Conservators v. Whitmore* (1909), 8 L. G. R. 179.

—On enfranchisement of copyholds.]—See Nos. 803, 805, 807, 808, 809, 810, 814, *post*.

364. — By conveyance of land with rights of common.—In case for disturbance of common of pasture, *pltf.* declared, in respect of a messuage & lands for common for all his cattle levant & couchant:—*Held*: a lease to *pltf.*'s testator for years, determinable on lives of a farm, etc., together with reasonable common of pasture was sufficient to sustain the right of common alleged in the declaration; this right was not destroyed by a subsequent conveyance to *pltf.* in fee of the farm & common of pasture thereto belonging & appertaining, for this operated as a new grant of the common.—*DOIDGE v. CARPENTER* (1817), 6 M. & S. 47; 105 E. R. 1160. *Annotation* *Distd.* *Baring v. Abingdon*, [1892] 2 Ch. 374.

365. — General words insufficient.—*BARING v. ABINGDON*, No. 93, *ante*.

366. — By Inclosure Act—Rights given in lieu of pre-existing rights.—By a local inclosure Act comrs. were required to allot to the lords of the manors, in trust for the occupiers for the time being of all such cottages & tenements containing less than one acre each as were erected on ancient sites or had then been erected more than fourteen years, in lieu of their rights or pretended rights of cutting turves, so much of the waste grounds as the comrs. should think proper for a turf common, which should be managed, & the turf arising therefrom taken & used, by the occupiers of such cottages in such manner as the lords of the manors & the churchwardens & overseers of the poor acting within each manor should appoint. In pursuance of the Act the comrs. allotted lands for a turf common. A portion of these lands was taken by a railway co., & the purchase-money was paid into *ct.* A question was then raised as to who was entitled to the fund:—*Held*: (1) the lord was entitled to so much of the fund in *ct.* as represented the value of the soil of the land taken by the railway co.; (2) the trust was for the benefit of the occupiers for the time being of the cottages, & not a trust for the owners, who were only entitled to benefit by the addition to the value of the occupation caused by the gift of the right to the occupiers.—*Re CHRISTCHURCH INCLOSURE ACT* (1888), 38 Ch. D.

PART VI. SECT. 1.

364 i. How new grant can be made—*By conveyance of land with rights of common.*—A. demised lands to B., in as full, large, & ample a manner as B. was then in possession thereof, & he covenanted that he would, at all times thereafter, during the term, give B. free liberty to cut & carry away as much turf on M., which adjoined the

demised lands, to use on the demised premises during the term, to be cut in such places & in such manner as A., should appoint, & not otherwise. Upon the marriage of B., the demised lands were conveyed by A. & B. as separate granting parties to re-lessees to uses. A. conveyed the lands "in as full, large, & ample a manner as the same were then in possession of B.," together with all "commons, common of pasture

520; 57 L. J. Ch. 564; 58 L. T. 827; 4 T. L. R. 392, C. A.; *affd. sub nom.* *A.-G. v. MEYRICK*, [1893] A. C. 1, H. L.; *subsequent proceedings, sub nom.* *Re CHRISTCHURCH INCLOSURE ACT, MEYRICK v. A.-G.*, [1894] 3 Ch. 209.

Annotations:—As to (1) *Consd.* *Simcoe v. Pethick*, [1898] 2 Q. B. 555. *Generally, Mentd.* *Re Norwich Town Close Estate Charity* (1888), 40 Ch. D. 298; *I. R. Comrs. v. Scott, Re Bootham Ward Strays, York*, [1892] 2 Q. B. 152.

—*See, generally, Part XIII., post.*
Presumption of lost grant—After extinction of common.—*See* No. 43, *ante*.

SECT. 2.—PRESCRIPTION AND CUSTOM.

SUB-SECT. 1.—DISTINCTION BETWEEN PRESCRIPTION AND CUSTOM.

367. In general.—*Def.* pleaded that all the inhabitants within the town of D., where *pltf.* supposed the trespass, have of time whereof memory, etc. been used to have common for their beasts; & he, *def.*, as one of the inhabitants of the same town put in his beasts, etc.:—*Held*: (1) tenants at will could not prescribe in their own right; but in the right of their lords; (2) tenants at will do not prescribe in a thing which endures in perpetuity; but they say that the usage & custom of the town has been of time whereof memory does not run to the contrary.—*ANON.* (1478), Y. B. 18 Edw. 4, fo. 3, pl. 15.

Annotations:—As to (2) *Refd.* *Foxall v. Venables* (1590), Cro. Eliz. 180; *Wakefield v. Costard* (1593), 1 And. 151; *Smith v. Gatewood* (1607), Cro. Jac. 152; *Baker v. Bremerman* (1635), Cro. Car. 418; *Paine v. Partrick* (1691), Carth. 191.

368. ——(1) A custom for one copyholder to have common or estover, etc., in his lord's soil, is good; she may allege that "within the manor there is a custom from time immemorial, that all customary tenants of certain messuages have common in such a place," etc.

(2) Where a copyholder claims common in the soil of another, he must lay a prescription in the lord; but where he claims common in the soil of the lord, he cannot prescribe in the name of the lord; & as he cannot prescribe in his own name, the law allows him to allege it by way of custom.

(3) Difference between prescription & custom; the former being personal, & always alleged in the person; as a man & his ancestors, or those whose estate he hath; the latter being local, & serving for the inhabitants of a town, etc., or as to insensible things, as to devise lands.—*FOISTON v. CRACHROODE* (1587), 1 Co. Rep. 31 b; 76 E. R. 962.

Annotations:—As to (1) *Refd.* *Derry v. Sanders*, [1919] 1 K. B. 223. As to (2) *Consd.* *R. v. Ecclesfield* (1818), 1 B. & Ald. 348. *Refd.* *Gateward's Case* (1607), 6 Co. Rep. 59 b; *R. v. Churchill* (1825), 6 Dow. & Ry. K. B. 635.

369. ——If a copyholder claims common against a stranger, he must allege prescription in the lord; if against the lord himself he must allege it by way of usage.—*PEARCE v. BACON* (1595), Cro. Eliz. 390; 78 E. R. 636.

Annotation:—*Refd.* *Derry v. Sanders*, [1919] 1 K. B. 223.

370. ——A custom to take a profit *in alieno solo* is bad; such a right can only be claimed

& turbary, rights & appurtenances whatsoever to the premises belonging, or therewith usually held or enjoyed." The grant by B. contained general words equally comprehensive:—*Held*: the right of turbary created by B.'s lease was preserved or newly granted by the settlement, notwithstanding the merger.—*DUGGAN v. CAREY* (1858), 8 I. C. L. R. 210.—*IR.*

Sect. 2.—Prescription and custom: Sub-sects. 1 & 2, A., B. & C. (a) & (b).]

by prescription.—GRIMSTEAD *v.* MARLOWE (1792), 4 Term Rep. 717; 100 E. R. 1263.

Annotations:—**Dbtd.** Austin *v.* Amhurst (1877), 47 L. J. Ch. 467. **Refd.** A.-G. *v.* Gauntlett (1829), 3 Y. & J. 93.

371. ———.]—A good deal of the argument on behalf of applt. has rested, I think, upon the failure to observe the proper distinction between rights which are claimed by custom & rights which are claimed by prescription. A custom must be reasonable, & a custom which destroys the subject-matter of the grant would not be reasonable. A right claimed by prescription is subject to no limitation, as far as its use & reasonableness is concerned, & the owner of the soil, that is, the owner of the bed of the river, has a perfect right if he chooses, if the fishing belongs to him, to grant a right to fish to any number of persons although it may destroy his own right. Therefore the fact that the right may be exercised by an unlimited number of persons is not a circumstance that is fatal to the prescription (WILLS, J.).—CHESTERFIELD *v.* FOUNTAINE (1895), [1908] 1 Ch. 243, n.; 77 L. J. Ch. 114, n.; 98 L. T. 237, n., D. C.

Annotations:—**Refd.** Chesterfield *v.* Harris, [1908] 2 Ch. 397. **Mentd.** Harris *v.* Chesterfield, [1911] A. C. 623.

See, further, CUSTOM & USAGES.

SUB-SECT. 2.—RIGHTS DEPENDING UPON PRESCRIPTION.

A. What Rights may be claimed.

372. In general.—A man may prescribe or allege a custom to have & enjoy *solum vesturam terrae*, from such a day till such a day, & hereby the owner of the soil shall be excluded to pasture or feed there; & so he may prescribe to have *separatam pasturam*, & exclude the owner of the soil from feeding there. So a man may prescribe to have *separatam piscariam* in such a water, & the owner of the soil shall not fish there; but if he claim to have *communiam piscariae* or *liberam piscariam*, the owner of the soil shall fish there.—WHITE *v.* SHIRLAND (1581), 1 Coke on Littleton 122 a.

See, generally, EASEMENTS & PROFITS À PRENDRE.

373. Pasture—For beasts levant & couchant—In same vill.—BOTELER *v.* BRISTOW, CITY OF COVENTRY CASE (1475), Y. B. 15 Edw. 4, fo. 29, pl. 7; fo. 32, pl. 16.

Annotations:—**Consd.** Race *v.* Ward (1855), 24 L. J. Q. B. 153. **Refd.** Foiston *v.* Crachroode (1587), 4 Co. Rep. 31 b; Wakefield *v.* Costard (1593), 1 And. 151; Goodday *v.* Michell (1595), Cro. Eliz. 441; Gateward's Case (1607), 6 Co. Rep. 59 b; Harrison *v.* Rooke (1625), Palm. 420; Baker *v.* Brereman (1635), Cro. Car. 418; Popham *v.* Woolcott (1666), 1 Sid. 291; White *v.* Coleman (1673), Freem. K. B. 134; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; Mercer *v.* Denne (1901), 91 L. T. 513. **Mentd.** *Re* Christchurch Inclosure Act (1887), 35 Ch. D. 355.

374. ———.]—JENKIN *v.* VIVIAN (1626), Poph. 201; 79 E. R. 1292.

375. ———.]—**Not for all commonable beasts.**—SAVE'S CASE (1611), March, 83; 82 E. R. 422.

376. ———.]—GRIMSTEAD *v.* MARLOWE (1792), 4 Term Rep. 717; 100 E. R. 1263.

Annotations:—**Dbtd.** Austin *v.* Amhurst (1877), 47 L. J. Ch. 467; **Mentd.** A.-G. *v.* Gauntlett (1829), 3 Y. & J. 93.

377. ———.]—BENSON *v.* CHESTER (1799), 8 Term Rep. 396; 101 E. R. 1453.

Annotations:—**Refd.** A.-G. *v.* Mathias (1858), 4 K. & J. 579; A.-G. *v.* Reynolds, [1911] 2 K. B. 888.

378. ———.]—**Prescription Act 1832 (c. 71).**—(1) Pltfs. claimed an injunction to restrain deft. from turning out horses, cattle & other animals to

graze or feed on a common. Deft. claimed that he had gained the right to do so under the above Act, & alleged acts of user & enjoyment without interruption for sixty years or thirty years of a right of common of pasture for all his cattle levant & couchant upon two closes of land in B. Deft. as to one portion of the period of thirty years, failed to prove that there had been any turning out of animals at all. As to another part of the period of thirty years there was an absence of evidence both as regards the beasts turned out & also the capacity of his land, & he did not distinguish in any way what he turned out in respect of one close & what he turned out in respect of the other:—**Held**: the claim to a prescriptive right failed.

(2) Deft. also claimed that by reason of being an inhabitant & ratepayer of M. he was entitled to rights of common of pasture without stint or alternatively for all beasts levant & couchant on his land. Evidence was given that during the period in respect of which the witnesses spoke not only they themselves but their fathers & grandfathers turned out, without stint, goats, donkeys & pigs, besides commonable beasts, & showed also that not only the inhabitants but everybody else, irrespective of where they lived, turned beasts out on the common. No evidence was given in support of a right confined to the inhabitants of M. or to commonable beasts:—**Held**: deft.'s claim as an inhabitant of M. also failed.—MITCHAM COMMON CONSERVATORS *v.* BANKS (1912), 76 J. P. 413; 10 L. Q. R. 183.

379. ———.]—**By corporation.**—MELLOR *v.* SPATEMAN (1669), 1 Saund. 339, 343; 85 E. R. 489, 495; *sub nom.* MILLER *v.* STAPLES, 1 Mod. Rep. 6; *sub nom.* MILLER *v.* SPATEMAN, 2 Keb. 527, 550, 570.

Annotations:—**Consd.** Ashby *v.* White (1703), 2 Ld. Raym. 938; R. *v.* Pasmore (1789), 3 Term Rep. 199; Cox *v.* Glue (1848), 5 C. B. 533; Parry *v.* Thomas (1850), 5 Exch. 37; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633. **Refd.** Hardy *v.* Hollyday (1765), cited in 4 Term Rep. 718; Colchester Corpn. *v.* Seaber (1766), 3 Burr. 1866; R. *v.* Churchill (1825), 4 B. & C. 750; R. *v.* Joint Stock Cos. (1847), 10 Q. B. 839; Johnson *v.* Barnes (1872), L. R. 7 C. P. 592. **Mentd.** A.-G. *v.* Gauntlett (1829), 3 Y. & J. 93; Bowen *v.* Jenkin (1837), 6 Ad. & El. 911; Richards *v.* Fry (1838), 7 Ad. & El. 698; Thriceutt *v.* Martin (1849), 18 L. J. Ex. 291; Dunraven *v.* Llewellyn (1850), 15 Q. B. 791; Davies *v.* Williams (1851), 16 Q. B. 546; Embrey *v.* Owen (1851), 6 Exch. 353; Bonomi *v.* Backhouse (1859), E. B. & E. 622; Constable *v.* Nicholson (1863), 14 C. B. N. S. 230; Carr *v.* Lambert (1865), 3 H. & C. 499; Harrop *v.* Hirst (1868), L. R. 4 Exch. 43; Robertson *v.* Hartopp (1889), 43 Ch. D. 484; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301; Bourne & Hollingsworth *v.* Marylebone B. C. (1908), 72 J. P. 129; Hammerton *v.* Dysart, [1916] 1 A. C. 57.

380. ———.]—**Not in respect of cultivated ground.**—PORTE *v.* WALKER (1557), Ben. & D. 45; Benl. 8 pi. 29; 123 E. R. 36.

381. ———.]—**Common of vicinage—Not common appendant.**—JENKIN *v.* VIVIAN (1626), Poph. 201; 79 E. R. 1292.

382. ———.]—**Appurtenant.**—COWLAM *v.* SLACK, No. 43, *ante*.

383. ———.]—**Extent of area over which claimed immaterial.**—SEWERS COMRS. *v.* GLASSE, No. 115, *ante*.

384. Sporting rights—In warren of another.—DAVIES' CASE (1688), 3 Mod. Rep. 246; 87 E. R. 161.

Annotations:—**Refd.** Wickham *v.* Hawker (1840), 7 M. & W. 63; Fitzhardinge *v.* Purcell, [1908] 2 Ch. 139.

See, also, Part V., Sect. 2, ante.

385. Not right to carry away soil—Without stint.—(1) A *profit à prendre* in another's soil cannot be claimed by custom, however ancient, uniform & clear the exercises of that custom may be.

(2) A right to carry away the soil of another, without stint, cannot be claimed by prescription, nor can the claim be sustained by evidence of a lost grant.—*A.-G. v. MATHIAS* (1858), 4 K. & J. 579; 27 L. J. Ch. 761; 31 L. T. O. S. 367; 4 Jur. N. S. 628; 6 W. R. 780; 70 E. R. 241.

Annotations:—*As to* (2) *Folld. De la Warr v. Miles* (1881), 17 Ch. D. 535. *Refd.* *Johnson v. Barnes* (1872), L. R. 7 C. P. 592; *Saltash Corp'n. v. Goodman* (1880), 5 C. P. D. 431; *Smith v. Andrews*, [1891] 2 Ch. 678; *Hough v. Clark & Hall* (1907), 23 T. L. R. 682. *Generally*, *Mentd. A.-G. v. Hanmer* (1859), 33 L. T. O. S. 176.

386. Fishing rights—Without stint.—*CHESTERFIELD v. FOUNTAINE* (1895), [1908] 1 Ch. 243, n.; 77 L. J. Ch. 114, n.; 98 L. T. 237, n., D. C.

Annotations:—*Consd.* *Chesterfield v. Harris*, [1908] 2 Ch. 397. *Refd.* *Harris v. Chesterfield*, [1911] A. C. 623.

387. — Not without stint.—*HARRIS v. CHESTERFIELD (EARL)*, No. 226, *ante*.

B. Must be Certain.

388. In general.—A prescription that a common belongs either to a manor or to a house is void for uncertainty.—*LEE v. MAYER* (1557), Benl. 21; Ben. & D. 60; 73 E. R. 946.

Annotation:—*Consd.* *Lethbridge v. Winter* (1824), 9 Moore, C. P. 95.

389. ——Prescription was laid to have sheep going *infra communes campos et territoria de G.*, to be folded:—*Held*: *territoria* was a word unknown in the law, so no certainty in the prescription.—*DICKMAN v. ALLEN* (1690), 2 Vent. 138; 86 E. R. 355.

Annotation:—*Generally*, *Mentd. Sharpe v. Bechenowe* (1687), 2 Lut. 1249.

See, also, No. 1, *ante*.

C. Who may Prescribe.

(a) Tenants and Occupiers.

390. Not tenants at will.—*BOTELER v. BRISTOW, CITY OF COVENTRY CASE* (1475), Y. B. 15 Edw. 4, fo. 29, pl. 7; fo. 32, pl. 16.

Annotations:—*Refd.* *Folston v. Crachroode* (1587), 4 Co. Rep. 31 b. *Mentd.* *Wakefield v. Costard* (1593), 1 And. 151; *Goodday v. Michell* (1595), Cro. Eliz. 441; *Gateward's Case* (1607), 6 Co. Rep. 59 b; *Ordway v. Ormo* (1612), 1 Bulst. 183; *Harrison v. Rooke* (1626), Palm. 420; *Popham v. Woolcot* (1666), 1 Sid. 291; *White v. Coleman* (1673), Freem. K. B. 134; *Race v. Ward* (1855), 24 L. J. Q. B. 153; *Goodman v. Saltash Corp'n.* (1882), 7 App. Cas. 633; *Re Christchurch Inclosure Act* (1887), 35 Ch. D. 355; *Mercer v. Denne* (1904), 91 L. T. 513.

391. ——*ANON.*, No. 367, *ante*.

392. Copyhold tenant—Not against lord of manor.—*FOISTON v. CRACHROODE*, No. 368, *ante*.

393. — Against stranger in right of lord.—*PEARCE v. BACON*, No. 369, *ante*.

394. ——*PRIETTY v. BUTLER* (1658), 2 Sid. 87; 82 E. R. 1272.

395. Not lessee for years—Must plead the *que estate*.—A lessee for years cannot prescribe for a right of common, but must plead the *que estate*.—*v. STRINGER* (1610), Cro. Car. 599; 79 E. R. 1115.

Annotation:—*Consd.* *A.-G. v. Gauntlett* (1829), 3 Y. & J. 93.

396. ——*LESSEE* for years cannot prescribe.—*SMITH v. MORRIS* (1732), Fortes. Rep. 340; 92 E. R. 881.

See, now, Prescription Act, 1832 (c. 71), s. 5; EASEMENTS & PROFITS A PRENDRE.

397. Not occupiers—Of new house—Unless in replacement of old house having right.—Where the occupiers of houses in a town have common by prescription, he who builds a new house cannot claim common. Otherwise if an old house fall down, & the tenant build it up in a new place.—*COSTARD & WINGFIELD'S CASE* (1593), 2 Leon. 44; Godb. 96; 78 E. R. 59; *sub nom.* *COMPTON'S*

(*LORD*) *CASE*, Gouldsb. 38; *sub nom.* *WAKEFIELD'S CASE*, Owen 4; *sub-nom.* *WAKEFIELD v. COSTARD*, 1 And. 151; Sav. 81.

Annotations:—*Consd. & Distd.* *A.-G. v. Reynolds*, [1911] 2 K. B. 888. *Refd.* *Hartop v. Hoare* (1743), 2 Stra. 1187; *Prichard v. Powell* (1845), 10 Q. B. 589.

See, also, Nos. 175, 195, *ante*.

398. ——*ENGLISH v. BURNELL & INGHAM* (1765), 2 Wils. 258; 95 E. R. 798.

399. — Manor tenements.—(1) Occupiers of tenements under the copyholders of a manor cannot prescribe for common.

(2) Bye-laws purporting to regulate the right to pasture on lammas lands of a manor were made by the homage from time to time. The latest bye-law provided that freeholders & copyholders might depasture a number of cattle regulated by the number of acres they held; & that occupiers might also depasture a number of cattle regulated in a different mode by the number of acres they occupied. Some of the lammas land was taken for the purpose of public undertakings, & compensation paid in respect of the right to depasture. In an action by occupiers on behalf of themselves & other occupiers:—*Held*: they were not entitled to participate in the compensation. Such a claim could only be made by custom, by grant or by prescription. There could be no such custom giving a *profit à prendre in alieno solo*; there was no grant, & there could be no right by prescription, inasmuch as the claim would be against the owner of the land in respect of which the claim was made.—*AUSTIN v. AMHURST* (1877), 7 Ch. D. 689; 47 L. J. Ch. 467; 38 L. T. 217; 26 W. R. 312.

400. ——*BAYLIS v. TYSEN-AMHURST*, No. 49, *ante*.

401. — & owners of enfranchised copyholds.—*TILBURY v. SILVA*, No. 227, *ante*.

Freeholders—Claiming by prescription—Presumption of lost grant.—*See* Sub-sect. 2, E., *post*.

See, also, Sub-sect. 3, B (a), *post*.

(b) Inhabitants and Householdors.

402. Not inhabitant as such.—*ANON.* (1478), Y. B. 18 Edw. 4, fo. 3, pl. 15.

Annotations:—*Refd.* *Foxall v. Venables* (1590), Cro. Eliz. 180; *Wakefield v. Costard* (1593), 1 And. 151; *Gateward's Case* (1607), 6 Co. Rep. 59 b; *Baker v. Brereman* (1635), Cro. Car. 418. *Mentd.* *Paine v. Partrich* (1691), Carth. 191.

403. ——Inhabitants cannot prescribe to have a right of common.—*FOWLER v. DALE* (1594), Cro. Eliz. 362; 78 E. R. 611.

404. ——*TINNERY v. FISHER* (1614), cited in 2 Bulst. 87; 80 E. R. 981.

405. — Not being copyholders of manor.—*ROBERTS v. ELLIOT* (1813), 7 J. P. 211, N. P.; *subsequent proceedings*, 11 M. & W. 527.

406. — Presumption of claim through freehold tenants.—*WARRICK v. QUEEN'S COLLEGE, OXFORD*, No. 179, *ante*.

407. — Unless incorporated.—(1) Inhabitants, unless they be incorporated, cannot prescribe to have profit in another's soil, but only in matters of easement.

(2) Copyholders in fee, or for life, may have, by custom of the manor, common in the demesnes of the lord of the manor, & they ought to allege the custom to be that every copyholder of every customary messuage, etc., & not that every inhabitant in any ancient customary messuage, etc.—*GATEWARD'S CASE* (1607), 6 Co. Rep. 59 b; 77 E. R. 344; *sub nom.* *SMITH v. GATEWOOD*, Cro. Jac. 152.

Annotations:—*As to* (1) *Consd.* *North v. Coe* (1668), Vaugh. 251; *Osbuston v. James* (1688), 2 Lut. 1377; *Lockwood v. Wood* (1844), 6 Q. B. 50; *London City Sewers Comrs. v. Glasse* (1872), 7 Ch. App. 456; *Austin v. Amhurst* (1877), 7 D. Ch. 689; *Chilton v. London Corp'n.* (1878), 7 Ch. D. 735; *Rivers v. Adams* (1878), 3 Ex. D. 361;

Sect. 2.—Prescription and custom: Sub-sect. 2, C.

Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633; *Re* Christchurch Inclosure Act (1887), 35 Ch. D. 355; Tilbury v. Silva (1890), 45 Ch. D. 98. **Refd.** Ordway v. Orme (1612), 1 Bulst. 183; Baker v. Brereman (1635), Cro. Car. 418; Bond's Case (1639), March, 16; Miller v. Spateman (1669), 2 Keb. 570; Weekly v. Wildman (1697), 1 Ld. Raym. 405; English v. Burnell (1765), 2 Wils. 258; Grimstead v. Marlowe (1792), 4 Term Rep. 717; R. v. Ecclesfield (1818), 1 B. & Ald. 348; Jones v. Robin (1847), 10 Q. B. 620; Rogers v. Brenton (1847), 10 Q. B. 26; Lloyd v. Jones (1848), 6 C. B. 81; A.-G. v. Mathias (1858), 4 K. & J. 579; Constable v. Nicholson (1863), 14 C. B. N. S. 230; R. v. Rollett (1875), L. R. 10 Q. B. 469; Chesterfield v. Harris, [1908] 2 Ch. 397; Mitcham Common Conservators v. Banks (1912), 76 J. P. 413. **Generally, Mentd.** Day v. Savadge (1614), Hob. 85; St. Albans Corpn. v. Dobbins (1672), Freem. K. B. 36; Drake v. Wiglesworth (1752), Willes, 654; Mounsey v. Ismay (1863), 11 W. R. 270; *Re* St. Stephen, Coleman St., *Re* St. Mary the Virgin, Aldermanbury (1888), 39 Ch. D. 492; Brocklebank v. Thompson, [1903] 2 Ch. 344.

408. —.]—CHILTON v. LONDON CORPN. No. 272, *ante*.

409. —.]—RIVERS (LORD) v. ADAMS, No. 191, *ante*.

410. — Unless rights limited to them.]—MITCHAM COMMON CONSERVATORS v. BANKS, No. 378, *ante*.

411. Not inhabitant of house built within thirty years—Where common claimed for inhabitants of town.]—COSTARD & WINGFIELD'S CASE (1593), Godb. 96; 2 Leon. 44; 78 E. R. 59; *sub nom.* COMPTON'S (LORD) CASE, Gouldsb. 38; *sub nom.* WAKEFIELD'S CASE, Owen, 4; *sub nom.* WAKEFIELD v. COSTARD, 1 And. 151; Sav. 81.

Annotations:—**Consd.** A.-G. v. Reynolds, [1911] 2 K. B. 888. **Refd.** Prichard v. Powell (1845), 10 Q. B. 589. **Mentd.** Hartop v. Hoare (1743), 2 Stra. 1187.

412. Not householder as such.]—A prescription for every householder to have common of pasture *in alieno solo* not good.—ORDEWAY v. ORME (1612), 1 Bulst. 183; 80 E. R. 872.

413. —.]—WEEKLY v. WILDMAN, No. 97, *ante*.

414. Burgesses.]—MELLOR v. SPATEMAN (1669), 1 Saund. 339; 85 E. R. 489; *sub nom.* MELLER v. STAPLES, 1 Mod. Rep. 6; *sub nom.* MILLER v. SPATEMAN, 2 Keb. 527, 550, 570; *subsequent proceedings, sub nom.* STAPLES v. MELLOR (1679), 2 Show. 43.

Annotations:—**Consd.** Cox v. Glue (1848), 5 C. B. 533; Parry v. Thomas (1850), 5 Exch. 37. **Refd.** Ashby v. White (1703), 2 Ld. Raym. 938; Grimstead v. Marlowe (1792), 4 Term Rep. 718; R. v. Churchill (1825), 4 B. & C. 750; Davies v. Williams (1851), 16 Q. B. 546; Constable v. Nicholson (1863), 14 C. B. N. S. 230; Johnson v. Barnes (1872), L. R. 7 C. P. 592; Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633. **Mentd.** Colechester Corpn. v. Seaber (1766), 3 Burr. 1866; R. v. Pasmore (1789), 3 Term Rep. 199; A.-G. v. Gauntlett (1829), 3Y. & J. 93; Bowen v. Jenkin (1837), 6 Ad. & El. 911; Richards v. Fry (1838), 7 Ad. & El. 698; *Re* Sheffield, Rotherham, & Chesterfield Fire & Life Insce. (1847), 16 L. J. Q. B. 407; R. v. Joint Stock Cos. Registrar (1847), 10 Q. B. 839; Thruscott v. Martin (1849), 18 L. J. Ex. 291; Dunraven v. Llewellyn (1850), 15 Q. B. 791; Embrey v. Owen (1851), 6 Exch. 353; Bonomi v. Backhouse (1859), E. B. & E. 646; Carr v. Lambert (1865), 3 H. & C. 499; Harrop v. Hirst (1868), L. R. 4 Exch. 43; Austin v. St. Matthew, Bethnal Green Grdns. (1874), 43 L. J. C. P. 100; Robertson v. Hartopp (1889), 43 Ch. D. 484; McCartney v. Londonderry & Lough Swilly Ry., [1904] A. C. 301; Bourne & Hollingsworth v. Marylebone B. C. (1908), 72 J. P. 129; Hammerton v. Dysart, [1916] 1 A. C. 57.

415. —.]—Burgesses in a borough can have common appurtenant to their burgages by prescription.—MELLOR v. WALKER (1670), as reported *sub nom.* MILLER v. WALKER, 1 Sid. 462; 82 E. R. 1217.

Annotations:—**Mentd.** Ellison v. Hes (1840), 3 Per & Dav. 391; R. v. Joint Stock Cos. Registrar (1847), 10 Q. B. 839; Holme v. Dalby (1819), 3 B. & Ald. 259.

416. — Cannot claim in individual right.]—If a burgess claims an individual right of pasturage in a part of the corporate estates, it must be considered as made in his corporate, & not in his

individual capacity, & where the particular lands had been sold no distinct claim could be made by him individually for compensation out of the unsold property of the corpn.—EVAN v. AVON CORPN. (1860), 29 Beav. 144; 30 L. J. Ch. 165; 3 L. T. 347; 6 Jur. N. S. 1361; 9 W. R. 84; 54 E. R. 581.

Annotation:—**Refd.** Watson v. Hythe B. C. (1906), 70 J. P. 153.

417. — Not new burgesses—Created under Municipal Corporations Act, 1835 (c. 76).]—BEARDSWORTH v. TORKINGTON (1841), 1 Q. B. 782; 1 Gal. & Dav. 482; 6 Jur. 339; 113 E. R. 1330; *sub nom.* BEARDSWORTH v. TORKINGTON, 10 L. J. Q. B. 254.

Annotations:—**Refd.** Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633. **Mentd.** Dorchester Corpn. v. Ensor (1869), L. R. 4 Exch. 335.

418. — — — —.]—HULLS v. ESTCOURT (1863), 2 H. & C. 47; 2 New Rep. 131; 32 L. J. Ex. 193; 8 L. T. 539; 27 J. P. 519; 9 Jur. N. S. 695; 11 W. R. 672; 159 E. R. 21.

See, generally, LOCAL GOVERNMENT.

419. Mayor & burgesses.]—The mayor & burgesses of a borough may prescribe for common in gross for all their cattle in the borough.—STAPLES v. MELLOR (1679), 2 Show. 43; 2 Lev. 246; T. Jo. 115; 89 E. R. 781.

Annotation:—**Fold.** Hinkes v. Clarke (1679), 2 Show. 78.

(c) Corporations.

420. General rule.]—*Held:* a corpn. as such cannot have any common for them & their tenants belonging to ancient houses in the corpn.—R. v. RIPON TOWN (1666), 2 Keb. 25; 81 E. R. 16.

421. Body aggregate—Provost & scholars of college.]—DICKMAN v. ALLEN (1690), 2 Vent. 138; 86 E. R. 355.

See Nos. 191, 272, 291, 379, 407, 418, *ante*.

See, generally, CORPORATIONS; EASEMENTS & PROFITS À PRENDRE.

D. Proof of Enjoyment.

(a) At Common Law.

See, generally, EASEMENTS & PROFITS À PRENDRE.

422. Prescription for common for all sheep levant & couchant—Not supported by proof of right for claimant's sheep only.]—DEVON (EARL) v. EYRE (1623), Palm. 362; 2 Roll. Rep. 309; 81 E. R. 1124.

Annotation:—**Refd.** Ward v. Creswell (1741), Willes, 265.

423. Ancient undated grant—Not necessarily inconsistent—Question for jury.]—An ancient grant, without date, does not necessarily destroy a prescriptive right, for it may be either prior to time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury.—ADDINGTON v. CLODE (1775), 2 Wm. Bl. 989; 96 E. R. 581.

Annotation:—**Consd.** Welcome v. Upton (1839), 5 M. & W. 398.

424. Interruption—Single act of exclusive ownership—Forty years before action—Insufficient to rebut presumption.]—WATT v. PATERSON (1813), 2 Dow, 25; 3 E. R. 775, H. L.

425. Clear proof required—Where trespass easily committed—Scottish Highlands.]—FRASER v. CHISHOLM (1814), 2 Dow, 561; 3 E. R. 967, H. L.

Annotation:—**Mentd.** Seaforth v. Hume (1814), 2 Dow, 338.

(b) Under Prescription Act, 1832 (c. 71).

See, generally, EASEMENTS & PROFITS À PRENDRE.

426. Application of Act—To right of sole pasture in gross.]—WELCOME v. UPTON, No. 139, *ante*.

427. Must be for full period—Without interruption.]—BAILEY v. APPLEYARD, No. 1, *ante*.

428. —.]—In an action for trespass deft. pleaded that he was possessed of a messuage, etc., & that he & all occupiers thereof for the time being,

for thirty years next before the time when, etc., had of right had, & been used, etc., to have common of pasture in the *locus in quo*, that the cattle were depasturing, etc., to the disturbance of such right of common, & that deft. distrained, etc.:—*Held*: (1) as a plea under the above Act, the plea was bad, for not claiming the right either so, or as used, etc., thirty years before the commencement of the suit; (2) the plea could not be construed as claiming right of common simply by virtue of possession, assuming that, if so construed, it would have been good.—*RICHARDS v. FRY* (1838), 7 Ad. & El. 698; 3 Nev. & P. K. B. 67; 1 Will. Woll. & H. 116; 7 L. J. Q. B. 68; 2 Jur. 641; 112 E. R. 632.

Annotations:—*As to* (1) *Refd.* *Flight v. Thomas* (1841), 8 Cl. & Fin. 231; *Ward v. Robins* (1846), 15 M. & W. 237; *Lowe v. Carpenter* (1851), 20 L. J. Ex. 374; *Cooper v. Hubbuck* (1862), 12 C. B. N. S. 456; *Hollins v. Verney* (1884), 13 Q. B. D. 304; *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Hymen v. Van Den Bergh*, [1908] 1 Ch. 167. *As to* (2) *Refd.* *Thirscutt v. Martin* (1849), 3 Exch. 454.

429. Need not be continuous—If without adverse interruption—Question for jury.—The interruption which defeats a prescriptive right under the above Act is an adverse obstruction, not a mere discontinuance of user by the claimant himself.

In a case under s. 1 of the above Act, if proof be given of a right enjoyed at the time of action brought, & thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether, at that time, the right had ceased or was still substantially enjoyed. The inference to be drawn from the facts proved, on this point, is not a presumption within s. 6 of the above Act.

Where a commoner had ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before & after:—*Held*: a jury were justified in finding a continued enjoyment of the right during thirty years.—*CARR v. FOSTER* (1812), 3 Q. B. 581; 2 Gal. & Dav. 753; 11 L. J. Q. B. 281; 6 Jur. 837; 114 E. R. 629.

Annotations:—*Consd.* *Lowe v. Carpenter* (1851), 6 Exch. 825; *Glover v. Coleman* (1874), L. R. 10 C. P. 108; *Hollins v. Verney* (1884), 13 Q. B. D. 304. *Refd.* *Clayton v. Corby* (1844), 8 Jur. 212. *Mentd.* *Smith v. Baxter*, [1900] 2 Ch. 138.

430. ———.] —MUSGRAVE v. INCLOSURE COMRS., No. 787, post.

431. ——— Enjoyment sometimes resisted—Whether substantial enjoyment—Question for jury.—*ANON.* (1846), 7 L. T. O. S. 281.

432. Interruption of enjoyment—As to part only—Not conclusive as to remainder.—*WELCOME v. UPTON*, No. 139, *ante*.

433. ——— Rebutts presumption as to that part.—In an action of trespass a plea set up a right of common exercised “in, upon & throughout” the close without interruption for thirty years:—*Held*: though an encroachment upon part of the common acquiesced in for more than a year before the trespass complained of would not destroy the right acquired by thirty years’ user in other parts of the common, it operated to prevent the acquiring a right under the above Act in that place in which the trespass was committed.—*DAVIES v. WILLIAMS* (1851), 16 Q. B. 546; 20 L. J. Q. B. 330; 15 J. P. 550; 15 Jur. 752; 117 E. R. 988.

Annotations:—*Refd.* *Presland v. Bingham* (1889), 41 Ch. D. 268. *Mentd.* *Lane v. Capsey*, [1891] 3 Ch. 411.

434. ——— Whether adverse—Party disputing

prescription not bound to prove.—*BAILEY v. APPELYARD*, No. 1, *ante*.

435. ——— Recent interruption—Ancient right not disproved.—*WELCOME v. UPTON*, No. 139, *ante*.

436. ——— May be by stranger.—An interruption of a right acquired by user within the above Act may be caused by the act of a stranger, & not the owner of the servient tenement.—*DAVIES v. WILLIAMS* (1851), 16 Q. B. 546; 20 L. J. Q. B. 330; 15 J. P. 550; 15 Jur. 752; 117 E. R. 988.

Annotations:—*Refd.* *Presland v. Bingham* (1889), 41 Ch. D. 268. *Mentd.* *Lane v. Capsey*, [1891] 3 Ch. 411.

437. ——— Acquiescence in—Non-user under threat of legal proceedings.—*WARRICK v. QUEEN’S COLLEGE, OXFORD*, No. 179, *ante*.

Sec. also, No. 227, *ante*.

438. ——— Immemorial appropriation to particular farm—Not an interruption.—(1) Proof that certain parts of a common have been from time immemorial appropriated for sheep feeding in respect of a certain adjoining farm, will not suffice to oust the commoners of their prescriptive rights.

(2) The erection of boundary stones, although strong evidence of ownership, will not suffice to prove it, if there is evidence that the erection was protested against either at a ct. leet, or otherwise.

(3) The survey of a manor is admissible though not conclusive evidence as to the rights of persons having an interest therein.—*BLANDY-JENKINS v. DUNRAVEN (EARL)* (1898), 62 J. P. 661; *subsequent proceedings*, [1899] 2 Ch. 121, C. A.

Annotation:—*Generally*, *Mentd.* *Evans v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578.

439. Onus of proof—On party prescribing.—*BAILEY v. APPELYARD*, No. 1, *ante*.

440. How claim defeated—By showing commencement of enjoyment—& no grant from Crown.—An allotment of waste land was made to A. under an inclosure Act passed in 1810. In respect of this allotment, A. claimed a right of common of pasture in the waste lands, & a right of pannage in the open woods of N. Forest, showing an enjoyment for the full period of thirty years, as of right, & without interruption, mentioned in the above Act, s. 1:—*Held*: the claim might be defeated by showing the commencement of the enjoyment, & that, by reason of New Forest Act, 1697–8 (c. 33), s. 10, & Crown Lands Act, 1702 (c. 1), s. 5, the right claimed could not have had any legal origin in a grant from the Crown.—*MILL v. NEW FOREST COMR.* (1856), 18 C. B. 60; 25 L. J. C. P. 212; 20 J. P. 375; 2 Jur. N. S. 520; 4 W. R. 508; 139 E. R. 1286.

Annotations:—*Consd.* *Angus v. Dalton* (1877), 3 Q. B. D. 85. *Refd.* *Bobbett v. S. E. Ry.* (1882), 9 Q. B. D. 424. *Mentd.* *Carlyon v. Lovering* (1857), 1 H. & N. 781.

441. How claim established—When individual right not common right—Ground of claim immaterial.—*DE LA WARR (EARL) v. MILES*, No. 78, *ante*.

442. What claim to right of common includes—Not claim to right of soil.—The claim to a right of common or profit referred to in s. 1 of the above Act means a claim to such right, & not a claim to the soil upon which the right is to be exercised. Consequently no right by prescription to a right of common or profit can be established by proof of enjoyment thereof for the period specified in the above sect. under a claim of right to the soil.

The doctrine of lost grant applies only where

PART VI. SECT. 2, SUB-SECT. 2.
—D. (b).

440 1. How claim defeated—By showing
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commencement of enjoyment.—Sixty years’ uninterrupted enjoyment of a right to cut turf falls as a prescriptive right where the enjoyment

appeared to be referrible during the period to an agreement in writing.—*LOWRY v. CROTHERS* (1871), 1 R. 5 C. L. 98.—IR.

Sect. 2.—Prescription and custom: Sub-sect. 2, D. (b) & E. (a), (b) & (c) & F.; sub-sect. 3, A. & B. (a).]

the enjoyment cannot be otherwise reasonably accounted for.—*LYELL v. HOTHFIELD (LORD)*, [1914] 3 K. B. 911; 84 L. J. K. B. 251; 30 T. L. R. 630.

443. Sufficiency of evidence.]—The forest of H., at the time of the passing of Crown Lands Act, 1851 (c. 43), comprised certain open commonable lands, called K.'s Forest, in the parishes of B. & D., containing 2842 acres, & another tract of waste in the parishes of C., L., & S., consisting of 1104 acres, & also a piece of woodland called T.'s Hill, containing about 44 acres. The rest of the forest consisted of inclosed land in the five parishes. Hainault Forest (Allotment of Commons) Act, 1858 (c. 37), s. 6, enacted that the comr. appointed to carry the Act into execution should ascertain & determine by his award whether the rights of common, or any of them, extended indiscriminately over all the commonable lands which he might find to be situate within the boundaries of the late forest, including the unallotted portion of K.'s Forest, or whether such rights, or any of them, were limited to the commons in the particular parish, district or place in which were situate the lands in respect of which the rights were claimed, or what was the nature of such rights. The evidence as to the rights of common of the commoners of the five parishes consisted of acts of user for more than sixty years previously to & down to the time of the disafforestation, & was to this effect, that a reeve was appointed for each of the five parishes, whose duty it was to mark the cattle of the persons entitled to common in their respective parishes; that the marking usually took place near the boundary of K.'s Forest, & within the parish to which the cattle so marked belonged; that the cattle were generally turned out at the spot where they were marked, & then went where they pleased, those turned on to K.'s Forest straying all over the other commonable land in the forest in the parishes of C., L., & S., & those turned on to the commonable lands in those parishes straying over K.'s Forest. The comr. by his award found that "the rights of common which are exercisable in respect of those parts or districts of the five parishes which lie within the boundaries of the forest, as ascertained, are exercised exclusively over the commons or commonable land hereinbefore mentioned situate within such parishes, including K.'s Forest; & that the rights of common, or any of them, are not limited to the commons in the particular parish, district, or place in which are situate the lands in respect of which the rights are claimed; but that the rights claimed for each of the parishes, districts or places, extend indiscriminately & generally over all the commons or commonable land in each & every of the parishes, districts, or places, including K.'s Forest":—*Held*: the decision of the comr. was warranted by the evidence & the matter within his jurisdiction.

As to T.'s Hill, the evidence of user was similar to that relating to the rest of the uninclosed lands, but it appeared in addition that, in 1827, fifteen acres of it had been inclosed by a former owner without interruption, & that, in 1856, other eight acres of it had been exchanged by the present owner for other land belonging to the Comrs. of Woods & Forests, & that the residue was then inclosed together with the land acquired by the exchange:—*Held*: there was nothing in the evidence to take T.'s Hill out of the general decision of the comr.—*Re HAINAULT FOREST ACT*,

1858 (1861), 9 C. B. N. S. 648; 142 E. R. 254; *sub nom.* *WALFORD v. WETHERELL*, 3 L. T. 738.

E. Presumption of Lost Grant.

(a) When Presumed.

444. General rule—When right incapable of other reasonable explanation.]—*LYELL v. HOTHFIELD (LORD)*, No. 442, *ante*.

445. Exercise of right—For sixty years & upwards.]—*SEWERS COMRS. v. GLASSE*, No. 115, *ante*.

446. — For fifty years—After extinction by unity of possession.]—*COWLAM v. SLACK*, No. 43, *ante*.

447. — For twenty years insufficient—If capable of other explanation.]—*DAWSON v. NORFOLK (DUKE)* (1815), 1 Price, 246; 145 E. R. 1391.

448. — From time immemorial—Rights exercised by inhabitants of manor.]—*WARRICK v. QUEEN'S COLLEGE, OXFORD*, No. 179, *ante*.

449. — — —.]—*GOODMAN v. SALTASH CORPN.* No. 224, *ante*.

450. — Inconsistent with right claimed—Grant not presumed.]—*RIVERS (LORD) v. ADAMS* No. 191, *ante*.

451. Not in contravention of statute.]—*MILL v. NEW FOREST COMR.*, No. 440, *ante*.

452. —.]—A lost grant cannot be presumed where such a grant would have been in contravention of a statute.

By an Act providing for the inclosure of certain commons, & their drainage in connection with that of a larger area in a fen level, as a work of public utility, it was enacted that the herbage on roads to be set out under the Act should belong to the person or persons to whom the Inclosure Comrs. should by their award allot the same, & that in their award the comrs. should insert such orders, regulations & determinations, to be observed & followed by the several proprietors, as should be necessary or proper to be inserted therein, for the completing & maintaining of the drainage & inclosure. By their award the comrs. awarded that the herbage on certain roads, which adjoined watercourses, should belong to the surveyor of highways, to be by him let annually for the depasturing of sound & healthy sheep, but of no other cattle or stock whatever. The surveyors of highways had for more than fifty years made a practice of letting the herbage on the roads for the depasturing of a certain number of horses & cattle as well as sheep:—*Held*: the prohibition of the pasturage on the roads of stock other than sheep was intended to be a permanent provision, & was meant not merely for the protection of the allottees of land under the Act, but also for the preservation of the drainage system in the public interest, & it was not competent for the allottees or any body of persons to make a grant or release in favour of the surveyor of highways, so as to extend the right of pasturage to stock other than sheep; & a legal origin could not be presumed in order to support the practice of the surveyors of highways.—*NEAVERSON v. PETERBOROUGH RURAL COUNCIL*, [1902] 1 Ch. 557; 71 L. J. Ch. 378; 86 L. T. 738; 66 J. P. 404; 50 W. R. 549; 18 T. L. R. 360, C. A.

Annotation:—*Mentd.* *C. L. Ry. v. City of London Land Tax* [1911] 2 Ch. 467.

(b) Pleading Lost Grant.

453. Date & parties—Must be pleaded.]—*NDY v. STEPHENSON* (1808), 10 East, 55; 103 E. R. 696.

Annotation:—*Refd.* *Dalton v. Angus* (1881), 6 App. Cas. 740.

454. — Need not be pleaded.]—Under the modern practice, a lost grant may be pleaded with-

out stating date or parties.—PALMER v. GUADAGNI, [1906] 2 Ch. 494; 75 L. J. Ch. 721; 95 L. T. 258.

See, generally, EASEMENTS & PROFITS À PRENDRE.

(c) *Rebuttal of Presumption.*

455. Impossibility of exercise of right.]—PEARSON v. UNDERHILL, No. 186, *ante*.

456. By proof of origin—Inconsistent with right claimed.]—SEWERS COMRS. v. GLASSE, No 115, *ante*.

See, generally, EASEMENTS & PROFITS À PRENDRE.

F. Other Cases.

457. May be regulated by custom.]—A right of common by prescription may be regulated by custom.—FOLLET v. TROAKE (1705), 2 Ld. Raym. 1186; 92 E. R. 284.

See, generally, Part XIV., *post*.

458. Land for which common claimed acquired in separate parcels—Prescription must be laid for each parcel—Not for whole.]—BASKET v. MORDAUNT (LORD) (1558), Ben. & D. 71; 2 Dyer, 164 a, pl. 59; 123 E. R. 58.

*Annotations:—*Refd. Rotherham v. Green (1597), Noy, 67; Ward v. Cresswell (1741), Willes, 265.

459. ———.]—DEVON (EARL) v. EYRE (1623), Palm. 362; 2 Roll. Rep. 309; 81 E. R. 1121.

*Annotation:—*Refd. Ward v. Cresswell (1741), Willes, 265.

460. Prescription for common in another manor—Must be laid in lord of commoner's manor.]—SMITH v. BENSALL (1597), Gouldsb. 117; 75 E. R. 1034.

*Annotation:—*Mentd. Robertson v. Hartopp (1889), 43 Ch. D. 484.

461. ———.]—BARWICK v. MATTHEWS (1814), 5 Taunt. 365; 1 Marsh. 50; 128 E. R. 730.

*Annotation:—*Refd. Derry v. Sanders, [1919] 1 K. B. 223.

SUB-SECT. 3.—RIGHTS DEPENDING UPON CUSTOM.

A. What may be Claimed.

462. Not profit in alieno solo—General rule.]—A.-G. v. MATHIAS, No. 385, *ante*.

463. ———.]—AUSTIN v. AMHURST, No. 399, *ante*.

464. Right of sole pasture.]—HOSKINS v. ROBINS, No. 140, *ante*.

465. Not common of pasture.]—GRIMSTEAD v. MARLOWE (1792), 4 Term Rep. 717; 100 E. R. 1263.

*Annotations:—*Refd. Austin v. Amhurst (1877), 47 L. J. Ch. 467. Mentd. A.-G. v. Gauntlett (1829), 3 Y. & J. 93.

466. Not right to take fowl—In another's warren.]—DAVIES' CASE (1688), 3 Mod. Rep. 246; 87 E. R. 161.

*Annotations:—*Refd. Wickham v. Hawker (1840), 7 M. & W. 63. Mentd. Fitzhardinge v. Purcell, [1908] 2 Ch. 139.

467. Right to cut rushes.]—RACKHAM v. JESUP & THOMSON (1772), 3 Wils. 332; 95 E. R. 1084.

468. ——— As annexed to common right.]—BEAN v. BLOOM, No. 171, *ante*.

469. Right to dig tin in waste land—In Cornwall—Good if bonâ fide working obligatory.]—ROGERS v. BRENTON (1847), 10 Q. B. 26; 17 L. J. Q. B. 34; 9 L. T. O. S. 352; 12 Jur. 263; 116 E. R. 10.

*Annotations:—*Consd. A.-G. v. Mathias (1858), 4 K. & J. 579; Constable v. Nicholson (1863), 14 C. B. N. S. 230; Mills v. Colchester Corp'n. (1864), 17 C. B. N. S. 635. Refd. Lloyd v. Jones (1848), 6 C. B. 81; Ivimey v. Stocker (1865), 34 L. J. Ch. 633.

470. Right to dig clay in copyhold tenement—Without stint—To make bricks for sale.]—In ejectment for a forfeiture, by a lord against a copyholder of inheritance, for digging & taking clay from the manor, to be sold off the manor to any one, deft. pleaded & proved a custom from time

immemorial for the copyholders of inheritance, without license from the lord, to break the surface & dig clay without limit, from & out of their copyhold tenements, for the purpose of making it into bricks to be sold off the manor:—*Held*: this custom was good in law.—SALISBURY (MARQUIS) v. GLADSTONE (1861), 9 H. L. Cas. 692; 34 L. J. C. P. 222; 4 L. T. 819; 8 Jur. N. S. 625; 9 W. R. 930; 11 E. R. 900, H. L.

*Annotations:—*Folld. Blewett v. Jenkins (1862), 12 C. B. N. S. 16. Consd. Warrick v. Queen's College, Oxford (1871), 6 Ch. App. 716; Tucker v. Linger (1883), 52 L. J. Ch. 941. Refd. Constable v. Nicholson (1863), 14 C. B. N. S. 230; Hammer v. Chance (1865), 11 L. T. 667; Lingwood v. Gyde (1866), L. R. 2 C. P. 72; Hall v. Byron (1877), 4 Ch. D. 667; A.-G. for Isle of Man v. Mylchreest (1879), 4 App. Cas. 291; Goodman v. Saltash Corp'n. (1882), 7 App. Cas. 633; Heath v. Deane, [1905] 2 Ch. 86. Mentd. Portland v. Hill (1866), L. R. 2 Eq. 765; Mercer v. Denno, [1904] 2 Ch. 534; Johnson v. Clark, [1908] 1 Ch. 303.

471. Not right to take shingle in private land—Above high water mark—For repair of highways.]—A special custom to take shingle from the beach above high water mark for the repairing of the highways of the parish, is bad as to such portion of the beach as is private property, being a custom of a *profit à prendre* in another man's land.—PITTS v. KINGSBRIDGE HIGHWAY BOARD (1871), 25 L. T. 195; 19 W. R. 884.

Must be reasonable.]—See No. 239, *ante*.

See, further, COPYHOLDS; CUSTOM & USAGES.

B. Who may Claim.

(a) *Tenants and Occupiers.*

472. Copyholder—In demesne of lord of manor—Must allege right in copyholders.]—FOISTON v. CRACHROODE, No. 368, *ante*.

473. ———.]—GATEWARD'S CASE, No. 407, *ante*.

474. ——— In exclusion of lord of manor.]—HOSKINS v. ROBINS, No. 140, *ante*.

475. ——— & no others.]—No other person than a copyholder can have common by custom on any part of the manor.—CROWTHER v. OLDFIELD (1706), 2 Ld. Raym. 1225; Holt, K. B. 146; 3 Salk. 13; 92 E. R. 308; *sub nom.* CROUTHER v. OLDFIELD, 1 Salk. 364.

*Annotations:—*Consd. Derry v. Sanders, [1919] 1 K. B. 223. Refd. Thompson v. Roberts (1732), Fortes. Rep. 339. Mentd. Wicker v. Norris (1735), Lee temp. Hard. 116; Sargent v. Reed (1745), 2 Stra. 1228; Portland v. Hill (1866), 35 L. J. Ch. 439.

476. Not occupier—Within parish.]—GRIMSTEAD v. MARLOWE (1792), 4 Term Rep. 717; 100 E. R. 1263.

*Annotations:—*Refd. Constable v. Nicholson (1863), 14 C. B. N. S. 230; Austin v. Amhurst (1877), 47 L. J. Ch. 467. Mentd. A.-G. v. Gauntlett (1829), 3 Y. & J. 93.

477. Not tenant at will.]—ELY (DEAN & CHAPTER) v. WARREN, No. 177, *ante*.

478. Not "tenant of tenements & premises"—Within manor.]—In an action to recover possession of certain horses of pltf.'s seized & impounded by deft., pltf. claimed, first, an ancient custom for the tenants respectively of tenements & premises in the manor, one of which such tenants he alleged himself to be, of right to have common of pasture for all their horses & commonable cattle levant & couchant upon the tenements & premises respectively in & upon the close, which he alleged to be waste land in & part of the manor, on & from May 15 until Candlemas every year; & that pltf., as such tenant, before the time, etc., put the horses in & upon the close, in due right & enjoyment of the common of pasture, & the horses so being in & upon the close were wrongfully seized, etc.; & secondly, a like custom for such tenants to have common of pasture for the like period in every year in & upon the commonable lands of the said manor:—*Held*: the custom

Sect. 2.—Prescription and custom: Sub-sect. 3, R.
(a), (b) & (c). **Sects. 3 & 4. Part VII. Sect. 1.]**

claimed by pltf. in this replication was bad. —
KNIGHT v. KING (1869), 20 L. T. 491.

479. Not occupier under copyholder of manor.]—
AUSTIN v. AMHURST, No. 399, *ante*.
See, also, No. 171, *ante*.

(b) *Inhabitants and Householders.*

480. Cannot claim as such.]—GATEWARD'S
CASE, No. 407, *ante*.

481. —.]—GRIMSTEAD v. MARLOWE (1792),
4 Term Rep. 717; 100 E. R. 1263.

*Annotations:—***Refd.** Austin v. Amburst (1877), 47 L. J. Ch.
467. **Mentd.** A.-G. v. Gauntlett (1829), 3 Y. & J. 93;
Constable v. Nicholson (1863), 14 C. B. N. S. 230.

482. —.]—HARDY v. HOLLYDAY (1765),
cited in 4 Term Rep. 718; 100 E. R. 1264.

*Annotation:—***Mentd.** Grimstead v. Marlowe (1792), 4 Term
Rep. 717.

483. — Unless freeman.]—HINKS v. CLERK
(1679), 2 Lev. 252; 2 Show. 78; 83 E. R. 543.

*Annotation:—***Mentd.** Goodman v. Saltash Corpn. (1882),
7 App. Cas. 633.

484. — Burgess—Cannot claim in individual
right.]—EVAN v. AVON CORPN., No. 416, *ante*.

485. — Freeholders in manor.]—THOMPSON
v. ROBERTS (1732), Fortes. Rep. 339; 92 E. R. 880.

486. —.]—LLOYD v. JONES (1848), 6 C. B.
81; 5 Dow. & L. 784; Cox, M. & H. 111; 17
L. J. C. P. 206; 11 L. T. O. S. 152; 12 J. P.
567; 12 Jur. 657; 136 E. R. 1182.

*Annotations:—***Refd.** Murphy v. Ryan (1868), 16 W. R. 678.
Mentd. Chew v. Holroyd (1852), 8 Exch. 249; Stephenson
v. Ruine (1853), 2 E. & B. 744; Tomkins v. Jones (1889),
22 Q. B. D. 599; R. v. London County J.J. & L. C. C.
[1891] 1 Q. B. 153.

487. "Poor & indigent householders"—Class
too vague.]—A custom for poor & indigent house-
holders living in A. to cut & carry away rotten
boughs & branches in a chase in A. cannot be
supported; the description of the persons entitled
being too vague.]—SELBY v. ROBINSON (1788), 2
Term Rep. 758; 100 E. R. 409.

*Annotations:—***Refd.** Rivers v. Adams (1878), 3 Ex. D. 361.
Mentd. Mortimer v. Moore (1815), 8 Q. B. 291.

488. Right established—To cut rushes.]—
RACKHAM v. JESUP & THOMSON (1772), 3 Wils.
332; 95 E. R. 1081.

(c) *Corporations.*

489. General rule.]—R. v. RIPPON TOWN, No.
420, *ante*.

SECT. 3.—ADMISSIBILITY OF EVIDENCE.

490. Acts asserting right of common —
Admissible against occupiers of other parts of
common.]—BRYAN d. CHILD v. WINWOOD (1808),
1 Taunt. 208; 127 E. R. 812.

*Annotations:—***Mentd.** Andrews v. Hailes (1853), 2 E. & B.
349; Whitmore v. Humphries (1871), L. R. 7 C. P. 1;
A.-G. v. Tomline (1877), 5 Ch. D. 750; A.-G. v. Tomline
(1880), 15 Ch. D. 150.

491. Reputation — Admissible.]—WEEKS v.
SPARKE (1813), 1 M. & S. 679; 105 E. R. 253.

*Annotations:—***Consd.** Barnes v. Stuart (1834), 1 Y. & C. Ex.
119; Thomas v. Jenkins (1837), 6 Ad. & El. 525. **Folld.**
Prichard v. Powell (1845), 10 Q. B. 589. **Consd.** Dunraven
v. Llewellyn (1850), 15 Q. B. 791; Williams v. Morgan
(1850), 15 Q. B. 782. **Refd.** Crease v. Barrett (1835), 1
Cr. M. & R. 919.

492. — Though unsupported by usage.]
—CREASE v. BARRETT (1835), 1 Cr. M. & R. 919;
5 Tyr. 458; 4 L. J. Ex. 297; 149 E. R. 1353.

*Annotations:—***Refd.** Doe d. Tatham v. Wright (1836), 1
Har. & W. 729; Evans v. Taylor (1838), 7 Ad. & El. 617;
Trimbletown v. Keimms (1843), 9 Cl. & Fin. 749; Beaufort
v. Smith (1849), 4 Exch. 450; Hammond v. Bradstreet
(1854), 2 C. L. R. 1195; Hardeastle v. Dennison (1861),
10 C. B. N. S. 606; Evans v. Merthyr Tydvil U. D. C.

(1898), 79 L. T. 578; R. v. Norfolk County Council (1910),
26 T. L. R. 269. **Mentd.** De Rutzen v. Farr (1835), 5
L. J. C. B. 38; Ward v. Suffield (1839), 5 Bing. N. C.
381; Mortimer v. McCallan (1840), 6 M. & W. 58; Gerish
v. Chartier (1845), 1 C. B. 13; Hughes v. Hughes (1846),
15 M. & W. 701; Doe d. Welsh v. Langfield (1847), 16
M. & W. 497; Quilter v. Jorss (1863), 14 C. B. N. S. 747;
Carmarthen & Cardigan Ry. v. Manchester & Milford Ry.
(1873), L. R. 8 C. P. 685; Mors-le-Blanch v. Wilson (1873),
L. R. 8 C. P. 227.

493. — To prove common by vicinage.]
—PRICHARD v. POWELL, No. 127, *ante*.

494. —.]—EVANS v. MERTHYR TYDFIL
URBAN COUNCIL, No. 554, *post*.

495. Declaration of former tenant—Though
still alive—To prove common of vicinage—Ad-
missible.]—WALKER v. BROADSTOCK (1795), 1
Esp. 458, N. P.

*Annotations:—***Overd.** Papendick v. Bridgwater (1855), 5
E. & B. 166. *Walker v. Broadstock* as reported is clearly
contrary to law, because the second declaration was
received although the declarant was alive, & there was no
privity of estate between him & the reversioner (LORD
CAMPBELL, C.J.). **Refd.** R. v. Birmingham Overseers
(1861), 1 B. & S. 763.

496. Declaration of deceased person — Not
admissible as to rights over waste.]—CREASE v.
BARRETT (1835), 1 Cr. M. & R. 919; 5 Tyr. 458;
4 L. J. Ex. 297; 149 E. R. 1353.

*Annotations:—***Refd.** Hammond v. Bradstreet (1854), 2
C. L. R. 1195; Hardeastle v. Dennison (1861), 10 C. B. N. S.
606; Evans v. Merthyr Tydvil U. D. C. (1898), 79 L. T.
578. **Mentd.** De Rutzen v. Farr (1835), 4 Ad. & El. 53;
Doe d. Tatham v. Wright (1836), 1 Har. & W. 729; Evans
v. Taylor (1837), 7 Ad. & El. 617; Ward v. Suffield (1839),
5 Bing. N. C. 381; Mortimer v. McCallan (1840), 6 M. & W.
58; Gerish v. Chartier (1845), 1 C. B. 13; Hughes v.
Langfield (1847), 16 M. & W. 497; Beaufort v. Smith (1849), 4
Exch. 450; Quilter v. Jorss (1863), 14 C. B. N. S. 747;
Carmarthen & Cardigan Ry. v. Manchester & Milford Ry.
(1873), L. R. 8 C. P. 685; Mors-le-Blanch v. Wilson (1873),
L. R. 8 C. P. 227; R. v. Norfolk County Council (1910),
26 T. L. R. 269.

497. —.]—DUNRAVEN (EARL) v. LLEWELLYN,
No. 18, *ante*.

498. Manorial records—Signed by some copy-
holders.]—Parchment writings preserved amongst
the muniments of a manor, dated in 1698 & 1717,
purporting to be signed by many persons, copy-
holders of the manor, stating an unlimited right
of common in the commoners, which having been
found inconvenient, they had agreed to stock the
common in a certain restricted manner, is evidence
of reputation as to the general right, sufficient to
destroy the restricted right set up by pltf., a copy-
holder, in an action on the case against a free-
holder of the manor for overstocking the common
beyond such stint: although it was objected that
the instrument was not proved to have been
signed by a majority of the then copyholders of
the manor, nor that pltf. held the copyhold
tenement of any one of those who had signed it.]—
CHAPMAN v. COWLAN (1810), 13 East, 10; 104
E. R. 269.

*Annotation:—***Refd.** Johnstone v. Spencer (1885), 30 Ch. D.
581.

499. — Survey.]—BLANDY-JENKINS v. DUN-
RAVEN (EARL), No. 438, *ante*.

500. — Entry in court rolls.]—HEATH v.
DEANE, No. 251, *ante*.

501. County history — As to boundaries—Not
admissible.]—EVANS v. GETTING (1834), 6 C. & P.
586, N. P.

*Annotation:—***Consd.** Fowke v. Berington, [1914] 2 Ch. 308.
See, generally, BOUNDARIES, FENCES & PARTY-
WALLS, Vol. VII., pp. 311 *et seq.*

502. Crown survey.]—The lord of a manor
having attempted to inclose a portion of the waste,
a bill was filed against him by one of the tenants,
who was both a freeholder & a copyholder of the
manor, on behalf of himself & all the other free-
hold & copyhold tenants of the manor, to obtain
a declaration of their rights to common over the

waste, & to restrain the lord from inclosing any portion of the common:—*Held*: (1) pltf. was entitled to sue on behalf of all the freeholders & copyholders of the manor; (2) the burden of proof that after making the proposed inclosure, a sufficiency of the waste would be left to satisfy the commonable rights of the tenants, lay upon the lord, the tenants having in the first instance established their right to common.

(3) A survey made by the direction of the Crown in 1607, when the manor belonged to the Duchy of C., was produced in evidence, but the commission on which it was founded had not been produced, & could not be found:—*Held*: admissible.—*SMITH v. BROWNLOW (EARL)* (1870), L. R. 9 Eq. 241; 21 L. T. 739; 34 J. P. 293; 18 W. R. 271.

Annotations:—As to (1) *Refd.* *Betts v. Thompson* (1870), 23 L. T. 427; *Warrick v. Queen's College, Oxford* (1870), L. R. 10 Eq. 105; *London Sewers Comrs. v. Glasbe* (1871), 25 L. T. 614. As to (3) *Consd.* *Evans v. Merthyr Tydfil U. C.*, [1899] 1 Ch. 241. *Generally, Mentd.* *De la Warr v. Miles* (1881), 17 Ch. D. 535.

503. Maps—Of manor—Tithe map.—*SMITH v. LASTER*, No. 979, *post*.

504. Verdict in action between strangers to suit—Concerning right of other lands—Not admissible.—*Semble*: on an issue whether the occupier of close T. had, as appurtenant to it, right of common in a tract called M., the party asserting such right cannot give in evidence the verdict in an action between strangers to the defending suit, where the issue was whether the occupier of B., another close belonging to the owner of T., had a right of common in M., & the jury found for the commoner.—*WILLIAMS v. MORGAN* (1850), 15 Q. B. 782; 117 E. R. 654.

505. Evidence of general usage to dig gravel—Not under plea of right in respect of particular

tenement.—*WILSON v. PAGE* (1801), 4 Esp. 71, N. P.

506. Evidence of right of several fishery—Not under plea of common of fishery.—*BENETT v. COSTAR* (1818), 8 Taunt. 183; 2 Moore, C. P. 83; 129 E. R. 353.

See, generally, EVIDENCE.

SECT. 4.—DISCOVERY.

507. Court rolls of manor—Action for encroachment—Between two copyholders.—*FOLKARD v. HEMET* (1776), 2 Wm. Bl. 1061; 96 E. R. 624.

508. — Issue of right of common—Between two tenants of manor.—*ROGERS v. JONES* (1825), 5 Dow. & Ry. K. B. 484; 2 Dow. & Ry. M. C. 510.

Annotation:—*Distd.* *R. v. Whichford* (1839), 3 Jur. 533.

509. — To prove title as freehold tenant—& customary rights.—In a suit by a pltf. alleging himself to be a freehold tenant of a manor, against the lord, to establish customary rights over commons in the manor, where deft., by answer, denied both the title of pltf. & the alleged custom:—*Held*: pltf. was entitled to production of all the ct. rolls.—*WARRICK v. QUEEN'S COLLEGE, OXFORD* (1867), L. R. 3 Eq. 683; 36 L. J. Ch. 505.

Annotation:—*Distd.* *Owen v. Wynn* (1878), 9 Ch. D. 29.

510. Title deed—Of party claiming as owner in severalty—Land alleged to be waste of manor—Must be produced.—*A.-G. OF PRINCE OF WALES v. LAMBE* (1848), 11 Beav. 213; 17 L. J. Ch. 154; 10 L. T. O. S. 498; 12 Jur. 386; 50 E. R. 798.

On feigned issue under Inclosure Acts.—*See* No. 1045, *post*.

See, generally, COPYHOLDS; DISCOVERY, INSPECTION & INTERROGATORIES.

Part VII. Alienation and Apportionment of Rights of Common.

SECT. 1.—ALIENATION AND SEVERANCE.

511. General rule—Inalienable apart from land.—A right of common cannot be severed from the land & converted into common in gross.—*SMITH v. MILWARD* (1782), 3 Doug. K. B. 70; 99 E. R. 543.

512. Alienation of “commons”—Without reservation of manorial rights—Soil passes.—Under a conveyance by the lord of the manor of P. of “all those messuages, lands, tenements, commons, wastes, woods, underwoods, & the soil of the woods & underwoods of P.,” without any reservation of manorial rights, the soil of the common of P. passes.—*CATOR v. CROYDON CANAL CO.* (1813), 4 Y. & C. Ex. 593; 13 L. J. Ch. 89; 2 L. T. O. S. 225; 8 Jur. 277; 160 E. R. 1149, L. C.

513. Common appendant—Inalienable apart from land.—*ANON.* (1531), Y. B. 26 Hen. 8, fo. 4, pl. 15.

Annotations:—*Consd.* *Baring v. Abingdon* (1892), 62 L. J. Ch. 105. *Mentd.* *Cattley v. Arnold* (1858), 4 K. & J. 595.

514. — — — — ——*LENIEL v. HARSLOP* (1672), 3 Keb. 66; 84 E. R. 597; *sub nom.* *DANIEL v. HANSLIP*, 2 Lev. 67.

515. — — — — — Passes by grant of land—To which appendant.—*GUY v. BROWN* (1600), Moore, K. B. 644; 72 E. R. 813.

516. — — — — ——*LENIEL v. HARSLOP* (1672), 3 Keb. 66; 84 E. R. 597; *sub nom.* *DANIEL v. HANSLIP*, 2 Lev. 67.

See, now, Conveyancing Act, 1881 (c. 41), s. 6; SALE OF LAND.

517. Common appurtenant—May pass without deed.—*HUDDLESTON v. WOODROFFE* (1618), 2 Roll. Rep. 61; 81 E. R. 659.

518. — — — — ——*SACHEVERELL v. PORTER* (1637), W. Jo. 396; Cro. Car. 482; 82 E. R. 208.

Annotations:—*Consd.* *Cowlam v. Slack* (1812), 15 East, 108. *Distd.* *Baring v. Abingdon*, [1892] 2 Ch. 374. *Refd.* *Leniel v. Harslop* (1672), 3 Keb. 66.

519. — — — — — Alienable apart from land.—*ANON.* (1534), Y. B. 26 Hen. 8, fo. 4, pl. 15.

Annotations:—*Consd.* *Baring v. Abingdon*, [1892] 2 Ch. 374.

Mentd. *Cattley v. Arnold* (1858), 4 K. & J. 595.

520. — — — — — Where certain.—*LENIEL v. HARSLOP* (1672), 3 Keb. 66; 84 E. R. 597; *sub nom.* *DANIEL v. HANSLIP*, 2 Lev. 67.

521. — — — — — Inalienable apart from land—Common for all owner's beasts.—A common appurtenant for all the owner's beasts cannot be granted over.—*DRURY v. KENT* (1603), Cro. Jac. 11; 79 E. R. 13.

522. — — — — — Levant & couchant.—*LENIEL v. HARSLOP* (1672), 3 Keb. 66; 84 E. R. 597; *sub nom.* *DANIEL v. HANSLIP*, 2 Lev. 67.

Sect. 1.—Alienation and severance. Sect. 2. Part VIII. Sects. 1 & 2: Sub-sects. 1 & 2, A. & B.]

523. — Passes by grant of land—To which appurtenant.]—PRETTY v. BUTLER (1658), 2 Sid. 87; 82 E. R. 1272.

524. — Common of turbary.]—SOLME v. BULLOCK (1684), 3 Lev. 165; 83 E. R. 632.

525. — Except on sale of part of manorial demesne—Unless contrary intention expressed.]—BARING v. ABINGDON, No. 93, *ante*.

526. Alienation by demise—Not by parol.]—LATHBURY v. ARNOLD (1823), 1 Bing. 217; 8 Moore, C. P. 72; 1 L. J. O. S. C. P. 71; 130 E. R. 88.

Annotation:—Mentd. Hewlins v. Shippam (1826), 7 Dow. & Ry. K. B. 783.

527. — Whether becoming common in gross.]—*Qu.*: whether common appurtenant converted to common in gross by demising it.—BUNN v. CHANNEN (1813), 5 Taunt. 211; 128 E. R. 683.

— Extinguishment—On purchase by commoner of part of common.]—*See* Part XI., Sect. 1, sub-sect. 2, *post*.

528. Common in gross—Alienable only by leave of the lord.]—Commoner in gross cannot sell his common without leave of the lord.—ANON. (1309), Y. B. 2 Edw. 2, Sel. Soc. p. 55, pl. 7.

529. — Sole pasturage—Capable of being conveyed.]—WELCOME v. UPTON, No. 139, *ante*.

SECT. 2.—APPORTIONMENT.

530. General rule.]—(1) If I grant away the moiety of my manor, or if I be disseised of a moiety, or the moiety be in execution by *elegit*, we shall both have common; (2) in apportionment of common respect ought always to be had to the quality of the land to which it is allotted.—SMITH v. BENSALL (1597), Gouldsb. 117; 75 E. R. 1034.
Annotation:—Generally, Refd. Robertson v. Hartopp (1889), 43 Ch. D. 481.

531. Common appendant—On alienation by commoner—Of part of land to which appendant.]—TYRRINGHAM'S CASE, No. 22, *ante*.

532. — — — — —.]—WYAT WILD'S CASE (1609), 8 Co. Rep. 78 b.; 77 E. R. 593.

Annotations:—Refd. Sacheverill v. Porter (1637), Cro. Car. 482; Baring v. Abingdon, [1892] 2 Ch. 374. **Mentd.** King v. Melling (1672), 1 Vent. 214; R. v. Starkey (1837), 7 Ad. & El. 95.

533. — On lease by commoner—Of part of land to which appendant.]—MORSE & WEBB'S CASE, No. 57, *ante*.

534. — On purchase by commoner—Of part of land over which common claimed.]—TYRRINGHAM'S CASE, No. 22, *ante*.

535. — — — — —.]—WYAT WILD'S CASE (1609), 8 Co. Rep. 78 b.; 77 E. R. 593.

Annotations:—Refd. Sacheverill v. Porter (1637), Cro. Car. 482; Baring v. Abingdon, [1892] 2 Ch. 374. **Mentd.** King v. Melling (1672), 1 Vent. 214; R. v. Starkey (1837), 7 Ad. & El. 95.

536. Common appurtenant—On sale by commoner—Of part of land to which appurtenant.]—WYAT WILD'S CASE (1609), 8 Co. Rep. 78 b.; 77 E. R. 593.

Annotations:—Refd. Sacheverill v. Porter (1637), Cro. Car. 482; Baring v. Abingdon, [1892] 2 Ch. 374. **Mentd.** King v. Melling (1672), 1 Vent. 214; R. v. Starkey (1837), 7 Ad. & El. 95.

537. — — — — —.]—ANON. (1618), Hob. 235; 80 E. R. 381.

538. — Common not extinguished.]—COLE v. FOXMAN (1618), Noy, 30; 74 E. R. 1000.

Annotations:—Mentd. Scholes v. Hargreaves (1792), 5 Term Rep. 46; Cheesman v. Hardham (1818), 1 B. & Ald. 706; Robertson v. Hartopp (1889), 43 Ch. D. 484.

539. — — — — —.]—SACHEVERELL v. PORTER (1637), W. Jo. 396; Cro. Car. 482; 82 E. R. 208.

Annotations:—Consd. Baring v. Abingdon, [1892] 2 Ch. 374. **Mentd.** Cowlam v. Slack (1812), 15 East, 108.

540. — Certain — Divisible.]—SPOONER v. DAY & MASON (1636), Cro. Car. 432; 79 E. R. 975; *sub nom.* DAY v. SPOONER, W. Jo. 375; 4 Vin. Abr. 591, pl. 4.

Annotation:—Mentd. Hayward v. Cunnington (1667), 1 Lev. 231.

Part VIII. Acquisition of Commons under Compulsory Powers.

See Lands Clauses Consolidation Act, 1845 (c. 18) (in this Part referred to as 1845 Act) ss. 99–107, &, generally, COMPULSORY PURCHASE OF LAND & COMPENSATION.

SECT. 1.—ACQUISITION OF RIGHTS OF OWNER OF SOIL.

541. Right to compel specific performance—Moor vested in trustees by statute—For benefit of inhabitants.]—Lands of a moor were vested in trustees by Act of Parliament, which provided that “all actions & suits by or on behalf of the

trustees against any persons or bodies might be prosecuted in the name of one as nominal plff., on behalf of the inhabitants of the parish.” A railway co. took lands & paid money into ct., & gave a bond under 1845 Act & took possession. They ultimately agreed in writing to pay a certain sum, but failing to complete, a bill was filed by one of the trustees on behalf of the inhabitants for specific performance, setting out the clause of the Act giving power to sue:—*Held*: a demurrer for want of equity to this bill must be overruled.—CRANSTONE v. HEMEL HEMPSTEAD & LONDON & NORTH WESTERN RY. CO. (1868), 17 L. T. 596.

542. Who entitled to value of soil taken—Turf

PART VII. SECT. 1.

523 i. Common appurtenant—
*grant of land.]—*A lease was made to M. “of all that part of J., together with a right of commonage & for the use of the said farm, as now in possession of M. It appeared that at execution of the lease, M. was in possession of a right of commonage on the adjoining mountain for the use of the farm:—*Held*: the lease gave M. the farm,

together with the same commonage which he then enjoyed in respect thereof.—O'HARE v. FAHY (1859), 10 I. C. L. R. 318.—**IR.**

PART VII. SECT. 2.

536 i. Common appurtenant — On lease by commoner.]—M. demised to F. & others 17 acres, portion of 41 acres, by the following description: “All that, etc., part of the land of J., con-

17 acres, now in possession of F. & partners, together with a right of commonage for the use of the said farm,” for a term of 18 years, which was a shorter term than that for which the grantor was possessed:—*Held*: the lessees of the 17 acres acquired as against the head landlord, a proportional share of the common appurtenant to the 41 acres.—O'HARE v. FAHY (1859), 10 I. C. L. R. 318.—**IR.**

common allotted to occupiers of cottages—In lieu of common of turbary in waste of manor—Construction of Inclosure Act.]—*Re* CHRISTCHURCH INCLOSURE ACT, No. 366, *ante*.

Effect of conveyance—By owner of soil—On rights of commoners.]—*See* No. 543,

SECT. 2.—ACQUISITION OF COMMONABLE AND OTHER RIGHTS.

SUB-SECT. 1.—IN GENERAL.

543. Compensation payable to commoners—Appointment of surveyor to ascertain—Onus on promoters—Not commoners.]—Where the promoters of an undertaking acquire by conveyance from the lord of the manor, the right in the soil of any lands subject to any rights of common, but no effectual meeting is held for the appointment of a committee by the commoners, to agree with the promoters as to the amount of compensation for the extinguishment of their commonable rights, it is the duty of the promoters, and not of the commoners, to take the initiative in getting a surveyor appointed by justices, to determine the amount of compensation.

Where the promoters fail to do so, and enter upon the land without payment or deposit of compensation to the commoners, whose rights of common are disturbed by the promoters, any such commoner may maintain an action against the promoters for the injury thereby sustained.—*STONEHAM v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1871), L. R. 7 Q. B. 1; 41 L. J. Q. B. 1; 25 L. 6 J. P. 499; 20 W. R. 77.

Annotation. *Re* *Lowther v. Cale Ry.*, [1891] 3 Ch. 443.

544. — Before construction of works by promoters of undertaking—Though soil conveyed by lord of manor—1845 Act, s. 100.]—*STONEHAM v. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, No. 543, *ante*.

545. — May be ascertained by agreement apart from statute—Statutory procedure not obligatory—1845 Act, ss. 101–106.]—1815 Act, ss. 101–106, with reference to the ascertainment of compensation for common lands, are not imperative so as to preclude the enforcement of specific performance of an agreement entered into otherwise than as mentioned in those sects.—*BEE v. STAFFORD & UTTOXETER RY. CO.* (1875), 23 W. R. 868.

See, also, No. 553, *post*.

Moor vested in trustees on behalf of inhabitants—Right to compel specific performance of agreement for purchase.]—*See* No. 541, *ante*.

2. APPORTIONMENT AND APPLICATION OF PURCHASE-MONEY.

A. Who Entitled and in what Proportions.

546. Copyholders & freeholders of manor—Entitled to common of pasture under bye-law—In proportion to stint laid down in bye-law.]—In 1835 certain bye-laws of a manor were passed, which provided that every copyholder & freeholder of lands & tenements within the manor should be entitled to common of pasture for one head of cattle for every £10 annual value of his lands & tenements, provided always that the whole number of cattle to any one copyholder or freeholder should not exceed thirty, & that each copyholder or freeholder should, on or before Aug. 12 in every year, claim such right; in default of such claim same should be transferable to the occupiers of such lands or tenements respectively in ratable

proportions, in addition to their own rights as occupiers; & that every occupier of any copyhold or freehold lands or tenements within the manor should be entitled to common of pasture, when his or her rent or annual value was at or under £10 a year, to three head of cattle, & so on in proportion of three head of cattle up to the value of £50, after which there was to be only one head of cattle for every £5 of value. Portions of the common lands were purchased by the E. Waterworks Co. & other cos., & the purchase-money, amounting to about £4,000, paid into ct. A suit was instituted to determine the rights of the parties in the £4,000:—*Held*: the fund was divisible among the copyhold tenants of the manor & the freeholders within it, according to the stint fixed by the first of the above clauses.—*FOX v. AMHURST* (1875), L. R. 20 Eq. 403; 44 L. J. Ch. 666.

547. Occupiers—Under copyholders—Not entitled.]—*AUSTIN v. AMHURST*, No. 399, *ante*.

548. — Having rights of turbary allotted by Inclosure Act to occupiers as such—Entitled—Not freeholders of cottages occupied.]—*Re* CHRISTCHURCH INCLOSURE ACT, No. 366, *ante*.

549. Divided between persons entitled equally—Method of ascertaining relative proportions of rights.]—*WEATHERLEY v. LAYTON*, [1892] W. N. 165.

B. Other Cases.

See Inclosure Act, 1852 (c. 79), s. 22; Inclosure Act, 1854 (c. 97), ss. 15–20; Commonable Rights Compensation Act, 1882, c. 15.

550. Petition for appropriation of purchase-money—Land subject to right of pasturage for freemen of corporation—Parties to be served—Representative number of freemen.]—*Re* GREAT NORTHERN RAILWAY ACT, *Ex p.* LINCOLN CORPN. (1851), 18 L. T. O. S. 298; 16 Jur. 756.

551. Application of purchase-money—By investment for benefit of commoners—Division refused—Commoners resident freemen of borough.]—Every resident freeman of the borough of B. had the right of annually turning on to the Freemen's Commons, allotted under an Inclosure Act of 1795 to the corpn., as trustees of the allotment, in lieu of certain rights of common of resident freemen, one head of stock for a period fixed from time to time by the town council, subject to a payment annually fixed by the town council for every head of stock so turned on; this right was transferable. A portion of the Freemen's Common having been taken by a railway co., on a bill to obtain the direction of the ct. as to the application of the purchase-money, filed by the committee appointed under Lands Clauses Act, 1845, s. 102:—*Held*: the present resident freemen were not entitled to have the corpus of the purchase-money divided amongst them; the proper course would be to invest the money in land, to be held in trust for the freemen from time to time resident within the borough; in the meantime the money ought to be invested, & the dividends paid to such resident freemen at the same time in each year as they had been accustomed to enter upon the enjoyment of their rights of common.—*NASH v. COOMBS* (1868), L. R. 6 Eq. 51; 37 L. J. Ch. 600; 32 J. P. 612; 16 W. R. 663.

Annotations:—*Consd.* *Richards v. De Winton*, *Richards v. Evans*, [1901] 2 Ch. 566. *Re* *Austin v. Amburst* (1878), 26 W. R. 312.

552. Costs—Commoners establishing their claim—Entitled to.]—Common land was taken under 1845 Act, & a sum paid under the Act to a committee of commoners was, on bill filed, paid into ct. Various persons in chambers established their claims to share in the funds:—*Held*: they

Sect. 2.—Acquisition of commonable and other rights : Sub-sect. 2, B. Sect. 3. Part IX. Sects. 1 & 2.

were entitled to receive three guineas each for their costs.—*WATERLOW v. BURT* (1870), 18 W. R. 683.

553. Proof that all parties interested present before court—All persons found commoners by court baron of manor.—On an application for payment out of ct. of a sum of £122, paid into ct. by the P. Urban District Council, under 1845 Act, s. 107, as compensation for the extinction of certain commonable rights over a portion of H. Moor, acquired by the council under the powers conferred by Paignton Urban District Water Act, 1900, which incorporated the 1845 Act, the two questions that had to be decided were, firstly, whether the ct. had jurisdiction to order the payment out otherwise than to a committee of the commoners; & secondly, whether there was sufficient evidence that the parties before the ct. were the only persons entitled. The land in question formed part of the common of a manor, & a ct. baron had been held to ascertain of whom the commoners consisted; all the persons found to be commoners by the ct. baron were before the ct.:—*Held*: (1) 1845 Act, Inclosure Act, 1854 (c. 97), & Commonable Rights Compensation Act, 1882 (c. 15), were all applicable; (2) there was sufficient evidence that all the parties interested were present.—*Re GERVIS* (1902), 46 Sol. Jo. 336.

554. Proof of right—What is admissible evidence.—In an action in the Ch. Div. by a statutory committee of commoners for specific performance of an agreement to purchase commonable rights, an order was made directing the trial before a jury in the Q. B. Div. of the following issue of fact, namely, whether a certain piece of land was common land or subject to any commonable rights either of the commoners of the parish of C., or of the commoners of the parish of L.:—*Held*: evidence of reputation was admissible on the trial of such an issue.—*EVANS v. MERTHYR TYDFIL URBAN COUNCIL*, [1899] 1 Ch. 211; 68 L. J. Ch. 175; 79 L. T. 578; 43 Sol. Jo. 151, C. A.

Annotations: *Refd.* *Heath v. Deane*, [1905] 2 Ch. 86. *Mercer v. Denne*, [1905] 2 Ch. 538.

Admissibility of evidence, *see, generally*, Part VI., Sect. 3, *ante*.

JURISDICTION TO DEAL WITH PURCHASE-MONEY.

See 1845 Act, s. 103; Inclosure Act, 1852 (c. 79), s. 22; Inclosure Act, 1854 (c. 97), ss. 15–

17; Commonable Rights Compensation Act, 1882 (c. 15), ss. 2, 4.

555. Committee of commoners—Or Board of Agriculture—Court has no jurisdiction—Except in cases of misconduct.—Under 1845 Act, & Inclosure Act, 1854, where common lands are taken for a public undertaking, the committee of commoners appointed to receive the compensation money payable in respect of the extinguishment of commonable rights, or, in cases of difficulty, the Board of Agriculture, as the successors of the Inclosure Comrs., are the proper tribunal to determine who are the persons interested in such money, & what are their interests, & in the absence of misconduct, the ct. has no original power to interfere with the jurisdiction of either body. An action against a committee of commoners by a person who claimed to be entitled as sole commoner to the whole of the compensation money in their hands was dismissed for want of jurisdiction.—*RICHARDS v. DE WINTON*, *RICHARDS v. EVANS*, [1901] 2 Ch. 566; 70 L. J. Ch. 719; 84 L. T. 831; 65 J. P. 696; 50 W. R. 87; *affd.*, [1903] 1 Ch. 507, C. A.

Annotations:—*Folld.* *Salmon v. Edwards*, [1910] 1 Ch. 552. *Refd.* *Re Gervis* (1902), 46 Sol. Jo. 336.

556. — Board of Agriculture—Board not to inquire into appointment of committee—Inclosure Act, 1852 (c. 79), s. 22.—Where under 1845 Act & Inclosure Acts, 1852 & 1854, common lands have been taken for a public undertaking & a committee of commoners has been appointed to receive & has received the compensation payable in respect of the extinguishment of commonable rights, the Board of Agriculture & Fisheries have jurisdiction to entertain an application by the committee under Inclosure Act, 1852, s. 22, without entering into any question as to the appointment or constitution of the committee. It is sufficient that the committee is a *de facto* committee.

A motion in an action against a *de facto* committee of commoners by persons suing on behalf of themselves & all other commoners for payment into ct. of compensation money in the hands of the committee on the ground that such committee was not properly constituted was dismissed for want of jurisdiction.—*SALMON v. EDWARDS*, [1910] 1 Ch. 552; 79 L. J. Ch. 296; 102 L. T. 456; 74 J. P. 177; 26 T. L. R. 325; 54 Sol. Jo. 406; 8 L. G. R. 405.

See, also, No. 553, *ante*.

Part IX: Rights, Remedies and Liabilities of Lord of Manor as Owner of Soil.

SECT. 1.—IN GENERAL.

557. General rule.—In an action for trespass for breaking & entering pltf.'s close, & treading down the grass, etc., & breaking & destroying the hedges & fences of pltf., etc., deft. as to all the trespasses, pleaded that pltf.'s close was parcel of the manor of C., & that a certain messuage & four acres of land was parcel, & a customary tenement of that manor, & that there was, & from time whereof, etc., there had been a custom within the manor that the customary tenant of that tenement should have common of pasture upon pltf.'s close; that J., being seised of the customary tenement, having occasion to use his common of pasture, entered the close in which, etc., & put

his cattle in, & because the hedges & fences had been improperly erected, deft. threw them down. Pltf. in his replication took issue upon the custom, & new assigned that deft. entered for other purposes than those mentioned in the plea:—*Held*: (1) upon the issue joined upon the replication, pltf. was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, & a grant to him of the *locus in quo* under such custom, & it was not necessary that that custom should be specially replied; (2) a custom for the lord of a manor to inclose the waste without limit or restriction, being inconsistent with the rights of the commoners, was bad in point of law, but that a custom to inclose, even as against common of

turbary, parcels of the waste, leaving a sufficiency of common, was good, & it lay on the lord, or his grantee, to show that a sufficiency of common was left; (3) when the lord or his grantee erects fences upon the common, the commoner may by law destroy the fences, & the fact of deft. having entered upon pltf.'s close, & thrown down the whole of the fences which he had erected, when he might have entered upon the close without throwing down any part of the fences, was not evidence that he entered for other purposes than those mentioned in the plea, & did not warrant the jury in finding a verdict for pltf. on the new assignment.

(4) The lord has rights of his own reserved upon the waste; I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common, & to every benefit to be derived from the soil, not inconsistent with the rights of commoners. When it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes (BAYLEY, J.). —ARLETT v. ELLIS (1827), 7 B. & C. 316; 9 Dow. & Ry. K. B. 897; 5 L. J. O. S. K. B. 301; 108 E. R. 752; *subsequent proceedings* (1829), 9 B. & C. 671.

Annotations:—*As to* (2) **Consd.** *Elwood v. Bullock* (1844), 13 L. J. Q. B. 330; *Hall v. Byron* (1877), 4 Ch. D. 667; *Parrott v. Watts* (1877), 37 L. T. 755. **Refd.** *Salisbury v. Gladstone* (1861), 9 H. L. Cas. 692; *Blackett v. Bradley* (1862), 1 B. & S. 910. *As to* (3) **Refd.** *Perry v. Fitzhowe* (1846), 8 Q. B. 757. *As to* (4) **Consd.** *Wakefield v. Buccleuch* (1867), L. R. 4 Eq. 613; *Robertson v. Hartopp* (1889), 43 Ch. D. 484. **Refd.** *Hilton v. Granville* (1844), 5 Q. B. 701; *Blackett v. Bradley* (1862), 1 B. & S. 940; *Hall v. Byron* (1877), 4 Ch. D. 667; *Parrott v. Watts* (1877), 37 L. T. 755; *Robinson v. Dulcep Singh* (1879), 11 Ch. D. 798.

558. ——.]—A lord of a manor has no right to a common; he has a right to the soil, to dig, to plant upon, & to do everything authorised by Stat. Merton (LORD THURLOW, C.).—*BOLTON v. LOWTHER* (1786), Dick. 677; 21 E. R. 435, L. C.

559. May have right to put cattle on waste of adjoining manor.--In respect of waste of own manor.]--SEFTON (EARL) *v.* COURT (1826), 5 B. & C. 917; 8 Dow. & Ry. K. B. 741; 4 L. J. O. S. K. B. 319; 108 E. R. 311.

Common of vicinage, *see* Part II., Sect. 1, sub-
sect. 5, *ante*.

560. Liability for nuisance—Pond on common .
Common managed by committee of commoners.] --
 A pond which was part of a common of a manor was a nuisance. The copyhold tenants had been in the habit of appointing a committee of themselves, with the assent of the lord of the manor, to manage & regulate the common:—*Held*: under Nuisances Removal Act, 1855 (c. 121), s. 12, the lord of the manor was not the proper party against whom to proceed for abating the nuisance.—

53. **THE UNION GUARDIANS v. ST. PAUL'S & CHAPTER** (1868), 18 L. T. 522; 33 J. P.

Right of lord to allotment on inclosure.]—See Part XIII., Sect. 7, sub-sect. 4, A., *post*.

Alienation of soil of common.]—*See* No. 512,
ante.

SECT. 2.—AS TO PASTURE.

561. Right of drift—& impounding—Without custom—Including beasts of commoners—For purpose of separating stranger's cattle.]—The lord or any commoner seeing a stranger's beasts [in the common] may impound or drive them out of the common without custom, & to sever them

from the beasts of the commoners, if it cannot be otherwise done, may drive them & the beasts of the commoners together to a convenient place to separate them (*per* CUR.).—THOMAS v. NICHOLS (1681), 3 Lev. 40; 83 E. R. 566.

562. ——— By custom—For manor-reeve—
Whenever steward shall appoint.] — A custom
for the reeve of a manor to make a drift of the
cattle upon a common within the manor at any
time when the steward of the manor shall appoint,
& impound such as have no right upon the common
anywhere within the manor is good, & not in-
consistent with the claim of a right of common
throughout the year.—FOLLET v. TROAKE (1705),
2 *Ld. Raym.* 1186 ; 92 *E. R.* 284.

563. — Right of distress incident to.]— Distress is incident to a drift of common.—**BROMFIELD v. TEIGH** (1673), 2 Lev. 87; 3 Keb. 163; 83 E. R. 462.

564. May maintain trespass—Against stranger putting in cattle—Unless damage negligible.]—*MARYS'S CASE*, No. 743, *post*.

565. Right to distrain—Cattle of commoner surcharging common—Not where right of common for cattle levant & couchant.]—SLOPER v. ALLEN (1617), 1 Brownl. 171; 123 E. R. 735.

Annotation :—**Mentd.** Bowen v. Joukin (1837), 6 Ad. & El. 911.

566. -----.]--ANON. (1770), 3 Wils.
126 ; 95 E. R. 970.

Annotation :—**Consd.** *Cape v. Scott* (1874), L. R. 9 Q. B. 269.

567. ——— Where right of common certain
- Right of distress of excess cattle - Where separ-
able.]—ELLIS *v.* ROWLES (1750), Willes, 638 ; 125
 E. R. 1361.

Annotation :—**Distd.** *Bowen v. Jenkin* (1837), 6 Ad. & El. 911.

568. — Cattle of stranger.] — THOMAS v. NICHOLS, No. 561, *ante*.

569. ———.]—ANON. (1770), 3 Wils. 126 ;
95 E. R. 970.

Annotation :—**Consd.** *Cape v. Scott* (1874), L. R. 9 Q. B. 269.

See, also, Nos. 562, 563, ante.

570. No right to drive away commoner's cattle
—From stack of corn erected by lord on common.]
—FARMOR (FARMER) v. HUNT (1611), Cro. Jac.
271; 1 Brownl. 220; Yelv. 201; 79 E. R. 233.

571. May license stranger to pasture cattle—
If sufficient common left for commoners—Deed
necessary, if for time certain—Not if pro hac vice.]
—SMITH v. FETHERWELL (1675), 1 Freem. K. B.
190 ; 2 Mod. Rep. 6 ; 89 E. R. 135.

Annotation: —**Refid.** Atkinson v. Teasdale (1772), 2 Wm. Bl. 817.

572. ———.]—ATKINSON v. TEASDALE
(1772), 2 Wm. Bl. 817 ; 3 Wils. 278 ; 96 E. R. 482.

Annotations: - **Consd.** Robertson v. Hartopp (1889), 43 Ch. D. 484. **Mentd.** Hobson v. Todd (1790), 4 Term Rep. 71.

573. Not liable for damage done by lessee—Unless as agent of the lord—Or with his licence—Lease of right to train & gallop horses.]—(1) A custom or customary bye-law whereby the commoners of a manor might take or destroy rabbits or game on the waste, is not necessarily void for unreasonableness.

(2) *Seemle*: a custom for any person, not merely any copyholder, to kill rabbits on a manor without molestation would be on the face of it unreasonable.

(3) The lord of the manor by deed leased the right to train & gallop horses on the waste of the manor: - *Held*: the lord would not be liable for damage done to the rights of common of pasturage of the copyholders by the lessee, unless it was proved that the lessee caused the damage as the lord's agent or with his licence.

(4) *Semble* : a licence to train & gallop horses

Sect. 2.—As to pasture. Sects. 3, 4 & 5: Sub-sect. 1.] does not of necessity involve injury to the right of pasturage.—*COOTE v. FORD* (1900), 82 L. T. 482; 17 T. L. R. 58.

See, also, Nos. 647, 702, post.

SECT. 3.—AS TO SUBSOIL.

574. Cannot open pits—& endanger commoner's beasts.]—*GEO. v. COTHER* (1663), 1 Sid. 106; 82 E. R. 999; *sub nom. COO v. CARTHORN*, 1 Keb. 453. *Annotation:—Consd. Robinson v. Duleep Singh* (1879), 11 Ch. D. 798.

575. May dig & remove subsoil—If sufficient common left—Brick earth.]—*FILEWOOD v. PALMER* (1729), Mos. 169; 25 E. R. 331; *sub nom. — v. PALMER*, 5 Vin. Abr. 8, pl. 33, L. C.

Annotations:—Consd. Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613; *Robinson v. Duleep Singh* (1879), 11 Ch. D. 798. *Refd. Malvern Hills Conservators v. Whitmore* (1909), 100 L. T. 841.

576. ——— Licensee from lord digging turves—Must plead sufficiency left.]—*GREENHOW v. ILSLEY* (1747), Willes, 619; 125 E. R. 1351.

Annotation:—Folld. Rogers v. Wynne (1826), 7 Dow. & Ry. K. B. 521.

577. ——— Onus of proof of disturbance on commoner.]—*HALL v. BYRON* (1877), 4 Ch. D. 667; 46 L. J. Ch. 297; 36 L. T. 367; 25 W. R. 317.

Annotations:—Consd. Bell v. Love (1883), 10 Q. B. D. 547; *Malvern Hills Conservators v. Whitmore* (1909), 8 L. G. R. 179. *Refd. Robinson v. Duleep Singh* (1879), 11 Ch. D. 798; *A.-G. v. Welsh Granite Co.* (1887), 35 W. R. 617; *Robertson v. Hartopp* (1889), 43 Ch. D. 484. *Mentd. Roe v. Siddons* (1888), 22 Q. B. D. 224; *Baring v. Abingdon*, [1892] 2 Ch. 374.

578. ——— ———.]—(1) The lord of a manor to whom the soil belongs has a right to dig for gravel & sand & to quarry for stone & minerals which lie under the waste for his own profit so long as he does not materially deprive the commoners of commonable rights, & the *onus* is on the commoner who complains of what is being done to show that his enjoyment has been hindered.

(2) Working a quarry properly fenced, when every effort has been made to do as little injury as possible, is not prohibited by Malvern Hills Act, 1884 (c. 175), s. 25.—*MALVERN HILLS CONSERVATORS v. WHITMORE* (1909), 100 L. T. 841; 73 J. P. 329; 8 L. G. R. 179.

579. ——— ———.]—*Pltf.*, being entitled to certain rights of fold course over a warren, claimed an injunction restraining *deft.*, who was lord of the manor, from digging gravel on the common, & from inclosing a part of it round the warren's lodge:—*Held*: (1) *deft.* was entitled to dig gravel, provided he did not infringe the commoners' rights; (2) on the evidence, there had been no substantial interference with the commoners' rights; (3) the extension of the curtilage of the warren's lodge had only been such as was proper & necessary.

Deft. derived his title under a lease & grant of the reversion on the lease. The lease contained a demise of "all that warren of conies at L.":—*Held*: (4) in the circumstances, the soil of the warren passed, & not merely a franchise.—*ROBINSON v. DULEEP SINGH* (1879), 11 Ch. D. 798; 48 L. J. Ch. 758; 41 L. T. 311.

Annotation:—As to (1) & (2) Refd. Robertson v. Hartopp (1889), 43 Ch. D. 484.

580. ——— Sufficiency determined by rights of commoners—Not by number of sheep actually on common.]—In an action brought on behalf of all the tenants of a manor to restrain the lord

inclosing parts of the waste, & from digging or removing any part of the soil of the waste, so as to interfere with their rights of common, it was shown that the tenants had rights of common of pasturage appendant over the waste for sheep, & that certain landowners not tenants of the manor had rights of common appurtenant over it for sheep, & that such rights appendant & appurtenant entitled the commoners to turn out a greater number of sheep than the waste would carry, but it was also shown that having regard to the average number of sheep which had been turned out for many years it was highly improbable that nearly as many sheep as the waste could carry would ever be turned out upon it:—*Held*: (1) the question whether there was a sufficiency of common must be determined, not according to the average number of sheep which the commoners had for a great number of years been in the habit of turning out, but according to the aggregate number of sheep which they were entitled to turn out; there was therefore not a sufficiency of common, & the lord ought to be restrained from doing any acts which would diminish the amount of pasturage.

(2) *Qu.*: whether, in ascertaining sufficiency of common, regard ought to be had to the present & modern system of sheep farming, according to which the sheep do not while turned out get all their sustenance from the common.—*ROBERTSON v. HARTOPP* (1889), 43 Ch. D. 484; 59 L. J. Ch. 553; 62 L. T. 585; 6 T. L. R. 126, C. A.

Annotations:—As to (1) Consd. Scott v. Baring (1895), 61 L. J. M. C. 200. *Refd. Malvern Hills Conservators v. Whitmore* (1909), 100 L. T. 841. *Generally, Mentd. Baring v. Abingdon*, [1892] 2 Ch. 374.

581. ——— & diminish common—By custom.]—*BATESON v. GREEN* (1793), 5 Term Rep. 411; 101 E. R. 230.

Annotations:—Folld. Weeks v. Sparke (1813), 1 M. & S. 679. *Consd. Arlett v. Ellis* (1827), 7 B. & C. 346; *Hilton v. Granville* (1841), Cr. & Ph. 283; *Hilton v. Granville* (1844), 5 Q. B. 701; *Wakefield v. Buccleuch* (1867), L. R. 4 Eq. 613; *Hall v. Byron* (1877), 4 Ch. D. 667. *Refd. Wilson v. Willes* (1896), 3 Smith, K. B. 167; *Humphries v. Brogden* (1850), 12 Q. B. 739; *Salisbury v. Gladstone* (1861), 9 H. L. Cas. 692; *Blackett v. Bradley* (1862), 1 B. & S. 940; *Robertson v. Hartopp* (1889), 43 Ch. D. 484; *Ramsey v. Cruddas* (1892), 68 L. T. 364.

See, also, No. 582, post.

— **Under Inclosure Acts.]**—*See Part XIII., Sect. 7, sub-sect. 1, C., post.*

SECT. 4.—AS TO SPORTING RIGHTS.

582. Right to make rabbit warren—& fish ponds.]—*PELLING v. LANGDEN* (1601), Owen, 114; 74 E. R. 940; *sub nom. BELLEW v. LANGDON*, Cro. Eliz. 876.

Annotation:—Folld. Hadesden v. Gryssel (1607), Cro. Jac. 195.

583. ———.]—*HADESDEN v. GRYSSEL* (1607), Cro. Jac. 195; 79 E. R. 170; *sub nom. HOLDESSEN v. GRESIL*, 1 Brownl. 208; *sub nom. HODDESSEN v. GRESIL*, Yelv. 104; *subsequent proceedings, sub nom. GRESIL v. HODDESSEN* (1608), Yelv. 143.

Annotations:—Folld. Hassard v. Cantrell (1695), 1 Lut. 101. *Refd. Howard v. Spencer* (1665), 1 Sid. 251. *Mentd. Ashmead v. Ranger* (1699), Fortes. Rep. 152; *Hall v. Harding* (1769), 4 Burr. 2426; *Atkinson v. Teasdale* (1772), 2 Wm. Bl. 817.

584. ———.]—*HASSARD v. CANTRELL* (1695), 1 Lut. 101; 125 E. R. 53.

Annotations:—Consd. Cope v. Marshall (1757), 2 Wils. 51. *Refd. Atkinson v. Teasdale* (1772), 3 Wils. 278; *Robertson v. Hartopp* (1889), 43 Ch. D. 484. *Mentd. Chandler v. Roberts* (1779), 1 Doug. K. B. 58.

585. ——— Unless commoners' rights interfered with—Though owner of free warren by royal grant.]—*GRISEL v. LEICHE* (1621), W. Jo. 12; 82 E. R.

8; *subsequent proceedings, sub nom.* GREESLY v. LEA & TAYLOR (1622), Palm. 319.

See, also, Part X., Sect. 1, sub-sect. 2, A., sub-sect. 3, *post*.

586. — Has right of action against commoner surcharging common.]—GREESLY v. LEA & TAYLOR (1622), Palm. 319; 81 E. R. 1102.

587. Right of shooting over common—Not shared by owners of cattlegate over common.]—RIGG v. LONSDALE (EARL), No. 320, *ante*.

— Under Inclosure Acts.]—*See* Part XIII., Sect. 7, sub-sect. 1, B., *post*.

Right of free warren.]—*See* Part V., *ante*.

Regulation of commoners' rights to take rabbits by bye-law.]—*See* No. 573, *ante*.

SECT. 5. — APPROVEMENT.

SUB-SECT. 1.—WHO MAY APPROVE.

588. At common law—Lord of manor—Leaving sufficient for commoners.]—ANON. (1221), 2 Co. Inst. at p. 85.

*Annotation:—*Consd. Grant v. Gunner (1809), 1 Taunt. 435.

589. — — — — —.]—(1) Stat. Merton (20 Hen. 3, c. 4) was but affirmative of the common law, for at common law the lord could approve leaving sufficient for the tenants.

(2) When the lord makes an approvement it is a proper course to summon the tenants by which they can assure themselves that the approvement is reasonable.—PROCTER v. MALLORIE (1616), 1 Roll. Rep. 365; 81 E. R. 537.

*Annotations:—*Mentd. R. v. Glastonby (1737), Lee temp. Hard. 355; Thornhill v. Huddersfield (1809), 11 East, 349.

590. — — — — —.]—TYSEN v. CLARKE (1774), Loft, 496; 3 Wils. 541; 98 E. R. 766.

591. — — — — — Right not abridged by custom for tenants to approve under certain restrictions.]—Trespass for breaking & entering a close, lately part of a waste in the manor. Defts. pleaded not guilty, & also several justifications; one, under a right of common, to which plff. replied a right of approving in the lord, leaving a sufficiency of common; another, under a right of digging sand or gravel upon the waste, which was traversed by the replication. Defts. also pleaded a custom within the manor, that if any person has been desirous to approve or inclose any part of the waste of the manor, obtaining the consent & licence of the lord, he might be presented by the homage of the ct. baron at a general ct., & if the homage thought that such inclosure would be of no prejudice to any of the tenants, etc. of the manor, it had been the custom to present that such person, so obtaining the consent & licence of the lord, might inclose the parcel of the waste, & a fine or rent had been set on such person by the homage; the plea then stated that the homage had not presented any such person, etc. Replication, that the lord had a right to inclose the said parcel under the Stat. Merton, & did approve same, there being left common sufficient to all persons having a right, etc. To this defts. demurred severally:—*Held*: the right of the lord to approve was a common law right & was not abridged by the custom giving the tenants a right of inclosing under certain restrictions.—DUBERLEY v. PAGE (1787), 2 Term Rep. 392, n.; 100 E. R. 211; *subsequent proceedings* (1788), 2 Term Rep. 391.

592. — — — — — Against common appurtenant without number—When reduced to a certainty.]—ANON. (1577), 4 Leon. 41; 74 E. R. 716.

*Annotation:—*Mentd. Luddington v. Kime (1696), 1 Ld. Raym. 203.

593. — — — — — Against common appendant.]—(1) There can be no approver in derogation of a right of common of turbary. (2) At common law the lord might approve against common of pasture appendant.—GRANT v. GUNNER (1809), 1 Taunt. 435; 127 E. R. 903.

*Annotations:—*As to (1) Distd. Robinson v. Duleep Singh (1878), 39 L. T. 313. Refd. Arlett v. Ellis (1827), 7 B. & C. 346; Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613.

594. Under Statute of Merton (20 Hen. 3, c. 4)—Lord of manor—As at common law.]—PROCTER v. MALLORIE, No. 589, *ante*.

595. — — — — — Though lord by wrong.]—HAMERTON v. EASTOFF (1635), Clay. 37.

See, also, No. 604, *post*.

596. — — — — — Not against several pasture—Nor in derogation of grant.]—POTTER v. NORTH (1669), 2 Keb. 513, 517; 1 Lev. 268; 1 Saund. 346; 1 Vent. 383; 84 E. R. 322, 324.

*Annotations:—*Refd. Hoskins v. Robins (1671), 2 Keb. 842; Lonsdale v. Rigg (1856), 25 L. J. Ex. 73; Derry v. Sanders, [1919] 1 K. B. 223. Mentd. Crouther v. Oldfield (1706), 1 Salk. 364; Jones v. Maunsell (1779), 1 Doug. K. B. 302; R. v. Churchill (1825), 4 B. & C. 750; Jones v. Richards (1837), 6 Ad. & El. 530; Welcome v. Upton (1840), 6 M. & W. 536; Dulton v. Angus (1881), 6 App. Cas. 740; A.-G. v. Antrobus, [1905] 2 Ch. 188.

597. — — — — —.]—BOLTON v. LOWTHER, No. 558, *ante*.

598. — — — — — Against foldcourse.]—ROBINSON v. DULEEP SINGH, No. 157, *ante*.

599. — — — — — & Statute of Westminster II. (13 Edw. 1 Stat. 1 c. 46)—Lord of manor—Leaving sufficient for commoners.]—CRUDWORTH (INHABITANTS) v. ARDERNE (1544), Toth. 56; 21 E. R. 122.

600. — — — — —.]—LEECH v. WIDSLEY (1670), 1 Vent. 54; 2 Keb. 590, 601; 1 Lev. 283; 86 E. R. 38; *sub nom.* ANON., T. Raym. 185.

*Annotations:—*Refd. Robertson v. Hartopp (1889), 43 Ch. D. 484. Mentd. Gates v. Bayley (1766), 2 Wils. 313; Cheesman v. Hardham (1818), 1 B. & Ald. 706.

601. — — — — —.]—FILEWOOD v. PALMER (1729), Mos. 169; 25 E. R. 331; *sub nom.* — v. PALMER, 5 Vin. Abr. 8 pl. 33, L. C.

*Annotations:—*Consd. Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613. Refd. Robinson v. Duleep Singh (1879), 11 Ch. D. 798; Malvern Hills Conservators v. Whitmore (1909), 100 L. T. 841.

602. — — — — — Against commoner by vicinage.]—FILEWOOD v. PALMER (1729), Mos. 169; 25 E. R. 331; *sub nom.* — v. PALMER, 5 Vin. Abr. 8 pl. 33, L. C.

*Annotations:—*Refd. Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613; Robinson v. Duleep Singh (1879), 11 Ch. D. 798; Malvern Hills Conservators v. Whitmore (1909), 100 L. T. 841.

603. — — — — — Not in derogation of grant.]—ROBINSON v. DULEEP SINGH, No. 157, *ante*.

604. — — — — — Any person seised in fee of waste.]—Any person who is seised in fee of part of a waste within a manor, may approve, leaving a sufficiency of common, though he is not the lord of the manor.—GLOVER v. LANE (1789), 3 Term Rep. 445; 100 E. R. 669.

*Annotations:—*Consd. Arlett v. Ellis (1827), 7 B. & C. 346. Refd. Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613. Mentd. Harrison v. Powell (1894), 10 T. L. R. 271.

605. — — — — — & tenant pur autre vie.]—(1) An owner in fee of one part, & tenant *pur autre vie* of other parts of a common consisting of woods, underwoods & pastures, may appoint woodwards for the preservation of the woods & underwoods, & beast-keepers for the safe custody of his own cattle & those of the other commoners, & may erect habitations for them on the common, under Stat. Westminster II.

(2) A plea justifying a trespass on the ground of such appointment, need not state the names of the commoners.

To an action of trespass for erecting cottages in a certain place or common, called R. Woods, &

Sect. 5.—Improvement: Sub-sects. 1, 2 & 3. Sect. 6.] disturbing pltf.'s right of common, deft. pleaded, that the place where deft. built the cottages, as in the declaration mentioned, was parcel of a waste within the manor of R., of which waste S. was seised in fee: that deft., as tenant of S., erected the cottages from the residue of the waste, & approved same, leaving sufficient common of pasture for pltf. & the other commoners, with sufficient ingress & egress to & from the same:—*Held*: (3) it sufficiently appeared on these pleadings, that enough common of pasturage was left for pltf. in the place where he had the right of common; (4) the time at which such common of pasturage was left was sufficiently alleged.—*PATRICK v. STUBBS* (1842), 9 M. & W. 830; 11 L. J. Ex. 281; 152 E. R. 351.

See, also, No. 595, *ante*.

606. ——— Enlargement of curtilage to house—Pleas must show that house ancient & occupied by lord or shepherd.]—*NEVILL v. HANCERTON* (1662), 1 Lev. 62; 83 E. R. 298; *sub nom.* *HAMMERTON v. NEVILL*, 1 Keb. 283, 314; *sub nom.* *NEVILL v. HAMERTON*, 1 Sid. 79.

Annotations:—Expld. *Patrick v. Stubbs* (1842), 9 M. & W. 830. *Refd.* *Robinson v. Duleep Singh* (1879), 11 Ch. D. 798.

607. By custom—Lord of the manor—Moss dales after turves exhausted—To hold by copy of court roll.]—*CLARKSON v. WOODHOUSE*, No. 872, *post*.

608. ——— By grant of the waste—Tenement property described as copyhold.]—If there be a custom within a manor for a lord to grant parcels of the waste by copy of court roll, the premises granted in the above mode are well described as copyhold premises, though the date of the grant be modern.—*NORTHWICK (LORD) v. STANWAY* (1803), 3 Bos. & P. 346; 127 E. R. 189. *Annotation:—Mentd.* *Fraser v. Mason* (1883), 11 Q. B. D.

609. ——— Not apart from custom.] *R. v. HORNBURCH (INHABITANTS)* (1818), 2 B. & Ald. 189; 106 E. R. 336. *Annotation:—Refd.* *R. v. Cuddington* (1845), 9 Jur. 938.

610. ——— Custom to grant without restriction bad.]—*BADGER v. FORD* (1819), 3 B. & Ald. 153; 106 E. R. 618.

Annotations:—Refd. *Arlett v. Ellis* (1827), 7 B. & C. 346. *Wakefield v. Buecleuch* (1867), L. R. 4 Eq. 613.

611. ——— As copyhold not freehold.]—(1) The lord of the manor may, by custom, approve against a right of common of turbary, & (2) by custom the lord of the manor may convert the waste of the manor into copyhold and not freehold.—*PARROTT v. WATTS* (1877), 37 L. T. 755. *Annotation:—Mentd.* *Foster v. Plumbers Co.* (1900), 44 Sol. Jo. 211.

612. ——— Though opposed by tenant of enfranchised copyhold.]—A custom that the lord with consent of the homage may make grants of waste to be held on copyhold tenure, although a sufficiency of common be not left, may be a good custom, & if proved, a grant of the waste, with the consent of the homage, *i.e.*, the majority of the homage, may be made in spite of the opposition of a commoner, who, having enfranchised his tenement under Copyhold Act, 1852 (c. 51), was no longer able to attend the manor ct.—*RAMSEY v. CRUDDAS*, [1893] 1 Q. B. 228; 62 L. J. Q. B. 269; 68 L. T. 364; 57 J. P. 406; 4 R. 218, C. A. *Annotation:—Distd.* *Broome v. Wenham* (1893), 68 L. T. 651.

613. Apart from custom—Lord cannot grant part of waste—To hold by copy—Unless grant before time of legal memory.]—*LONDON (BP.) v. ROWE* (1673), 3 Keb. 124; 81 E. R. 631.

See, further, COPYHOLDS.

In a royal forest.]—*See* No. 274, *ante*.

Encroachment by lord or commoner.]—*See* Part XII., *post*.

Inclosure—By agreement.]—*See* Part XIII., Sect. 1, *post*.

— **By custom.]**—*See* Part XIII., Sect. 2, *post*.

Rights & remedies of commoners.]—*See, generally*, Part X., *post*.

SUB-SECT. 2.—AGAINST WHAT RIGHTS OF COMMON.

614. Common of pasture—If sufficient left for commoners.]—(1) The lord of a manor may inclose part of a common against tenants having common of pasture, notwithstanding they have also a common of turbary, if he leave sufficient common of pasture; & if to trespass for driving away a commoner's cattle from the common the lord in his plea justifies under an improvement of the common, alleging that he left sufficient common of pasture for his tenants, & pltf. replies that he was entitled to common of turbary, that therefore the lord wrongfully inclosed, etc., & that pltf. put in his cattle to enjoy his common of pasture, & deft. demur, it will be taken that the lord did leave sufficient common of pasture, & on these pleadings deft. is entitled to judgment. (2) But if the lord in exercising his right of approving injure the right of common of turbary, the person whose right is so injured may have an action against the lord.—*FAWCETT v. STRICKLAND* (1738), Willes, 57; 2 Com. 578; 125 E. R. 1054.

Annotations:—As to (1) *Apld.* *Shakespear v. Peppin* (1796), 6 Term Rep. 741. *Refd.* *Lascelles v. Onslow* (1877), 46 L. J. Q. B. 333. *As to* (2) *Consd.* *Grant v. Gunner* (1809), 1 Taunt. 435.

615. ——— Though commoner has common in the soil.]—The lord of a manor, or his grantee, may inclose & approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig sand, etc., if he leave sufficient common of pasture.—*SHAKESPEAR v. PEPPIN* (1796), 6 Term Rep. 741; 101 E. R. 802.

Annotation:—Refd. *Grant v. Gunner* (1809), 1 Taunt. 435.

See, also, No. 622, *post*.

616. ——— Appendant.]—*GRANT v. GUNNER*, No. 593, *ante*.

See, also, Nos. 579, 580, *post*.

617. Common of turbary—By custom.] *PARROTT v. WATTS*, No. 611, *ante*.

618. ——— Ground enclosed unfit for production of fuel.]—*PEARLON v. UNDERHILL*, No. 186, *ante*.

619. ——— Not to injury of commoners' rights.]—*FAWCETT v. STRICKLAND*, No. 614, *ante*.

620. ——— Custom.]—(1) Where the lord of a manor has appropriated by leasing & also has granted out by copy of court roll portions of the waste, the fact that there has been a sufficiency of common of pasture during ten years is evidence that the inclosures have not interfered with the rights of the commoners.

In 1751 the lord of the manor of C. demised a brick-kiln then standing on the waste thereof, with liberty to inclose a piece of land not exceeding half an acre, & to dig earth for the use of the kiln; this lease, after its expiration, was renewed from time to time, & meanwhile leases of other parts of the waste were granted for the purpose of erecting thereon kilns & of digging clay. During the currency of the lease made in 1751 presentments were made by the homage of encroachments on the waste by strangers, but no objection was made to the granting of the leases, & the commoners

bought bricks at the kilns:—*Held*: (2) the granting of the leases ought to be referred to a legal origin; (3) there was evidence sufficient to establish that the lord of the manor had by custom the right to approve, so that he left a sufficiency of turbary and estovers to the commoners.

By a deed, made in 1614, certain copyhold land of the manor of C. was enfranchised, & thereby the lord granted to M. all & all manner of turbaries, digging & carrying of turfs, estovers, & common of estovers, heath, & fern . . . in such sort, nature, quality, & condition as the freeholders & tenants in free socage of the said manor, within the parish of C. had used & enjoyed same:—*Held*: (4) the terms of the deed afforded no evidence that at the time of its execution the freeholders of the manor had larger rights of common than the copyholders; (5) the deed did afford evidence that the grant of common of turbary & estovers to M. was made subject to the customs of the manor; & the lord could approve as against the successor in title of M.

The court rolls of the manor of C. contained twelve entries relating to grants by the lord of parcels of the waste; the entries commenced in 1664 & ended in 1858, with a break of many years, & in ten of them it was stated that the homage consented to the grant; the land included in the whole of these grants amounted to rather more than 51 acres, the extent of the waste being about 4,500 acres. The homage was composed wholly of copyholders:—*Held*: (6) the entries afforded evidence of a custom within the manor to grant parcels of the waste with the consent of a homage of copyholders; (7) the custom was valid as against the freeholders having rights of common over the waste. *LASCELLES v. ONSLOW* (LORD) (1877), 2 Q. B. D. 433; 46 L. J. Q. B. 333; 36 L. T. 459; 11 J. P. 436; 25 W. R. 496, D. C.

Annotation:—As to (1) & (3) *Consd.* Robertson v. Hartopp (1889), 43 Ch. D. 484.

621. ———.]—*ARLETT v. ELLIS*, No. 91, *ante*.

622. Common in the soil—Not under Statute of Merton (20 Hen. 3, c. 4).]—The lord has no right under above Act to inclose & approve the wastes of a manor where the tenants of the manor have a right to dig gravel or the waste, or take estovers there.—*DUBERLEY v. PAGE* (1788), 2 Term Rep. 391; 100 E. R. 211.

Annotations:—*Refd.* Wilson v. Willes (1806), 3 Smith, K. B. 167. *Mentd.* Bird v. Higginson (1836), 5 Ad. & El. 83; Spencer v. Hamerton (1836), 4 Ad. & El. 413; Partridge v. Gardner (1849), 4 Exch. 303.

623. ———.]—*SHAKESPEAR v. PEPPIN*, No. 615, *ante*.

624. Common of estovers—Not under Statute of Merton (20 Hen. 3, c. 4).]—*DUBERLEY v. PAGE*, No. 622, *ante*.

625. ——— By custom.]—*LASCELLES v. ONSLOW* (LORD), No. 620, *ante*.

Encroachment by lord of manor.]—*See* Part XII.,

SUB-SECT. 3.—SUFFICIENCY OF COMMON LEFT FOR COMMONERS.

626. At what time ascertained—At time of approvement.]—*ANON.* (1334), 8 Lib. Ass. fo. 16, pl. 18.

627. How ascertained—By jury.]—*A. v. W.* (1333), Y. B. 7 Edw. 3, fo. 67, pl. 73.

628. ——— By inspection by tenants.]—*PROCTER v. MALLORIE*, No. 589, *ante*.

629. ——— Issue directed.]—*WEEKS v. STAKER* (1693), 2 Vern. 301; 23 E. R. 794.

Annotation:—*Refd.* Powell v. Powis (1826), 1 Y. & J. 159.

630. ———.]—*ARTINGTON v. FAWKES* (1697), 2 Vern. 356; 1 Eq. Cas. Abr. 103, pl. 4 23 E. R. 821.

631. What rights considered—Not right disused for twenty years—Right in Crown.]—On the trial of a question between the lord of a manor & a commoner, as to the right of the former to inclose a portion of the waste, leaving a sufficiency of common for those having a right of common there, the waste being part of a royal forest:—*Held*: the right of the Crown to turn deer on the waste did not form an element for the consideration of the jury on the question of sufficiency of common, in a case where no deer had been turned on the waste for upwards of twenty years.—*LAKE v. PLAXTON* (1854), 10 Exch. 196; 24 L. J. Ex. 52; 23 L. T. O. S. 191; 156 E. R. 412.

Annotation:—*Consd.* Robertson v. Hartopp (1889), 43 Ch. D. 484.

632. ——— Maximum rights to which commoners entitled—Not actual user over many years.]—*ROBERTSON v. HARTOPP*, No. 580, *ante*.

633. Onus of proof—On person approving—Licence from lord of manor.]—*ROGERS v. WYNNE* (1826), 7 Dow. & Ry. K. B. 521; 4 L. J. O. S. K. B. 75.

634. ——— Lord of manor.]—*SMITH v. BROWNLOW* (EARL), No. 502, *ante*.

635. ———.]—A bill was filed by a freehold tenant of a manor, suing on behalf of himself & all other owners of freehold tenements within the ambit or former ambit of the manor, to establish rights of common against the lord. It was proved that pltf. & the other freehold tenants within the present ambit of the manor had commonable rights, & that the copyholders of the manor had also commonable rights, but it was not proved that the owners of freehold tenements within the former ambit had such rights:—*Held*: (1) the joining as pltf. the owners of freehold tenements within the former ambit amounted merely to a misjoinder of pltf., & did not prevent the ct. from making a decree upon the bill; (2) though pltf. might have sued on behalf of the copyholders also, if they had rights co-extensive with those of the freeholders, he was able to maintain his bill on behalf of the freeholders alone; (3) where the lord claims a right to inclose a part of the waste, the onus of showing that sufficient waste is left for the commoners lies upon the lord.—*BERTS v. THOMPSON* (1871), 6 Ch. App. 732; 25 L. T. 363; 19 W. R. 1100, L. C.

Annotation:—*Generally*, *Mentd.* Hall v. Byron (1877), 4 Ch. D. 667.

636. Evidence of sufficiency—Sufficiency during ten years.]—*LASCELLES v. ONSLOW* (LORD), No. 620, *ante*.

637. Proof of damage necessary.]—*LESSINGHAM'S CASE* (temp. 1771–80), cited in 2 East, 156; 102 E. R. 329.

Annotation:—*Refd.* Pindar v. Wadsworth (1802), 2 East, 154.

638. Plea of sufficiency—For sheep levant & couchant—Sufficient—Without alleging sufficiency for tenements.]—*LEECH v. WIDSLEY* (1670), 1 Vent. 51; 2 Keb. 590, 601; 1 Lev. 283; 86 E. R. 38; *sub nom.* *ANON.*, T. Raym. 185.

Annotations:—*Refd.* Cheesman v. Hardham (1818), 1 B. & Ald. 706; Robertson v. Hartopp (1889), 43 Ch. D. 484. *Mentd.* Gates v. Bayley (1766), 2 Wils. 313.

Encroachment by lord of manor.]—*See* Part XII.,

SECT. 6.—INCLOSURE OF SMALL PORTIONS OF COMMON FOR SPECIAL PURPOSES.

639. Preservation of timber by inclosure—Woods subject to common of pasture—Cannot

Sect. 6.—Inclosure of small portions of common for special purposes. Part X. Sect. 1: Sub-sects. 1 & 2, A. & B. (a), (b) & (c), C. & D.]

be inclosed—Under Inclosure of Woods in Forests Act, 1482-3 (c. 7).]—BARRINGTON'S CASE, No. 273, *ante*.

640. ————.]—DIBBEN v. ANGLESEY (MARQUESS) (1834), 2 Cr. & M. 722; 4 Tyr. 926; 4 L. J. Ex. 278; 149 E. R. 951.

Annotations:—Mentd. Eardley v. Steer (1835), 5 Tyr. 1071; Farley v. Briant (1835), 3 Ad. & El. 839; Clarke v. Owen (1836), 2 Har. & W. 324; Hunt v. Hunt (1836), 5 Dowl. 412; Duckworth v. Harrison (1838), 4 M. & W. 432; Empson v. Fairfax (1838), 8 Ad. & El. 296; Gisborne v. Hart (1839), 5 M. & W. 50; England v. Davison (1841), 9 Dowl. 1052; Bourke v. Lloyd (1842), 10 M. & W. 550.

641. — — By agreement—Under Inclosure Act, 1756 (c. 36)—Confined to common of pasture.]—In 1769 the lord of a manor, the freehold tenants of which were not only entitled to common of pasture, but were also collectively the owners of the bushes & underwoods growing on the wastes of the manor, entered into an agreement, under the above Act with the major part of such tenants for the periodical inclosure of parts of the wastes of the manor for the growth & preservation of timber & underwood; this agreement appeared to have been from time to time acted upon from the year 1773 until, in the year 1880, two of the

freehold tenants of the manor brought an action on behalf of themselves & all other freehold tenants against the lord of the manor to restrain him from further infringement of their rights. In a special case stated in that action:—*Held*: (1) the above Act applied only to agreements by persons entitled to common of pasture, & not to agreements by persons who were the owners of the bushes & underwood; (2) the agreement of 1769 was inoperative against such owners; (3) the lord had no right to inclose as against them.—NICHOLLS v. MITFORD (1882), 20 Ch. D. 380; 51 L. J. Ch. 485; 30 W. R. 509.

For burial grounds.]—See BURIAL & CREMATION Vol. VII., p. 539, No. 198.

For churches & churchyards.]—See ECCLESIASTICAL LAW.

For national defence.]—See ROYAL FORCES.

For parsonages.]—See ECCLESIASTICAL LAW.

For school sites.]—See EDUCATION.

For workhouses.]—See POOR LAW.

See, generally, Commons Act, 1899 (c. 30), s. 22.

Inclosure under Inclosure Acts.]—See Part XIII., Sect. 7, *post*.

Inclosure by agreement.]—See Part XIII., Sect. 1, *post*.

Part X.—Rights and Remedies of Commoners.

SECT. 1.—NATURE OF REMEDY.

SUB-SECT. 1.—WHETHER ACTION OR ABATEMENT PROPER REMEDY.

642. General rule.]—The commoners of a manor may abate a nuisance, which wholly excludes them from exercising their rights of common over the lord's waste, without first resorting to the cts. for relief. But if the nuisance only amounts to a partial exclusion, a sufficiency of common being left for the exercise of common rights, the commoners ought not to take the law into their own hands, their proper remedy is to apply to the cts. for a declaration of their rights. This rule applies whether the right of common alleged to be infringed is for common of pasture, or of turbary, or of estovers.

Where tenants of a manor in assertion of a claim to common of turbary & of estovers over certain heath lands, alleged to be waste of the manor, entered on the heath lands & cut down trees, there being sufficient heath lands for the exercise of the rights claimed, if any:—*Held*: the trespass was unjustifiable & the lord was entitled to an injunction & damages.—HOPE v. OSBORNE, [1913] 2 Ch. 349; 82 L. J. Ch. 457; 109 L. T. 41; 77 J. P. 317; 29 T. L. R. 606; 57 Sol. Jo. 702; 11 L. G. R. 825.

See, also, Nos. 613, 614, 616, 703, 704, 719, 725, 742, 750-753, *post*.

SUB-SECT. 2.—ACTION GENERALLY.

A. Right of Action.

643. Damage by cattle—Not actionable.]—A commoner may justify trespass by pleading damage feasant, but cannot bring an action against the owner of the cattle.—ANON. (1502), Keil, 46; 72 E. R. 204.

644. Damage by rabbits—Actionable.]—CONEY'S

CASE (1587), Godb. 122; 78 E. R. 75; *sub* ANON., 2 Leon. 201.

Annotations:—Consd. Robertson v. Hartopp (1889), 43 Ch. D. 484. *Refd.* Atkinson v. Teasdale (1772), 3 Wils. 278; Blades v. Higgs (1865), 20 C. B. N. S. 214. *Mentd.* Blunket v. Holmes (1661), 1 Keb. 119.

645. — Warren surcharged — Actionable.]—GREESLY v. LEA & TAYLOR (1622), Palm. 319; 81 E. R. 1102.

646. — Escaping on to common—Not actionable.]—HINSLEY v. WILKINSON (1631), Cro. Car. 387; 79 E. R. 938; *sub nom.* HINDLEY v. WILKINSON, W. Jo. 356.

647. — Erecting burrows in waste — Right of action in lord only.]—NORRIS v. AYERS (1668), 2 Keb. 386; 84 E. R. 212.

See, also, No. 744, *post*.

648. Descends to the heir.]—GRESILL v. HODDSDEN (1608), Yelv. 143; 80 E. R. 96.

Against lord of manor.]—See Sect. 2, sub-sect. 1, A., *post*.

Against fellow-commoner.]—See Sect. 2, sub-sect. 2, A., *post*.

Against stranger.]—See Sect. 2, sub-sect. 3, A., *post*.

B. Parties to Action.

(a) Plaintiffs.

Parties to actions generally.]—See PRACTICE & PROCEDURE.

649. Tenant at will.]—TIMBERLEY v. GROBHAM-HOW (1671), T. Jo. 5; 84 E. R. 1119.

Annotation:—Mentd. Legg v. Strudwick (1709), 2 Salk. 414.

650. Commoner in gross—On behalf of lessee.]—ANON. (1309), Y. B. 2 Edw. 2, Sel. Soc. p. 55, pl. 7.

651. Lessee—Showing title of lessor.]—HONEYWOOD v. HUSBANDS (1589), Cro. Eliz. 153; 78 E. R. 412.

See, also, Nos. 395, 396, *ante*.

652. Joint tenants.]—ANON. (1308), Y. B. 1 Edw. 2, Sel. Soc. p. 25, pl. 14.

653. Tenants in common—Unless damage suffered by one alone.]—HAMON v. WHITE (1626), W. Jo. 142; 82 E. R. 76; sub nom. HARMAN v. WHITCHLOW, Lat. 152.

*Annotations:—***Refd.** Addison v. Overend (1796), 6 Term Rep. 766. **Mentd.** Carlton v. Mortagh (1704), 1 Salk. 268.

654. Representative action—Minority—Though against wish of majority.]—BROMLEY v. SMITH (1826), 1 Sim. 8; 5 L. J. O. S. Ch. 53; 57 E. R. 482.

*Annotations:—***Mentd.** Ewing v. Glasgow Police Comrs. (1839), Macl. & Rob. 847; A.-G. v. Magdalen College, Oxford (1854), 18 Beav. 223.

655. ——— To establish right of common—Where one general right.]—YORK CORPN. v. PILKINGTON (1737), 1 Atk. 282; West temp. Hard. 293; 26 E. R. 180, L. C.; subsequent proceedings (1712), 2 Atk. 302, L. C.

*Annotations:—***Distd.** Tenham v. Herbert (1742), 2 Atk. 483. **Consd.** St. Luke's v. St. Leonard's (1779), 1 Bro. C. C. 40; Betts v. Thompson (1870), 23 L. T. 427; Smith v. Brownlow (1870), L. R. 9 Eq. 241; Warrick v. Queen's College, Oxford (1870), L. R. 10 Eq. 105; London Sewer Comrs. v. Gellatly (1876), 3 Ch. D. 610; Norwich Corpn. v. Brown (1883), 48 L. T. 898. **Refd.** Montague v. Dudman (1751), 2 Ves. Sen. 396; Atkins v. Hatton (1794), 2 Anst. 386; Hanson v. Gardiner (1802), 7 Ves. 305; Reading Corpn. v. Winkworth (1818), 5 Price, 473; London City Sewers Comrs. v. Glasse (1872), 7 Ch. App. 456. **Mentd.** Weale v. West Middlesex Waterworks Co. (1820), 1 Jac. & W. 358; A.-G. v. Barker (1872), L. R. 7 Exch. 177.

656. ———.]—A bill will lie against the lord by one copyholder, on behalf of himself & the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder, not suing on behalf of all, cannot maintain such a bill.—PHILLIPS v. HUDSON (1867), 2 Ch. App. 243; 36 L. J. Ch. 301; 16 L. T. 221; 15 W. R. 370, L. C.

*Annotations:—***Mentd.** Evans v. Merthyr Tydfil U. C., [1899] 1 Ch. 241; Mercer v. Denne, [1905] 2 Ch. 538.

657. ——— Copyholder & freeholder.]—SMITH v. BROWNLOW (EARL), No. 502, ante.

658. ——— Leave to add enfranchised copyholder as co-plaintiff refused after action brought.]—A bill was filed against the lord of a manor by a pltf., on behalf of himself & all the other freehold & copyhold tenants of the manor, for a declaration of their rights in respect of the common of the manor, pltf. being at the time aware that there were enfranchised copyholders of the manor who might have similar rights against the lord: *Held*: the pltf. could not obtain leave to amend by adding as co-pltf. one of the enfranchised copyholders.—PEEK v. SPENCER (1870), 5 Ch. App. 518; 39 L. J. Ch. 538; 22 L. T. 459; 18 W. R. 558, L. J.

659. ——— Freeholder.]—WARRICK v. QUEEN'S COLLEGE, OXFORD, No. 179, ante.

660. ——— Alteration of ambit of manor—Misjoinder of parties.]—BETTS v. THOMPSON, No. 635, ante.

661. ——— On behalf of freeholders & copyholders.]—BETTS v. THOMPSON, No. 635, ante.

662. ——— Ancient freeholds & enfranchised copyholds.]—HALL v. BYRON, No. 363, ante.

663. ——— Owners & occupiers—On behalf of all owners & occupiers within forest.]—SEWERS COMRS. v. GLASSE, No. 115, ante.

(b) Defendants.

Parties to actions generally.]—See PRACTICE & PROCEDURE.

664. Action by lord—Not all commoners necessary parties.]—YORK CORPN. v. PILKINGTON (1737), 1 Atk. 282; West temp. Hard. 293; 26 E. R. 180, L. C.; subsequent proceedings (1742), 2 Atk. 302, L. C.

*Annotations:—***Consd.** St. Luke's v. St. Leonard's (1779), 1 Bro. C. C. 40; Weale v. West Middlesex Waterworks Co.

(1820), 1 Jac. & W. 358; Warrick v. Queen's College, Oxford (1870), L. R. 10 Eq. 105; London City Sewers Comrs. v. Gellatly (1876), 3 Ch. D. 610. **Refd.** Betts v. Thompson (1870), 23 L. T. 427; Norwich Corpn. v. Brown (1883), 48 L. T. 898. **Mentd.** Tenham v. Herbert (1742), 2 Atk. 483; Montague v. Dudman (1751), 2 Ves. Sen. 396; Atkins v. Hatton (1794), 2 Anst. 386; Hanson v. Gardiner (1802), 7 Ves. 305; Reading Corpn. v. Winkworth (1818), 5 Price, 473; Smith v. Brownlow (1870), L. R. 9 Eq. 241; A.-G. v. Barker (1872), L. R. 7 Exch. 177; London City Sewers Comrs. v. Glasse (1872), 7 Ch. App. 456.

665. Action by commoners—Lord & grantees claiming under him—Though entitled to defend separately.]—POWELL v. POWIS (1826), 1 Y. & J. 159; 148 E. R. 627.

*Annotation:—***Consd.** Warrick v. Queen's College, Oxford (1871), 6 Ch. App. 716.

666. ——— Lord & representative grantees claiming under him—Other grantees bound.]—SEWERS COMRS. OF LONDON v. GELLATLY, No. 693, post.

(c) The Attorney-General.

667. Not necessary party—To action by minority of commoners for disturbance.]—BROMLEY v. SMITH (1826), 1 Sim. 8; 5 L. J. O. S. Ch. 53; 57 E. R. 482.

*Annotations:—***Expld.** A.-G. v. Magdalen College, Oxford (1854), 18 Beav. 223. **Refd.** Ewing v. Glasgow Comrs. of Police (1839), Macl. & Rob. 847.

668. Must institute action—When commoners concur in disturbance.]—BROMLEY v. SMITH (1826), 1 Sim. 8; 5 L. J. O. S. Ch. 53; 57 E. R. 482.

*Annotations:—***Refd.** Ewing v. Glasgow Comrs. of Police (1839), Macl. & Rob. 847; A.-G. v. Magdalen College, Oxford (1854), 18 Beav. 223.

See, generally, PRACTICE & PROCEDURE.

C. Maintenance of Action.

669. Commoners may contribute to defence—In respect of joint interests.]—MEREDITH v. HIS TENANTS (1599), Noy, 99; 74 E. R. 1065.

670. ———.]—HUMBLETON v. BUCKE (1628), Het. 4, 21; 124 E. R. 295, 309.

*Annotation:—***Mentd.** R. v. Beare (1698), 1 Ld. Raym. 414.

See, generally, ACTION, Vol. I., pp. 66 et seq.

D. Form and Procedure.

671. Writ of admeasurement.]—ANON. (1308), Y. B. 1 Edw. 2, Sel. Soc. p. 25, pl. 14.

Bill of peace.]—See Nos. 655, 656, 665, ante.

672. Ejectment—Not in respect of common pasture—Or sheepgate.]—WEEKS v. MESEY (1611), 1 Brownl. 128; 123 E. R. 709.

673. Pleading—Action for disturbance—Plaintiff need not show particular title—To land to which common appendant.]—SAUNDERS v. WILLIAMS (1677), 1 Vent. 319; 3 Keb. 820; 86 E. R. 206; sub nom. ANON., 1 Freem. K. B. 458.

*Annotation:—***Mentd.** Atkinson v. Teasdale (1772), 2 Wm. Bl. 817.

674. ——— To the common.]—BOUND v. BROOKING (1681), 1 Vent. 356; 86 E. R. 429.

675. ——— Possession sufficient.]—HILL v. GALLOP (1693), Holt, K. B. 548; 4 Mod. Rep. 175; 90 E. R. 1202.

676. ——— Action against stranger.]—BIRD v. STROUD (1696), Holt, K. B. 146; 3 Salk. 12; 90 E. R. 979; sub nom. BIRT v. STRODE, 12 Mod. Rep. 97; sub nom. BURK v. STROWD, Comb. 370; sub nom. STROUD v. BIRT, 1 Com. 7; 4 Mod. Rep. 411, 418; Skin. 621.

*Annotations:—***Consd.** Winton Corpn. v. Wilks (1705), 2 Ld. Raym. 1129. **Refd.** Dorn v. Gashford (1697), 1 Com. 44; Iveson v. Moor (1698), 1 Com. 58.

677. ———.]—GREENHOW v. ILSLEY (1717), Willes, 619; 125 E. R. 1351.

*Annotation:—***Mentd.** Rogers v. Wynne (1826), 7 Dow. & Ry. K. B. 521.

Sect. 1.—Nature of remedy: Sub-sect. 2, D.; sub-sect. 3. Sect. 2: Sub-sect. 1, A.]

678. ——— Action against lord—Plaintiff must show title.]—ANON. (1705), 11 Mod. Rep. 53, case 78; 88 E. R. 880.

679. ——— ——— ———.]—GREENHOW v. ILSLEY (1747), Willes, 619; 125 E. R. 1351.
Annotation:—Mentd. Rogers v. Wynne (1826), 7 Dow. & Ry. K. B. 521.

680. ——— Defendant claiming as licensee of the lord—Must show sufficiency of common left.]—SMITH v. FEVERELL (1675), 2 Mod. Rep. 6; 1 Freem. K. B. 190; 86 E. R. 909.
Annotation:—Consd. Atkinson v. Teasdale (1772), 3 Wils. 278.

681. ——— Claim by defendant as of right — Plea disclosing matter of law sufficient.]—BIRCH v. WILSON (1677), 2 Mod. Rep. 274; 86 E. R. 1068.
Annotation:—Distd. Bridge v. Grand Junction Ry. (1838), 1 Horn. & H. 26.

682. ——— Action for surcharge—Against fellow-commoner—Defendant's right need not be stated.]—ATKINSON v. TEASDALE (1772), 2 Wm. Bl. 817; 3 Wils. 278; 96 E. R. 482.
Annotations:—Refd. Hobson v. Todd (1790), 4 Term Rep. 71; Robertson v. Hartopp (1889), 43 Ch. D. 484.

683. ——— Against lord—Plaintiff must show particular surcharge.]—ATKINSON v. TEASDALE (1772), 2 Wm. Bl. 817; 3 Wils. 278; 96 E. R. 482.
Annotations:—Consd. Robertson v. Hartopp (1889), 43 Ch. D. 484. *Mentd.* Hobson v. Todd (1790), 4 Term Rep. 71.

684. ——— Insufficiency of common—Distinguished from surcharge.]—HASSARD v. CANTRELL (1695), 1 Lut. 101; 125 E. R. 53.
Annotations:—Distd. Atkinson v. Teasdale (1772), 3 Wils. 278. *Refd.* Cope v. Marshall (1757), 2 Wils. 51; Robertson v. Hartopp (1889), 43 Ch. D. 484. *Mentd.* Chandler v. Roberts (1779), 1 Doug. K. B. 58.

685. ——— Plea of damage to common by digging soil—Not an allegation of title to soil.]—SHEENE v. BULLEN (1623), Palm. 366; 81 E. R. 1126; *sub nom.* BULLEN & SHEENE'S CASE, Godb. 343.
Annotation:—Mentd. Jeveson v. Moor (1698), 12 Mod. Rep. 262.

686. ——— Plea divisible —Proof of part sufficient —To entitle to damages.]—RICKETTS v. SALWEY (1819), 2 B. & Ald. 360; 1 Chit. 101; 106 E. R. 398.
Annotations:—Distd. Fox v. Waters (1810), 12 Ad. & El. 43; Brunton v. Hall (1841), 1 Q. B. 792. *Consd.* Beardsworth v. Torkington (1841), 1 Q. B. 782. *Distd.* Ivatt v. Mann (1842), 3 Man. & G. 691; Scholefield v. Andrew (1851), 17 L. T. O. S. 140. *Refd.* Manifold v. Pennington (1825), 4 B. & C. 161; Wood v. Waud (1849), 3 Exch. 748; Holt v. Daw (1851), 16 Q. B. 990; Rochdale Canal v. Radcliffe (1852), 18 Q. B. 287. *Mentd.* Muskett v. Hill (1839), 5 Bing. N. C. 694; Peter v. Daniel (1848), 5 C. B. 568.

687. ——— Proof of right wider than right claimed — Proof sufficient.¹ —SCHOLEFIELD v. ANDREW (1851), 17 L. T. O. S. 140.

—— **Common appendant.]—**See Part II., Sect. 1, sub-sect. 2, A., *ante*.

688. Whether actual damage must be shown—Not in action for surcharge.]—WELLS v. WATLING (1779), 2 Wm. Bl. 1233; 96 E. R. 726.
Annotations:—Consd. Marzetti v. Williams (1830), 1 B. & Ad. 415; Robertson v. Hartopp (1889), 43 Ch. D. 484. *Refd.* Pindar v. Wadsworth (1802), 2 East, 154.

689. ——— Action for disturbance—Amount of damage immaterial.]—LIDGOLD v. BUTLER (1808), cited in 1 Selwyn's N. P. 11th Ed., 444.

See, further, ACTION, Vol. I., p. 39, Nos. 306, 307.

690. Verdict—Of disturbance by digging turf —& no disturbance by making fish-pond—Not repugnant.]—REEVE v. DIGBY (1638), Cro. Car. 495; 79 E. R. 1027.
Annotation:—Apprvd. Bowers v. Nixon (1848), 13 Jur. 334.

691. Leave necessary—For new proceedings—Under Epping Forest Amendment Act, 1872 (c. 95).]

—SEWERS COMRS. OF LONDON v. GELLIATLY, No. 693, *post*.

692. Award of pasture—Though damages only asked for.]—ANON. (1311), Y. B. 4 Edw. 2, Sel. Soc. p. 140, pl.

693. Who bound—One of class not personally party to action—Defended by representative defendants.]—A suit was instituted in the Ct. of Ch. by plffs. on behalf of themselves & all other occupiers of lands & tenements within E. Forest, against, amongst others, the lord of a manor within that forest & two grantees from that lord of part of the wastes of the manor. Plffs. claimed to be entitled to rights of common over the wastes of the manor, & alleged that the lord of the manor inclosed or authorised the inclosure of large portions of the waste, so as to interfere with the rights of common, & had granted other portions of the waste to persons who made similar inclosures, & that such persons were too numerous to be made parties to the suit but were sufficiently represented by the two grantees made defts. A decree was made establishing the right of common claimed, & granting an injunction. After Jud. Acts came into operation, plffs. filed a supplemental statement of claim against another grantee from the lord, seeking to have the benefit of the decree against him, & an injunction:—*Held*: (1) deft. was bound by the decree in the suit, & could not litigate the right of common thereby established.

(2) Epping Forest Amendment Act, 1872 (c. 95), which was passed during the pendency of the suit, provided that no new legal proceeding, except such supplemental or amended bills as might be filed by plffs. for the purpose of making the suit effectual, should be instituted, brought or taken respecting the matters in question except with the leave of the E. Forest Comrs.: *Held*: assuming that Jud. Act, 1873 (c. 66), s. 76, enabled plffs. to institute a supplemental action in a proper case under the former Act, the present statement of claim was not supplemental, & ought not to have been delivered without the leave of the comrs.—SEWERS COMRS. OF LONDON v. GELLIATLY (1876), 3 Ch. D. 610; 45 L. J. Ch. 788; 21 W. R. 1059.

Annotations:—As to (1) Consd. Conybeare v. Lewis (1883), 48 L. T. 527. *Refd.* Wilson v. Church (1879), 41 L. T. 50; McHenry v. Lewis (1882), 21 Ch. D. 202; Temperton v. Russell (1893), 9 T. L. R. 298; Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 126; Markt v. Knight S.S. Co., Sale & Prazar v. Knight S.S. Co., [1910] 2 K. B. 1021.

SUB-SECT. 3.—ABATEMENT GENERALLY.

694. Animals damage feasant—Right of distress.]—ANON., No. 643, *ante*.

695. Damage by rabbits—No right to kill.]—OULD & CONYES CASE (1584), 4 Leon. 7; 74 E. R. 690.

696. ———.]—CONEY'S CASE (1587), Godb. 122; 78 E. R. 75; *sub nom.* ANON., 2 Leon. 201.
Annotations:—Consd. Blades v. Higgs (1865), 20 C. B. N. S. 214; Robertson v. Hartopp (1889), 43 Ch. D. 484. *Refd.* Atkinson v. Teasdale (1772), 3 Wils. 278. *Mentd.* Blunket v. Holmes (1661), 1 Keb. 119.

697. ——— No right to fill up burrows.]—PELLING v. LANGDEN (1601), Owen, 114; 74 E. R. 940; *sub nom.* BELLEW v. LANGDON, Cro. Eliz. 876.

Annotation:—Folld. Hadesden v. Gryssel (1607), Cro. Jac. 195.

698. ———.]—CARRILL v. PACK & BAKER (1613), 2 Bulst. 115; 80 E. R. 996.
Annotation:—Refd. Cooper v. Marshall (1757), 1 Burr. 259.

699. ——— No right to enter on land of another—To kill.]—HADESDEN v. GRYSSEL (1607), (

Jac. 195; 79 E. R. 170; *sub nom.* HOLDESSEN v. GRESIL, 1 Brownl. 208; *sub nom.* HODDESSEN v. GRESIL, Yelv. 104; *subsequent proceedings, sub nom.* GRESILL v. HODDESSEN (1608), Yelv. 143.

Annotations:—**Refd.** Howard v. Spencer (1665), 1 Sid. 251; Hassard v. Cantrell (1694), 1 Lut. 101; Hall v. Harding (1769), 4 Burr. 2426; Atkinson v. Teasdale (1772), 3 Wils. 278. **Mentd.** Ashmead v. Ranger (1699), Fortes. Rep. 152.

700. ——— **No right to fill up burrows.**—HORSEY v. HAGBERTON (1609), Cro. Jac. 229; 79 E. R. 199.

Annotation:—**Consd.** Cooper v. Marshall (1757), 1 Burr. 259.

See, also, Nos. 697, 698, *ante*, & Nos. 703, 704, *post*.

701. ——— **Belonging to owner of neighbouring close—Right to kill upon common.**—HINSLEY v. WILKINSON (1634), Cro. Car. 387; 79 E. R. 938; *sub nom.* HINDLEY v. WILKINSON, W. Jo. 356.

702. Surcharge by rabbits—No right to kill.—SAMFORD & HAVEL'S CASE (1612), Godb. 184; 78 E. R. 112; *sub nom.* SAMBORNE v. HARILO, J. Bridg. 9.

703. ——— **No right to fill up burrows.**—COOPER v. MARSHALL (1757), 1 Burr. 259; 2 Keny. 1; 97 E. R. 303.

Annotations:—**Appld.** Kirby v. Sadgrove (1797), 3 Anst. 892. **Consd.** Arlett v. Ellis (1827), 7 B. & C. 346; Cootle v. Ford (1900), 83 L. T. 482. **Refd.** Hope v. Osborne, [1913] 2 Ch. 349.

704. ——— ————**]**—COPE v. MARSHALL (1757), 1 Burr. 268; 2 Wils. 51; 97 E. R. 308.

Annotation:—**Mentd.** Iveson v. Moore (1698), 1 Salk. 16.

See, also, Nos. 614, 615, 646, 647, *ante*.

705. Turves cut by another—No right to burn.—BROMHALL v. NORTON (1682), T. Jo. 193; 84 E. R. 1212.

706. House built on common—For more than twenty years—Threat to pull down by some tenants of manor only—Information granted.—R. v. HALLINGBY (1734), Cunn. 93; 91 E. R. 1083.

707. ——— **No right to pull down—While actually inhabited.**—Where a house has been unlawfully erected on a common, a commoner whose enjoyment of the common is interrupted by it may pull it down, but he is not justified in pulling it down if there are persons in it at the time.—PERRY v. FITZHOWE (1846), 8 Q. B. 757; 15 L. J. Q. B. 239; 7 L. T. O. S. 180; 10 J. P. 600; 10 Jur. 799; 115 E. R. 1057.

Annotations:—**Distd.** Davies v. Williams (1851), 16 Q. B. 516. **Consd. & Foll.** Jones v. Jones (1862), 1 H. & C. 1. **Refd.** Harvey v. Bridges (1847), 1 Exch. 261; Davison v. Wilson (1848), 11 Q. B. 890; Burling v. Read (1850), 11 Q. B. 904; Lascelles v. Onslow (1877), 2 Q. B. D. 433; Lane v. Capsey, [1891] 3 Ch. 411.

708. ——— ————**]**—A declaration in trespass alleged that deft. broke & entered pltf.'s dwelling-house & land, which dwelling-house was then actually inhabited by pltf. & his family, & in which he then was; & whilst pltf. was therein pulled down & destroyed the dwelling-house & the fixtures therein, & assaulted pltf. then being therein, & ejected & expelled him & his family therefrom, & seized, converted & destroyed the materials of the house. Deft. pleaded, as to breaking & entering, pulling down & destroying the dwelling-house & fixtures therein, & seizing the materials, that he was entitled to common of pasture over the land, & because the house was wrongfully erected on the land, so that without pulling down the same deft. could not use or enjoy the common of pasture in so ample & beneficial manner as he otherwise would & ought to have done, he necessarily & unavoidably committed the trespass in the introductory part of the plea mentioned in removing the house, doing no unnecessary damage, etc.:—*Held*: the deft. was not justified in pulling down the house when pltf. & his family were in it.—JONES v. JONES (1862),

1 H. & C. 1; 31 L. J. Ex. 506; 8 Jur. N. S. 1132; 158 E. R. 777.

Annotation:—**Refd.** R. v. French, [1902] 1 K. B. 637.

709. ——— ———— **Unless notice given.**—Where a house obstructs the exercise of a right of common, the commoner may, after notice & request to pltf. to remove the house, pull it down, though pltf. is actually inhabiting & present in the house.—DAVIES v. WILLIAMS (1851), 16 Q. B. 546; 20 L. J. Q. B. 330; 15 J. P. 550; 15 Jur. 752; 117 E. R. 988.

Annotations:—**Refd.** Lane v. Capsey, [1891] 3 Ch. 411. **Mentd.** Presland v. Bingham (1889), 41 Ch. D. 268.

710. Hedges—Right to abate.—MASON v. CAESAR (1676), 2 Mod. Rep. 65; 86 E. R. 944.

Annotations:—**Distd.** Cooper v. Marshall (1757), 1 Burr. 259. **Consd.** Sadgrove v. Kirby (1795), 6 Term Rep. 483.

Refd. Arlett v. Ellis (1827), 7 B. & C. 346; Perry v. Fitzhowe (1846), 8 Q. B. 757; Hope v. Osborne, [1913] 2 Ch. 349.

711. ——— ———— **Not after inclosure for a year.**—ETTON v. BARNE (1308), Y. B. 1 Edw. 2, Sel. Soc. p. 20, pl. 9.

712. ——— ———— **Though cattle not put in immediately.**—HUMBLETON v. BUCKE (1628), Het. 4, 21; 124 E. R. 295, 309.

Annotation:—**Mentd.** R. v. Beare (1697), 1 Ld. Raym. 414.

713. ——— ———— **By other commoners or by tenants.**—HUMBLETON v. BUCKE (1628), Het. 4, 21; 124 E. R. 295, 309.

Annotation:—**Mentd.** R. v. Beare (1697), 1 Ld. Raym. 414.

714. ——— ———— **Not by night.**—R. v. ASHDOWN (INHABITANTS) (1667), 2 Keb. 229; 84 E. R. 143.

715. ——— **Abatement amounts to riot—After rule of court for issue of right of common.**—R. v. WYVILL (1739), 7 Mod. Rep. 286; 87 E. R. 1245.

As against lord of manor.—*See* Sect. 2, sub-sect. 1, B., *post*.

As against fellow-commoner.—*See* Sect. 2, sub-sect. 2, B., *post*.

As against stranger.—*See* Sect. 2, sub-sect. 3, B., *post*.

SECT. 2.—AGAINST WHOM EXERCISED.

SUB-SECT. 1.—AGAINST LORD OF MANOR.

A. Right of Action.

716. For surcharge—By rabbits.—If the lord surcharge the common [with rabbits, the commoner] may have an action for the disturbance.—HADESSEN v. GRYSSEL (1607), Cro. Jac. 195; 79 E. R. 170; *sub nom.* HOLDESSEN v. GRESIL, 1 Brownl. 208; *sub nom.* HODDESSEN v. GRESIL, Yelv. 104; *subsequent proceedings, sub nom.* GRESILL v. HODDESSEN (1608), Yelv. 143.

Annotations:—**Consd.** Hall v. Harding (1769), 4 Burr. 2426; Atkinson v. Teasdale (1772), 3 Wils. 278. **Refd.** Howard v. Spencer (1665), 1 Sid. 251; Hassard v. Cantrell (1694), 1 Lut. 101. **Mentd.** Ashmead v. Ranger (1700), Fortes.

See, also, Nos. 614, 615, 646, 647, *ante*.

717. ——— **By cattle.**—ANON. (1611), Godb. 182; 78 E. R. 110.

718. ——— ————**]**—HASSARD v. CANTRELL (1695), 1 Lut. 101; 125 E. R. 53.

Annotations:—**Consd.** Cope v. Marshall (1757), 2 Wils. 51. **Distd.** Atkinson v. Teasdale (1772), 3 Wils. 278. **Refd.** Robertson v. Hartopp (1889), 43 Ch. D. 484. **Mentd.** Chandler v. Roberts (1779), 1 Doug. K. B. 58.

See, also, No. 615, *ante*, & Nos. 733, 739, 740, 741, *post*.

719. For disturbance—By planting trees—If insufficient common left.—A commoner cannot justify cutting down trees planted by the lord on the waste, but is driven to his action if there is not sufficient common left.—KIRBY v. SADGROVE (1797), 3 Anst. 892; 1 Bos. & P. 13, 145 E. R.

Sect. 2.—Against whom exercised: Sub-sect. 1, A. B.; sub-sect. 2, A. & B.; sub-sect. 3, A. & B.]
 1073; *affg. S. C. sub nom. SADGROVE v. KIRBY* (1795), 6 Term Rep. 483.
Annotations:—Refd. Arlett v. Ellis (1827), 7 B. & C. 346; *Hope v. Osborne*, [1913] 2 Ch. 349.
See, also, No. 612, ante.

B. Abatement.

720. Surcharge—No right to abate.]—If the lord, by reason of conies, should surcharge the common, & deprive [the commoner] of his common, he may not kill the conies, no more than he may kill any other beasts of the lord.—*HADSDEN v. GRYSEL* (1607), Cro. Jac. 195; 79 E. R. 170; *sub nom. HODSDEN v. GRESIL*, 1 Brownl. 208; *sub nom. HODSDON v. GRESIL*, Yelv. 101; *subsequent proceedings, sub nom. GRESIL v. HODSDEN* (1608), Yelv. 143.

Annotations:—Consd. Hall v. Harding (1769), 4 Burr. 2426; *Atkinson v. Teasdale* (1772), 3 Wils. 278. *Mentd. Howard v. Spencer* (1665), 1 Sid. 251; *Hassard v. Cantrell* (1694), 1 Lut. 101; *Ashmead v. Ranger* (1700), Fortes. Rep. 152.

721. ———.]—*ANON.* (1611), Godb. 182; 78 E. R. 110.

722. ———.]—*CARRILL v. PACK & BAKER* (1613), 2 Bulst. 115; 80 E. R. 996.

Annotation:—Consd. Cooper v. Marshall (1757), 1 Burr. 259.

723. ——— Stinted common—Commoner may abate.]—If the lord of a manor surcharge a stinted common, the commoners may justify taking the cattle surcharged as *damage feasant*.—*KENTICK v. PARGITER* (1608), Cro. Jac. 208; 79 E. R. 181; *sub nom. KENDRIDGE v. PARGETTOR*, Noy, 130; *sub nom. KENRICK v. PARGITER*, 1 Brownl. 187; Yelv. 129; *subsequent proceedings, sub nom. KENRICK v. PARGITER & PHILIPS* (1611), 2 Brownl. 60.

Annotations:—Consd. Hall v. Harding (1769), 4 Burr. 2426. *Refd. Dowglass v. Kendal* (1610), Cro. Jac. 256; *Atkinson v. Teasdale* (1772), 3 Wils. 278.

724. ——— Land commonable at certain periods only.]—*TRULOCK v. WHITE* (1638), 1 Roll. Abr. 405, pl. 6.

Annotation:—Consd. Hall v. Harding (1769), 4 Burr. 2426.

725. Fences—Commoner may abate.]—*ARLETT v. ELLIS*, No. 91, *ante*.

726. ——— Lord claiming to inclose as improvement—Injunction against abatement—Pending trial of right of common.]—*ARTINGTON v. FAWKES* (1697), 2 Vern. 356; 1 Eq. Cas. Abr. 103, pl. 4; 23 E. R. 824.

Approval.]—*See, generally, Part IX., Sect. 5, ante.*

727. Haystack erected by lord on common—Commoners' cattle may eat.]—*FARMER (FARMOR) v. HUNT* (1611), 1 Brownl. 220; Cro. Jac. 271; Yelv. 201; 123 E. R. 766.

728. Trenches dug by lord—Commoner cannot fill in.]—*HOWARD v. SPENCER* (1665), 1 Sid. 251; 82 E. R. 1088.

729. Trees planted by lord—No right to abate.]—A commoner cannot justify cutting down trees planted by the lord on the waste.—*KIRBY v. SADGROVE* (1797), 3 Anst. 892; 1 Bos. & P. 13; 145 E. R. 1073; *affg. S. C. sub nom. SADGROVE v. KIRBY* (1795), 6 Term Rep. 483.

Annotations:—Consd. Arlett v. Ellis (1827), 7 B. & C. 346. *Refd. Hope v. Osborne*, [1913] 2 Ch. 349.

730. ———.]—*HOPE v. OSBORNE*, No. 642, *ante*.

SUB-SECT. 2.—AGAINST FELLOW—

A. Right of Action.

731. For what action lies—General rule.]—One commoner can maintain an action against

a fellow-commoner for wrongful acts by which the former's right of common is destroyed or interfered with, or which unless stopped would grow into a legal right to the prejudice of the rights of common of the other commoners.

Defts., who were only entitled to have common of pasture for their cattle levant & couchant over the waste of the manor, were carting goods & refuse to & from their tenement over, & depositing refuse on, a part of the waste of the manor, & admittedly intended to acquire a right of way by prescription:—*Held*: they could be restrained by injunction at the suit of a fellow-commoner, & he need not prove actual pecuniary damage.—*KING v. BROWN, DURANT & Co.*, [1913] 2 Ch. 416; 82 L. J. Ch. 548; 109 L. T. 69; 29 T. L. R. 691; 57 Sol. Jo. 754.

732. ——— Surcharge.]—*AYRE v. PYNCOMB* (1649), Sty. 161; 82 E. R. 614.

Annotation:—Consd. Atkinson v. Teasdale (1772), 3 Wils. 278.

733. ——— By cattle not levant & couchant.]—*DIXON v. JAMES* (1698), 1 Freem. K. B. 273; 2 Lut. 1238; 89 E. R. 195.

Annotations:—Consd. Atkinson v. Teasdale (1772), 3 Wils. 278. *Refd. Cape v. Scott* (1874), 43 L. J. Q. B. 65. *Mentd. Ellis v. Rowles* (1750), Wils. 638; *Hall v. Harding* (1769), 4 Burr. 2426.

734. ——— Though plaintiff has himself surcharged.]—*HOBSON v. TODD* (1790), 4 Term Rep. 71; 100 E. R. 900.

Annotations:—Consd. Pindar v. Wadsworth (1802), 2 East, 154; *Robertson v. Hartopp* (1889), 43 Ch. D. 484.

735. ——— Destroying common—By digging clay.]—*BULLEN & SHIENE'S CASE* (1623), Godb. 78 E. R. 202; *sub nom. SHIENE v. BULLEN*, Palm. 366.

Annotation:—Mentd. Jeverson v. Moor (1700), 12 Mod. Rep. 262.

736. ——— By carting & depositing refuse.]—*KING v. BROWN, DURANT & Co.*, No. 731, *ante*.

737. ——— Removal of estovers—Cut by plaintiff.]—*SPILMAN'S CASE* (1617), 1 Brownl. 44; 123 E. R. 651.

See, further, Part II., Sect. 3, ante.

B. Abatement.

738. Right of distress—For surcharge—Common certain.]—*DIXON v. JAMES*, No. 733, *ante*.

739. ——— Common stinted in number—Not where stint in relation to land.]—*HALL v. HARDING* (1769), 4 Burr. 2426; 1 Wm. Bl. 673; 98 E. R. 271.

Annotation:—Apld. Cape v. Scott (1874), L. R. 9 Q. B. 269.

740. ——— In breach of agreement by commoners restricting mutual rights.]—*WHITEMAN v. KING* (1791), 2 Hy. Bl. 4; 126 E. R. 397.

741. ——— Not where cattle on common by colour of right—Common of vicinage.]—The principle laid down in *Hall v. Harding* (No. 739, *ante*), that one commoner cannot distrain the cattle of another commoner because they come upon the commonable land by colour of right, applies to common *pur cause de vicinage* as well as to common appurtenant.—*CAPE v. SCOTT* (1874), L. R. 9 Q. B. 269; 43 L. J. Q. B. 65; 30 L. T. 87; 38 J. P. 263; 22 W. R. 326.

SUB-SECT. 3.—AGAINST S

A. Right of Action.

742. For cattle damage feasant—Action—Or abatement.]—*ANON.* (1465), Jenk. 144; 145 E. R. 100.

743. ——— Not when damage negligible.]—*MARYS'S CASE* (1612), 9 Co. Rep. 111 b; 77 E. R.

895; *sub nom.* MORRIS'S CASE, Godb. 185; *sub nom.* CROGATE v. MORRIS, 2 Brownl. 55, 146.

Annotations:—**Consd.** Atkinson v. Teasdale (1772), 3 Wils. 278; Wells v. Watling (1779), 2 Wm. Bl. 1233. I always thought the doctrine of Lord Coke, in *Marys's Case*, that there must be a loss of the common in order to maintain this action, a singular doctrine of his own, & not any part of the judgment of the ct.; the injury consists in preventing the enjoyment of the common *tam amplo modo* (GOULD, J.). Any act that will ground a *per quod*, & lessen the profit of the common, will support an action against the commoner. Nor do I see anything singular or repugnant to this, in the doctrine of *Marys's Case* (BLACKSTONE, J.). **Pryce v. Belcher** (1846), 3 C. B. 58; **Robertson v. Hartopp** (1889), 43 Ch. D. 484; **King v. Brown, Durant**, [1913] 2 Ch. 416. **Refd.** *Jeveson v. Moor* (1700), 12 Mod. Rep. 262; *Hall v. Harding* (1769), 4 Burr. 2426; *Pindar v. Wadsworth* (1802), 2 East, 154. In *Wells v. Watling* ((1779), 2 Wm. Bl. 1233) GOULD, J. questioned the doctrine of Lord Coke in *Marys's Case* (GROSE, J.). **Mentd.** *Crouther v. Oldfield* (1706), 1 Salk. 364; *Grinnell v. Wells* (1844), 2 Dow. & L. 610; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38.

744. For trespass by carts carrying away turf—Not for cutting & carrying away turf—Right of action for damage to soil in lord only.—**TERREY v. GODIER** (1633), 1 Roll. Abr. 89, pl. 8.

Annotation:—**Refd.** *Iveson v. Moore* (1699), 1 Salk. 15.

See, also, No. 617, *ante*.

745. For removal of manure—Amount of damage immaterial.—**PINDAR v. WADSWORTH** (1802), 2 East, 154; 102 E. R. 328.

Annotations:—**Consd.** *George v. Lysaght & Meade-King* (1883), 49 L. T. 49; *Robertson v. Hartopp* (1889), 43 Ch. D. 484. **Refd.** *Kitchen v. Knight* (1821), M'Cle. 373; *Bower v. Hill* (1835), 1 Hodg. 15; *Harrop v. Hirst* (1868), 17 W. R. 164.

746. For damage to pasture—By person exercising lawful rights—Not actionable.—The owners of two closes immediately abutting upon a common, over which the freeholders of the manor had the right of depasturing their sheep & the inhabitants of the neighbourhood had the right of public recreation, caused damage to the freeholders of the manor by the lawful use of their premises in diminishing the turf of the common, which was already insufficient for the depasturing of the proper number of sheep. In an action for damages by the freeholders, who were commoners:—**Held**: there was no cause of action against the owners of the adjoining closes for the damage consequent upon the user of their premises, though resulting in the diminution of their rights of common.—**GEORGE v. LYSAGHT & MEADE-KING** (1883), 49 L. T. 49; 47 J. P. 696.

747. —By licensee of corporation—Having regulation of common under statute—Licence opposed by commoners.—By special Acts of 1774 & 1870 the right of resident freemen & widows of resident freemen of the town of N. to depasture two milch cows each on the Town Moor was established & regulated, the number of cows to be depastured in any one year on the moor being limited to eight hundred, & every freeman & widow of a freeman was entitled in Apr. of each year on application to their stewards & wardens to a stint ticket for two milch cows to be depastured on the moor, which was transferable to any resident inhabitant of the town, but no person was to hold more than ten such tickets. In 1912 the area of the moor available for pasturage was insufficient to carry the statutory number of cows. The Act of 1774 authorised the corpn. at the request of the stewards & wardens from time to time to grant leases of parts of the Town Moor for the purpose of improving the same, but s. 7 enacted that no lease should be granted of that part of the Town Moor called C. & such part adjoining the same as should be necessary for holding the C. fairs, nor of another part of the moor called the Race ground, nor of any part of the moor where any booths, stalls & other erections had been set up

during the holding of the fairs or horse races, but the same should be reserved for fairs & horse races as theretofore. The Act of 1870, s. 6, constituted a committee of the stewards & wardens, to be elected annually, to act for the stewards & wardens & for the freemen & widows of freemen for all purposes relating to the Town Moor, & s. 8 authorised the committee & the corpn. from time to time to enter into agreements for the appropriation of parts of the Town Moor for not exceeding ten days at a time for agricultural shows or other public purposes. Prior to 1882 horse races with attendant roundabouts & shows had for many years been held on the race ground on the Town Moor, but in that year they were & ever since had been held elsewhere. From 1882 down to 1912 a temperance festival with attendant roundabouts & shows was annually held on the old race ground on the moor with the joint consent of the committee & of the corpn., & had grown into a very large gathering of many thousands of people. In 1912 the heavy traction engines used by defts. to bring their roundabouts & shows to the festival cut up the surface of the moor & seriously damaged the herbage; consequently, in 1913, the committee, while consenting to the festival being held as usual on the moor, declined to join with the corpn. in granting a licence to defts. to bring their roundabouts & shows on the moor for the festival. The corpn. nevertheless granted defts. a licence for that purpose, & damage ensued to the herbage. Most of the holders of stint tickets for the years 1912 & 1913 were not freemen but persons who had purchased tickets from freemen. In an action by the committee against defts. for an injunction to restrain them from bringing their roundabouts & shows on to the moor, & for damages, the corpn. not being parties to the action:—**Held**: (1) neither the horse races nor the temperance festival with the attendant roundabouts & shows was a fair within the meaning of the Act of 1774, s. 7; (2) the corpn. had no power under either of the Acts to grant the licence to defts. without the consent of plffs.; (3) defts. were trespassers & plffs. were entitled to an injunction against them & damages; (4) the measure of damages was the amount of injury to the herbage, irrespective of whether the stint ticket holders were or were not freemen.—**WALKER v. MURPHY**, [1915] 1 Ch. 71; 83 L. J. Ch. 917; 112 L. T. 189; 79 J. P. 137; 59 Sol. Jo. 88; 13 L. G. R. 109, C. A.

748. For encroachment authorised by commoner—No right of action in commoner authorising.—

HARVEY v. REYNOLDS (1823), 12 Price, 724; 1 C. & P. 141; 147 E. R. 858.

Annotation:—**Consd.** *Perry v. Fitzhove* (1846), 8 Q. B. 757.

749. Nature of remedy—For temporary disturbance—Damages—Not injunction.—**GARTON v. GUILDFORD, GODALMING, & WOKING JOINT HOSPITAL BOARD** (1898), 63 J. P. Jo. 68; 43 Sol. Jo. 205, C. A.

B. Abatement.

750. By distress—Cattle damage feasant.—**ANON.** (1465), Jenk. 144; 145 E. R. 100.

751. — — ——**ANON.** (1500), Y. B. 15 Hen. 7. fo. 12, pl. 23.

Annotations:—**Mentd.** *Geary v. Bearcroft* (1666), Cart. 57; *King v. Welling* (1672), 3 Keb. 95.

752. — — ——**ANON.** (1611), Godb. 182; 78 E. R. 110.

753. — — ——**HODDESSEN v. GRESIL** (1607), Yelv. 104; *sub nom.* **HOLDESSEN v. GRESIL**, 1 Brownl. 208; 80 E. R. 71; *subsequent*

sub nom. **GRESIL v. HODDESSEN** (1608), Yelv. 143.

Annotations:—**Consd.** *Hall v. Harding* (1769), 4 Burr. 2426.

Refd. *Ashmead v. Ranger* (1699), Fortes. Rep.

Sect. 2.—Against whom exercised: Sub-sect. 3, B. Sect. 3. Part XI. Sect. 1: Sub-sects. 1 & 2. Sects. 2 & 3.]

Atkinson v. Teasdale (1772), 2 Wm. Bl. 817. **Mentd.** Howard v. Spencer (1665), 1 Sid. 251.

754. ——— Unless damage immaterial.]—MARYS'S CASE (1612), 9 Co. Rep. 111 b; 77 E. R. 895; *sub nom.* MORRIS'S CASE, Godb. 185; *sub nom.* CROGATE v. MORRIS, 2 Brownl. 55, 146.

Annotations:—Consd. Atkinson v. Teasdale (1772), 3 Wils. 278; Wells v. Watling (1779), 2 Wm. Bl. 1233; Pindar v. Wadsworth (1802), 2 East, 154; Fryco v. Belcher (1846), 3 C. B. 58; Robertson v. Hartopp (1889), 43 Ch. D. 484; King v. Brown, Durant, [1913] 2 Ch. 416. **Refd.** Hall v. Harding (1769), 1 Wm. Bl. 673. **Mentd.** Jeyeson v. Moor (1700), 12 Mod. Rep. 262; Crouther v. Oldfeild (1706), 1 Salk. 364; Grinnell v. Wells (1844), 2 Dow. & L. 610; Admiralty Comrs. v. S.S. Amerika, [1917] A. C. 38.

755. ——— Damage need not be proved.]—BRONGE v. MORE (1654), Sty. 428; 82 E. R. 834.

756. ——— Damage must be proved.]—WOOLTON v. SALTER (1683), 3 Lev. 104; 3 Salk. 91; 83 E. R. 599.

757. ——— Right to impound & separate.]—AS v. NICHOLS (1681), 3 Lev. 40; 83 E. R. 566.

758. ———.]—DIXON v. JAMES (1698), 1 Freem. K. B. 273; 2 Lut. 1238; 89 E. R. 195. **Annotations:—Refd.** Ellis v. Rowles (1750), Wilses, 638; Hall v. Harding (1769), 4 Burr. 2426; Atkinson v. Teasdale (1772), 3 Wils. 278; Cape v. Scott (1874), 43 L. J. Q. B. 65.

759. ——— Not allottee under Inclosure Act—Omitting to fence.]—WELLS v. PEARCY, No. 135, *ante*.

760. By driving away.]—ANON. (1611), Godb. 182; 78 E. R. 110.

761. ———.]—HODDESDON v. GRESIL, No. 699, *ante*.

762. ———.]—THOMAS v. NICHOLS (1681), 3 Lev. 40; 83 E. R. 566.

763. Not by dispersing fern ashes—Burnt by stranger.]—WOADSON v. NAWTON (1727), 2 Stra. 777; 93 E. R. 842.

Annotations:—Consd. Rackham v. Jesup (1772), 3 Wils. 332. **Refd.** De La Warr v. Miles (1880), 49 L. J. Ch. 476.

SECT. 3.—MEASURE OF DAMAGES.

764. Injury done.]—WALKER v. MURPHY, No. 747, *ante*.

See, generally, DAMAGES.

Part XI.—Suspension and Extinguishment of Rights of Common otherwise than by Statute.

SECT. 1.—BY UNITY OF SEISIN OR POSSESSION.

SUB-SECT. 1.—IN GENERAL.

765. Right of common suspended—During disseisin of lord of the soil.]—ANON. (1501), Y. B. 16 Hen. 7, fo. 11, pl. 4.

766. ——— Parsonage with right of common out of an abbey—Parsonage appropriated to abbot.]—ANON. (1581), Godb. 4; 78 E. R. 3.

See, also, No. 778, post.

767. ——— Manor vesting in Crown—On dissolution of monasteries—Copyhold tenants.]—SAWYER'S CASE (1632), W. Jo. 284; 82 E. R. 150.

Annotation:—Refd. Trigg v. Turner (1678), 2 Show. 9.

See, also, No. 777, post.

768. ——— Crown representing Duchy of Cornwall.]—R. v. HERMITAGE (INHABITANTS) (1692), Carth. 211; 90 E. R. 743.

Annotations:—Mentd. R. v. Glastonby (1737), Lee temp. Hard. 355; A.-G. v. Plymouth Corpn. (1754), Wight. 134; Byam v. Booth (1816), 2 Price, 231; Vickery v. L. B. & S. C. Ry. (1870), L. R. 5 C. P. 165.

769. ——— Owner in fee of land to which common appendant—Also tenant for life of common land.]—In the year 1796 S. was seised in fee of a certain farm & also of an estate for life in a certain moor. In 1822, S. & the tenant in remainder joined in a conveyance of the moor to C. in fee, that he might be tenant to the praecipe for the purpose of suffering a recovery, in order to create a mtge. term, but no recovery was suffered. In 1827 S. became bkpt., & by subsequent conveyances his interest in the moor vested in deft., & his interest in the farm vested in pltf. S. always occupied the farm by his tenants who had enjoyed without interruption the right of depasturing their cattle on the moor. In the year 1856, deft. distrained pltf.'s cattle *damage feasant* when pltf. claimed the right of common by enjoyment as of right for the respective periods of sixty & thirty years mentioned in Prescription Act, 1832 (c. 71):—**Held:** (1) there was no unity of seisin to extinguish the easement or prevent its existence; (2) the title to the tenements was such that there could not, in point of law, have been an enjoyment of

the right of common for the period of sixty years, as of right, for S. being owner in fee of the farm & also tenant for life & occupier of the common, the rights of the tenants of the farm over the common were derived from him, & as he could not have an enjoyment as of a right against himself within the meaning of the statute, so neither could his tenants; (3) the conveyance by S. in 1822 to make a tenant to the praecipe, made no difference & consequently the thirty years' claim could not be supported.—**WARRBURTON v. PARKE** (1857), 2 H. & N. 64; 26 L. J. Ex. 298; 29 L. T. O. S. 127; 157 E. R. 26.

Annotation:—Generally, Mentd. Gardner v. Hodgson's Kingston Breweries, [1900] 1 Ch. 592.

770. Right of common extinguished—Common appendant—Unity of possession within legal memory.]—ANON. (1350), Y. B. 24 Edw. 3, fo. 45, pl. 29.

771. ———.]—TYRRINGHAM'S CASE, No. 22, *ante*.

See, also, Nos. 777, 778, post.

772. ——— Common appurtenant—Unity of possession by assignment.]—BRADSHAW v. EYRE, No. 357, *ante*.

—— Common of turbary & taking stones.]—*See No. 775, post.*

773. ——— Sole pasturage during part of year.]—WALTON v. LATIMER (1309), Y. B. 2 Edw. 2, Sel. Soc. p. 81, pl. 27.

774. ——— Manor vested in Crown—On dissolution of monasteries.]—NELSON'S CASE (1585), Gouldsb. 3; 75 E. R. 957.

775. ——— Against tenant for years of ancient tenement—Common of turbary & taking stones.]—GRYMES v. PEACOCK (1610), 1 Bulst. 17; 80 E. R. 722.

Annotations:—Refd. Barlow v. Rhodes (1833), 1 Cr. & M. 439. **Mentd.** Plant v. James (1833), 5 B. & Ad. 791.

776. ——— Rights of lord.]—SAWYER'S CASE (1632), W. Jo. 284; 82 E. R. 150.

Annotation:—Mentd. Trigg v. Turner (1678), 2 Show. 9.

777. ——— Copyholders of manor—Common appendant.]—JAMES v. READE (1610), 2 Brownl. 47; 123 E. R. 807.

See, also, No. 767, ante.

778. Parsonage Improprate—Close with common appendant—Unity of possession from time immemorial.]—BRUSTERS CASE (1600), cited in 2 Roll. Rep. 251; 81 E. R. 780.

See, also, No. 766, ante.

Effect of re-grant.]—See Part VI., Sect. 1, ante.

Alienation or lease by commoner—Of part of land in respect of which common claimed.]—See Part VII., Sect. 1, ante.

Extinction by escheat or surrender of copyholds.]—See Nos. 361, 362, 363, ante.

Common of shack.]—See No. 314, ante.

SUB-SECT. 2.—ACQUISITION BY COMMONER OF PART ONLY OF COMMON LAND.

779. By purchase—Common appurtenant—Extinguished.]—KIMPTON'S CASE (1586), Gouldsb. 53; 75 E. R. 990; *sub nom.* KIMPTON v. WOOD & BELLAMY, 1 And. 159.

780. ——— Not common appendant.]—TYRRINGHAM'S CASE, No. 22, ante.

781. ——— WOOD v. MORETON (1608), 1 Brownl. 180; 123 E. R. 741.

782. ——— WYAT WILD'S CASE (1609), 8 Co. Rep. 78 b; 77 E. R. 593.

*Annotations:—*Consd. Baring v. Abingdon, [1892] 2 Ch. 374. Refd. Sacheverill v. Porter (1637), Cro. Car. 482. Mentd. King v. Melling (1672), 1 Vent. 214; R. v. Drake (1706), 2 Salk. 660; R. v. Starkey (1837), 7 Ad. & El. 95.

783. ——— MORSE & WEBB'S CASE (1610), 13 Co. Rep. 65; 1 Brownl. 180; 2 Brownl. 297; 77 E. R. 1474.

784. By inclosure—Extinguished.]—BRADSHAW v. BOKINGHAM (1602), Noy, 106; 74 E. R. 1072.

Alienation or lease by commoner—Of part of land in respect of which common claimed.]—See Part VII., Sect. 1, ante.

SECT. 2.—BY ABANDONMENT.

785. What amounts to abandonment Not non-user—Common of estovers.]—CHICHESTER (Bp.) & STRODWICK'S CASE (1613), Godb. 234; 78 E. R. 136.

*Annotation:—*Mentd. A.-G. v. Reynolds, [1911] 2 K. B. 888.

786. ——— For two years—Out of thirty.]—CARR v. FOSTER, No. 429, ante.

787. ——— For sixteen years & fourteen years—Evidence of common rights for over a hundred & fifty years.]—By Inclosure Act, 1845 (c. 118), s. 27, the comrs. were to set forth in their provisional order the terms on which the inclosure should be made, & if the lord of the manor was entitled to the soil of the land proposed to be inclosed, should specify the proportion of the land which should be allotted to the lord in respect of his right & interest in the soil, either exclusively or inclusively of his right to the mines, etc., under such land, or inclusively or exclusively of any right of pasturage which might have been usually enjoyed by such lord or his tenant. Pltf., the lord of a manor, was owner of the soil of the waste proposed to be inclosed, consisting of four tracts, & was also owner of seven farms of demesne lands. The provisional order directed that one-sixteenth part in value of the waste should be allotted to pltf. as lord of the manor in lieu of his right & interest in the soil, exclusively of his right to the mines, etc., under same:—*Held*: (1) right of pasturage which might have been usually enjoyed by the tenants, meant the *quasi* right of pasturage over the wastes of the manor enjoyed by the lord

or his tenants in respect of his demesne lands in such a manner as would establish, in ordinary cases, an immemorial right of common; (2) the provisional order, being silent as to the right of pasturage, must be taken not to have included it in the allotment of one-sixteenth.

(3) Pltf. having sent in claims to pasturage over all four tracts in respect of his seven farms, objections were delivered to some of the claims, but no objection was sent in as to the claims over one of the tracts:—*Held*: by the scheme of the Act, the valuer & assistant comr. had no power to disallow the claims which were not objected to.

(1) In order to support a claim, made on the inclosure in 1860, in respect of one of the farms called M., over one of the tracts called F., it was proved that the farm was between three & four miles from F. The tenants of the farm, previous to 1826, were dead. The tenant, in 1828, turned a few horses on F. & also sixteen or eighteen sheep during the summer of that year, & a pony in 1844 & 1845. But the tenant did not keep a flock fit to be turned on F., & sheep were not sent to F., because there was better pasture on M. Sheep were also sent to F. during the years 1859, 1860, & 1861. Leases were produced from pltf.'s custody beginning in 1677, in which rights of common generally were granted to the tenants of M.; & in leases of 1727 & 1741 it was agreed that the tenant of M. should have a right of way for his cattle & sheep to & from F. over one of the other farms; & in a series of leases of that other farm from 1732 to 1791, there was a proviso that the tenants of M. should have this right of way:—*Held*: there was sufficient evidence of a right of pasturage usually enjoyed by the lord or his tenants. *MUSGRAVE v. INCLOSURE COMRS.* (1874), L. R. 9 Q. B. 162; 43 L. J. Q. B. 80; 30 L. T. 160; 38 J. P. 324; 22 W. R. 295.

788. ——— Non-user for many years—Coupled with change in character of land & user.]—SCRUTTON v. STONE (1893), 9 T. L. R. 478; *affd.* on other grounds, 10 T. L. R. 157, C. A.

789. ——— Not rebuilding ancient house—Entitled to common of estovers & turbary.]—A.-G. v. REYNOLDS, No. 175, ante.

Interruption of prescription.]—See Part VI., Sect. 2, sub-sect. 2, D., ante.

Effect of non-user—Common in forest.]—See No. 264, ante.

SECT. 3.—BY RELEASE.

790. Extinguishes common—As against persons claiming under party releasing—Common appendant.]—BLACET v. DE LA WARRE (1308), Y. B. 1 Edw. 2, fo. 7, pl. 1.

791. Release of part—Extinguishes the whole—Common appurtenant.]—ROTHERHAM v. GREEN (1597), 2 And. 89; Cro. Eliz. 593; Gouldsb. 114; Noy, 67; 123 E. R. 561.

*Annotation:—*Refd. Bassett v. Mitchell (1831), 2 B. & Ad. 99.

792. ——— Not exclusive right of pasture.]—JOHNSON v. BARNES, No. 118, ante.

793. By lord on enfranchisement—Bars other copyholders—Common of piscary.]—TILBURY v. SILVA, No. 227, ante.

794. Of seigniorial rights—In customary freeholds—Common not extinguished.]—BARING v. ABINGDON, No. 93, ante.

795. Evidence of release—Licence to inclose.]—A licence to inclose common, may be pleaded as a release of common.—MILES v. EYTERIDGE (1692), 1 Show. 349; 89 E. R. 618.

See, also, No. 866, post.

SECT. 4.—BY ALTERATION OF COMMONER'S TENEMENT.

796. Common appendant—House built—Arable land converted to pasture.]—TYRRINGHAM'S CASE, No. 22, *ante*.

797. Common of estovers—Alteration or enlargement of house.]—LUTTREL'S CASE, No. 209, *ante*.

798. ——— House rebuilt—On former site—Common not extinguished.]—BRYERS v. LAKE (1655), Sty. 446 ; 82 E. R. 850.

Annotation :—**Refd.** A.-G. v. Reynolds, [1911] 2 K. B. 888.

799. ———.]—A.-G. v. REYNOLDS, No. 175, *ante*.

800. Common of pasture appurtenant—Lands entitled & turned to different purposes.]—A right of common appurtenant for cattle levant & couchant, proved by acts of user for thirty years, & exercised in respect of a tenement formerly in a condition to support cattle, but now, & for more than thirty years past, turned to different purposes, is not extinguished or suspended by reason of such change in the condition of the tenement, if the tenement is still in such a state that it might easily be turned to the purpose of feeding cattle.—CARR v. LAMBERT (1866), L. R. 1 Exch. 168 ; 4 H. & C. 257 ; 35 L. J. Ex. 121 ; 14 L. T. 255 ; 30 J. P. 181 ; 12 Jur. N. S. 194 ; 14 W. R. 405, Ex. Ch.

Annotations :—**Consd.** A.-G. v. Reynolds, [1911] 2 K. B. 888.

Refd. Warriek v. Queen's College, Oxford (1871), 6 Ch. App. 716. **Mentd.** Johnson v. Barnes (1872), L. R. 7 C. P. 692 ; Robertson v. Hartopp (1889), 43 Ch. D. 481.

801. Common of turbary—House rebuilt.]—A.-G. v. REYNOLDS, No. 175, *ante*.

SECT. 5.—BY EXHAUSTION OR DESTRUCTION OF PRODUCT.

802. Common of turbary—Inclosure after exhaustion—By custom.]—CLARKSON v. WOODHOUSE, No. 872, *post*.

——— **Impossibility of exercise.]—See No. 186, *ante*.**

SECT. 6.—BY ALTERATION OF COMMONER'S ESTATE.

SUB-SECT. 1.—LAND ENTITLED AND COMMON IN SAME MANOR.

803. Enfranchisement of land entitled—Right of common extinguished.]—PORT v. WARD (1598), Moore, K. B. 667 ; 72 E. R. 827.

Annotation :—**Refd.** Derry v. Sanders, [1919] 1 K. B. 223.

804. ———.]—SPEAKER v. STYANT (1689), Comb. 127 ; 90 E. R. 384.

805. ——— In law.]—STYANT v. STAKER (1691), 2 Vern. 250 ; 1 Eq. Cas. Abr. 104, pl. 10 ; 23 E. R. 761.

Annotation :—**Consd.** Derry v. Sanders, [1919] 1 K. B. 223.

806. ———.]—CROWTHER v. OLDFIELD (1706), Holt, K. B. 146 ; 6 Mod. Rep. 19 ; 1 Salk. 170 ; 3 Salk. 13 ; 90 E. R. 979 ; *sub nom.* CROUTHER v. OLDFIELD, 1 Salk. 364.

Annotations :—**Refd.** Derry v. Sanders, [1919] 1 K. B. 223. **Mentd.** Thompson v. Roberts (1732), Fortes. Rep. 339 ; Wicker v. Norris (1735), Lee temp. Hard. 116 ; Sargent v. Reed (1745), 2 Stra. 1228 ; Portland v. Hill (1866), 35 L. J. Ch. 439.

807. ——— With all appurtenances—Right of common extinguished.]—MASSAM v. HUNTER (1610), 2 Brownl. 209 ; 1 Bulst. 2 ; Cro. Jac. 253 ; 123 E. R. 901 ; *sub nom.* MASSAM v. HUNT, 1 Brownl. 220 ; Yelv. 189 ; *sub nom.* DARSON v. HUNTER, Noy, 136.

Annotations :—**Consd.** Birch v. Wilson (1677), 2 Mod. Rep. 274 ; Baring v. Abingdon, [1892] 2 Ch. 374 ; Derry v.

Sanders, [1919] 1 K. B. 223. **Refd.** Leets v. Edwards (1617), Hob. 190 ; Crouther v. Oldfield (1706), 1 Salk. 364. **Mentd.** Hall v. Byron (1877), 4 Ch. D. 667.

808. ——— With all commons occupied—Right of common not extinguished.]—GRYMES v. PEACOCK (1610), 1 Bulst. 17 ; 80 E. R. 722.

Annotations :—**Consd.** Plant v. James (1833), 5 B. & Ad. 791. **Refd.** Barlow v. Rhodes (1833), 1 Cr. & M. 439.

809. ———.]—LEE v. EDWARDS (1621), 1 Brownl. 173 ; 123 E. R. 736 ; *sub nom.* LEETS v. EDWARDS, Hob. 190.

810. ——— In equity.]—STYANT v. STAKER (1691), 2 Vern. 250 ; 1 Eq. Cas. Abr. 104, pl. 10 ; 23 E. R. 761.

Annotation :—**Consd.** Derry v. Sanders, [1919] 1 K. B. 223.

See, also, No. 803, *ante*.

Effect of regrant after escheat or surrender of copyhold.]—See Nos. 361, 362, 363, *ante*.

811. Purchase of freehold—By leaseholder—Common not extinguished.]—DOIDGE v. CARPENTER (1817), 6 M. & S. 47 ; 105 E. R. 1160.

Annotation :—**Distd.** Baring v. Abingdon, [1892] 2 Ch. 374.

812. Release of seigniorial rights—Over customary freehold—Common not extinguished.]—BARING v. ABINGDON, No. 93, *ante*.

813. ———.]—Pltfs. were respectively the owners in fee simple of two properties in the parish of W., situated on the north side of a lane used by them as the nearest way to the village & railway station. A short distance from pltfs.' properties the lane became a patch of green & then forked off into two branches. Deft. was the owner of a property situated between the two branches, the southern boundary of which adjoined the patch of green with a fence between. Deft. had attempted to inclose the patch of green adjoining the end of his property, & by so doing had interfered with one of the branches of the lane. Pltfs. thereupon brought an action against him, claiming an injunction to restrain him from inclosing any part of the patch of green, on the ground, *inter alia*, that the patch of green was waste of the manor of W., & that they had rights of common of pasture & turbary thereon. It appeared that down to 1881 pltfs.' properties were freeholds of the manor of W. At that date the seignory thereof was released. Pltfs. alleged that their predecessors in title, freehold tenants of the manor, were entitled in respect of the two properties & over the wastes of the manor, including the patch of green, to rights of common of pasture & turbary thereon :—*Held* : although rights of common annexed to copyholds were extinguished on enfranchisement, there was no similar doctrine with reference to the extinguishment of rights of common on the release of seigniorial rights due by the freeholders of a manor, & pltfs.' rights of common had not been extinguished by the enfranchisement in 1881.—BROOME v. WENHAM (1893), 68 L. T. 651 ; 9 T. L. R. 346.

SUB-SECT. 2.—LAND ENTITLED AND COMMON NOT IN SAME MANOR.

814. Enfranchisement of land entitled—Right of common extinguished.]—LEETS v. EDWARDS (1621), Hob. 190 ; 80 E. R. 337 ; *sub nom.* LEE v. EDWARDS, 1 Brownl. 173.

815. ——— Right of common not extinguished.]—FIELD v. BOOTHBY (1658), 2 Sid. 81 ; 82 E. R. 1269.

816. ———.]—CROWTHER v. OLDFIELD (1706), Holt, K. B. 146 ; 6 Mod. Rep. 19 ; 1 Salk. 170 ; 3 Salk. 13 ; 90 E. R. 979 ; *sub nom.* CROUTHER v. OLDFIELD, 1 Salk. 364.

PART XII.—ENCROACHMENT UPON COMMON LANDS.

Annotations :—**Consd.** Derry v. Sanders, [1919] 1 K. B. 223. **Mentd.** Thompson v. Roberts (1732), Fortes. Rep. 339; Wicker v. Norris (1735), Lee temp. Hard. 116; Sargent v. Reed (1745), 2 Stra. 1228; Portland v. Hill (1866), 35 L. J. Ch. 439.

817. ———.]—**BARWICK v. MATTHEWS** (1814), 5 Taunt. 365; 1 Marsh. 50; 128 E. R. 730.

Annotation :—**Refd.** Derry v. Sanders, [1919] 1 K. B. 223.

SECT. 7.—BY AGREEMENT.

818. Agreement to stint common—Though lord & tenants only tenants for life—Good.]—DUNN v. ALLEN (1686), 1 Vern. 426; 23 E. R. 563.

819. ——— **Enforced—Minority of tenants objecting.]—DELABEERE v. BEDDINGFIELD** (1689), 2 Vern. 103; 1 Eq. Cas. Abr. 104, pl. 6; 23 E. R. 676.

820. ——— **By majority of tenants—Does not bind minority.]—BRUGES v. CURWIN** (1706), 2 Vern. 575; 23 E. R. 974.

821. ——— **Agreement by lord's bailiff—Authority presumed—After thirty years acquiescence by lord.]—TUFTON v. WENTWORTH** (1720), 1 Bro. Parl. Cas. 165; 2 Eq. Cas. Abr. 207, pl. 3; 1 E. R. 489, II. 1.

Agreement to inclose.]—See Part XIII., Sect. 1,

SECT. 8.—BY ENCROACHMENT.

See Part XII., Sect. 2, post.

SECT. 9.—BY SEVERANCE.

See Part VII., Sect. 1,

SECT. 10.—COMMON OF VICINAGE.

See Part II., Sect. 1, sub-sect. 5, D., ante.

Part XII.—Encroachment upon Common Lands.

SECT. 1.—WHAT AMOUNTS TO ENCROACHMENT.

822. Not inclosure—Without objection by lord's steward—Licence presumed—Notice to quit necessary before action of ejectment.]—DOE d. FOLEY v. WILSON (1809), 11 East, 56; 103 E. R. 925.

823. ——— **If explainable by custom.]—A.-G. v. BEVELEY** (1870), cited in 62 J. P. 663.

Annotation :—**Refd.** Blandy-Jenkins v. Dunraven (1898), 62 J. P. 661.

824. Not occasional licence by lord of manor—For use of small portion of waste by circus.]—MALVERN HILLS CONSERVATORS v. FOLEY (1888), 4 T. L. R. 672.

Closing access—To lammas lands.]—See No. 300, ante.

Presumption as to hedge & ditch-width.]—See BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 280, No. 117.

SECT. 2.—PERIOD OF LIMITATION.

SUB-SECT. 1.—TO EXTINGUISH RIGHTS OF COMMON.

See, generally, LIMITATION OF ACTIONS.

825. Thirty years—Common rights extinguished.]—SILWAY v. COMPTON (1681), 1 Vern. 32; 1 Eq. Cas. Abr. 101, pl. 8; 23 E. R. 287.

826. Twenty years—Common rights extinguished.]—CREACH v. WILMOT (1752), cited in 2 Taunt. 160; 127 E. R. 1038, N. P.

Annotations :—**Refd.** Hawke v. Bacon (1809), 2 Taunt. 156; Tapley v. Wainwright (1833), 5 B. & Ad. 395.

827. ——— **Proof must extend to whole inclosure.]—HAWKE v. BACON** (1809), 2 Taunt. 156; 127 E. R. 1036.

Annotations :—**Dbtd.** Bassett v. Mitchell (1831), 2 B. & Ad. 99.

828. ——— **Proof of inclosure & enjoyment of part sufficient.]—TAPLEY v. WAINWRIGHT** (1833), 5 B. & Ad. 395; 2 Nev. & M. K. B. 697; 110 E. R. 836.

ns :—**Consd.** Smith v. Royston (1841), 8 M. & W. **Refd.** Webber v. Richards (1841), 1 Q. B. 439.

SECT. 2.—AS BETWEEN COMMONER AND LORD OF MANOR.

generally, LIMITATION OF ACTIONS.

829. Twenty years—Rights of lord barred.]—

CREACH v. WILMOT (1752), cited in 2 Taunt. 160; 127 E. R. 1038, N. P.

Annotations :—**Refd.** Hawke v. Bacon (1809), 2 Taunt. 156; Tapley v. Wainwright (1833), 5 B. & Ad. 395.

830. ——— **Right of purchaser from Crown barred—Though Crown might have brought ejectment.]—DOE d. WATT v. MORRIS** (1835), 2 Bing. N. C. 189; 1 Hodg. 215; 2 Scott, 276; 4 L. J. C. P. 285; 132 E. R. 75.

Annotations :—**Refd.** Hicks v. Sallitt (1853), 23 L. J. Ch. 571; Emmerson v. Maddison, [1906] A. C. 569.

831. ——— **Inclosure by licence—Right of lord barred—Without proof of revocation of licence.]—DOE d. DUNRAVEN (EARL) v. WILLIAMS** (1836), 7 C. & P. 332, N. P.

Annotation :—**Apprvd.** Andrews v. Hailes (1853), 21 L. T. O. S. 151.

SUB-SECT. 3.—INTERRUPTION.

832. By commoner—Operates for benefit of lord.]—ANON. (1653), Sty. 370; 82 E. R. 786.

833. Sufficiency of—As evidence of countermand of licence—Breaking down enclosure sufficient.]—DOE d. BECK v. HEAKIN (1837), 6 Ad. & El. 405; 2 Nev. & P. K. B. 660; 112 E. R. 189.

834. ——— **As evidence of resumption of possession—Where trespasser left in possession—Not hole made in roof of hut.]—DOE d. BAKER v. WINCHESTER** (1850), 15 L. T. O. S. 68.

Annotations :—**Mentd.** Baker v. White (1875), L. R. 20 Eq. 166; **Re** Allsop & Joy's Contract (1889), 61 L. T. 213.

835. ——— **Not portion of fence removed—& stone removed from wall of hut.]—DOE d. BAKER v. COOMBS** (1850), 9 C. B. 711; 19, L. J. C. P. 306; 15 L. T. O. S. 90; 137 E. R. 1073.

Annotation :—**Mentd.** Worssam v. Vandenbrande (1868), 17 W. R. 53.

SECT. 3.—FOR WHOSE BENEFIT ENCROACHMENT OPERATES.

836. Encroachment by tenant—Not for benefit of landlord.]—Encroachments by the tenant on the waste, do not belong to the landlord.]—DOE d. COLCLOUGH v. MULLINER (1795), 1 Esp. 460, N. P.

Annotations :—**Consd.** Lisburne v. Davies (1866), L. R. 1 C. P. 259; Whitmore v. Humphries (1871), L. R. 7 C. P. 1. **Refd.** Andrews v. Hailes (1853), 2 E. & B. 349. **Mentd.**

Sect. 3.—For whose benefit encroachment operates.

Sect. 4. Part XIII. Sect. 1.]

Doe d. Palmer v. Eyre, Doe d. Baddeley v. Massey (1851), 15 Jur. 1031.

837. ——— For benefit of landlord.]—Encroachments by the tenant on the waste, belong to the landlord.—*DOE d. CHAILNOR v. DAVIES (1795), 1 Esp. 460, N. P.*

Annotation:—Expld. Lisburne v. Davies (1866), L. R. 1 C. P.

838. ———.]—*DOE d. GONVILLE & CAIUS COLLEGE, CAMBRIDGE, & DICKINSON v. STOPFORD (1831), 9 L. J. O. S. K. B. 171.*

839. ——— House built.]—*LOYD v. BARTLET (1726), 2 Eq. Cas. Abr. 228, pl. 13; 6 Vin. Abr. 183 (X. d), pl. 1; 22 E. R. 194.*

840. ——— Subject to right of tenant during lease.]—*DOE d. HARRISON v. MURRELL (1837), 8 C. & P. 134, N. P.*

841. ———.]—*BAILEY v. ABRAHAM (1849), 14 L. T. O. S. 219.*

842. ——— Whether doctrine applicable to copyholder.]—A copyhold was surrendered in 1809 to a trustee for the Crown for military purposes. In 1808 the then lord of the manor had granted to M., the governor of a neighbouring fort, a licence to inclose a portion of the waste adjoining the copyhold, & occupy it at a yearly rent during his life, if he so long continued governor, which he ceased to be in 1811. Nothing further was shown as to the title to the land included in the licence except that at the commencement of this action in 1874 the Crown had been in possession of it as inclosed ground, as well as of the original copyhold, for more than forty years. Since 1811 there had been repeated admittances of trustees for the Crown to the original copyhold, in which it was described by metes & bounds not including the close L. comprised in the licence. In 1874 the lord of the manor, without the consent of the Crown, granted a licence to get coprolites out of close L. at a royalty, & received £222 for royalties. The Crown brought an action for an injunction & damages. The tenant who held close L. under the Crown had separately received full compensation for surface damage, & the land had been restored to its original condition: *Held*: (1) assuming the doctrine that encroachments made by a lessee enure to the benefit of the landlord to be applicable to encroachments by a copyholder, the application of that doctrine was excluded by the facts that the inclosure of close L. having been made by licence from the lord was not an encroachment, & the subsequent admittances did not treat close L. as part of the copyhold tenement; (2) the Crown had under the Stat. Limitations acquired a freehold title to close L., & as the coprolites belonged to the Crown, the damages were not excessive.

Qu.: (3) whether the doctrine that encroachments made by a lessee enure to the benefit of the landlord is applicable to encroachments by a copyholder; (4) whether if close L. had been copyhold, a finding, which gave to the copyholder by way of damages the whole sum received by the lord for the coprolites, could have been sustained.—*A.-G. v. TOMLINE (1880), 15 Ch. D. 150; 43 L. T. 486, C. A.* *Annotations:—As to (2) Refd. Elwes v. Brigg Gas Co. (1886), 33 Ch. D. 562. As to (3) Refd. East Stonehouse District L. B. (1902), 50 W. R. 698. Generally, Mentd. Beighton v. Beighton (1895), 13 R. 743.*

Relation between copyholder & lord of manor generally, see COPYHOLDS.

843. ——— Adjoining land demised—Benefit of landlord—Lessee for lives.]—*BRYAN d. CHILD v. WINWOOD (1808), 1 Taunt. 208; 127 E. R. 812.*

Annotations:—Consd. Andrews v. Hailes (1853), 2 E. & B.

349. Refd. Whitmore v. Humphries (1871), L. R. 7 C. P. 1; A.-G. v. Tomline (1880), 15 Ch. D. 150.

844. ——— Unless accompanied by evidence to contrary.]—*DOE d. LEWIS v. REES (1834), 6 C. & P. 610, N. P.*

Annotations:—Consd. Andrews v. Hailes (1853), 2 E. & B. 349. Apld. Doe d. Croft v. Tidbury (1854), 14 C. B. 304. Refd. Kingsmill v. Millard (1855), 11 Exch. 313; Lisburne v. Davies (1866), 35 L. J. C. P. 193.

845. ———.]—*DOE d. DUNRAVEN (EARL) v. WILLIAMS (1836), 7 C. & P. 332, N. P.* *Annotation:—Apprvd. Andrews v. Hailes (1853), 21 L. T. O. S. 151.*

846. ———.]—*DOE d. CROFT & SKINNER v. TIDBURY (1854), 14 C. B. 304; 23 L. J. C. P. 57; 18 Jur. 468; 2 C. L. R. 347; 139 E. R. 124.*

Annotations:—Consd. Berney v. Bickmore (1863), 8 L. T. 353. Refd. A.-G. v. Tomline (1880), 15 Ch. D. 150.

847. ——— Admission of previous encroachment.]—*KINGSMILL v. MILLARD (1855), 11 Exch. 313; 19 J. P. 661; 3 C. L. R. 1022; 156 E. R. 849.*

Annotations:—Consd. Lisburne v. Davies (1866), L. R. 1 C. P. 259. Refd. A.-G. v. Tomline (1880), 15 Ch. D. 150.

848. ——— Subsequent grant by lord of manor.]—A tenant encroached on an adjoining waste, part of manor belonging to her son, a minor. On her son attaining his majority, the homage presented that she had encroached. She thereupon applied for & obtained from her son, the lord, a grant of the piece of land so encroached on. She never paid any rent for it, nor was any service ever rendered in respect of the grant. At the expiration of the tenancy, the landlord took possession, not only of the land demised, but of the piece of the waste encroached on. On ejectment by the lord of the manor:—*Held*: in the circumstances, the ordinary presumption of law that an encroachment made by a tenant is for the benefit of his landlord was rebutted; by the acceptance of the grant from the lord, the encroacher became his tenant, & the lord was entitled to succeed.—*BERNEY v. BICKMORE (1863), 8 L. T. 353.*

849. ——— Inclosure by licence.]—The lessee of certain premises for a term of ninety-nine years, dependent on four lives, inclosed, with the assent of the lessor given by word of mouth, a piece of adjoining waste which belonged to the lessor, as lord of the manor, on the understanding that the piece so inclosed should be treated as if comprised in the lease. Upon the determination of the lease, which was more than twenty-one years from the date of the inclosure, the reversioners brought ejectment to recover the land so inclosed from the tenant:—*Held*: the assent of the landlord to the inclosure of the additional piece of land did not create such a tenancy of the land as to bring the case within Real Property Limitation Act, 1833, s. 7, or prevent such inclosure from being an encroachment within the ordinary rule of law that an encroachment made by a tenant must be taken to be made for the benefit of the landlord, & treated as part of the demised premises; & consequently the statute did not begin to run till the determination of the lease, & plffs. were entitled to recover the land.—*WHITMORE v. HUMPHRIES (1871), L. R. 7 C. P. 1; 41 L. J. C. P. 43; 25 L. T. 496; 35 J. P. 807; 20 W. R. 79.*

Annotations:—Consd. A.-G. v. Tomline (1880), 15 Ch. D. 150. Refd. Hastings v. Saddler (1898), 79 L. T. 355.

850. ——— Not adjoining land demised—Benefit of landlord.]—*ANDREWS v. HAILES (1853), 2 E. & B. 349; 22 L. J. Q. B. 409; 21 L. T. O. S. 151; 17 Jur. 621; 1 W. R. 366; 1 C. L. R. 1034; 118 E. R. 797.*

Annotations :—**Consd.** *Kingsmill v. Millard* (1855), 11 Exch. 313; *Berney v. Bickmore* (1863), 8 L. T. 353. **Refd.** *Doe d. Croft v. Tidbury* (1854), 14 C. B. 304; *A.-G. v. Tomline* (1880), 15 Ch. D. 150; *Nesbitt v. Mablethorpe U. C.*, [1918] 2 K. B. 1.

851. ——— ——— ——— **Unless accompanied by evidence to contrary.**—*DOE d. LLOYD v. JONES* (1846), 15 M. & W. 580; 16 L. J. Ex. 58; 153 E. R. 980.

Annotations :—**Refd.** *Andrews v. Hailes* (1853), 2 E. & B. 349; *Doe d. Croft v. Tidbury* (1854), 14 C. B. 304.

852. ——— ——— ——— **Evidence insufficient.]**—To raise the presumption that an encroachment on waste land by a tenant was made for the benefit of his landlord, it is not necessary that the land encroached upon should be contiguous or adjoining to, in the sense of conterminous with, the land held by him as tenant; it is enough if it be so near thereto that it may be presumed that his position as tenant enabled him to approve. Nor does the circumstance of the intervention of a small river & a fence & a narrow strip of waste between the holding & the encroachment rebut the *prima facie* presumption, though there be no direct access between the two across the stream. About forty years ago, A., a labourer, in the course of three years completed the inclosure of four acres of waste land of the manor of P., separated only by a small river and a narrow strip of the waste from a farm held by B. under the lord; & when the inclosure was completed, B. paid A. £4 10s., & took possession of the four acres, & occupied them with the farm. At the expiration of his term, B. claimed to be entitled to the fee simple of the four acres; & in ejectment by the lord, who claimed

them as an encroachment by his tenant for his benefit, a verdict was taken for the plff., the whole matter being reserved for the consideration of the ct., who were to draw inferences of fact; the ct. drew the inference that the encroachment was made by A. as the servant of B.:—**Held**: there was nothing in the relative position of the inclosure & the farm to rebut the presumption that B. held the inclosure as part of the farm.—*LISBURNIE (EARL) v. DAVIES* (1866), L. R. 1 C. P. 259; Har. & Ruth. 172; 35 L. J. C. P. 193; 13 L. T. 795; 12 Jur. N. S. 340; 14 W. R. 333.

Annotations :—**Consd.** *Whitmore v. Humphries* (1871), L. R. 7 C. P. 1. **Refd.** *A.-G. v. Tomline* (1877), 5 Ch. D. 750; *Nesbitt v. Mablethorpe U. C.*, [1918] 2 K. B. 1.

853. ——— **Holding tenements under different landlords—If not for benefit of one landlord—Presumption of benefit for other.**—*DOE d. BUCK v. AS* (1849), 13 L. T. O. S. 325.

PT. 4.—OTHER CASES.

854. Person encroaching not estopped—From showing title by lapse of time—By description in subsequent conveyance of contiguous land as waste.]—*DOE d. LONDON (BP.) & MARSHALL v. WRIGHT* (1816), 1 Stark. 349, N. P.

855. Acts of ownership over encroachment—Not evidence of title to surrounding waste.]—*SMITH v. LISTER*, No. 979, *post*.

Acquirement of easement—In respect of signpost of public house.]—*See* No. 1081,

Part XIII.—Inclosure of Commons and Common Fields.

SECT. 1.—BY AGREEMENT.

856. Consent of majority — Binding after thirty years.]—Lands had been inclosed thirty years by consent of most of the parishioners:—**Held**: they should continue inclosed.—*PIDDOT v. KNIVERTON* (1607), Toth. 109; 21 E. R. 138.

857. — **Presumed after lengthy occupation—Coupled with acts of ownership.]**—In 1739 it was agreed between the lord & freehold tenants of a manor, that no other part of the wastes of the manor should at any time thereafter be inclosed or built upon, unless by the mutual consent of the lord of the manor for the time being, & of the greater part in number & value of the freehold tenants of the said manor under their hands & seals, & in case of any improvements & inclosures by such consent that the same & all profits & advantages arising therefrom should belong to & be divided between the lord & freehold tenants in the proportions therein mentioned. The articles of agreement were confirmed by a private Act of Parliament passed in the same year. Persons were appointed by the lord & freeholders to receive the rents on their behalf, & books were kept showing how the rents were received & divided, in accordance with the provisions of the agreement. An entry appeared in one of these books in 1803 that R. paid a rent of £1 1s. in respect of certain premises which were there described as a stable; & it appeared from entries in the books that he continued to do so down to 1808, when the property then in tenancy was mentioned as held by D. at a yearly rent of £2 12s. 6d. In 1811 D. was entered as holding a coal warehouse at the rent of £4 10s. “now & in future.” In 1813 D. paid the same rent in respect

of a coal & corn warehouse, & that rent was paid by D. & his successors in title until just before this action was brought:—**Held**: (1) a consent to the inclosure of the property in question, in accordance with the agreement, might in the circumstances be fairly assumed; (2) the result of possession under such consent was that a tenancy from year to year was created. *WELLER v. STONE* (1885), 51 L. J. Ch. 497; 53 L. T. 361; 33 W. R. 421, C. A.

858. Power of court to bind dissentients.]—*MAGDALEN COLLEGE, OXFORD (PREBENDS & SCHOLARS) v. HIDE* (1613), Toth. 110; 21 E. R. 138.

859. ———.]—The ct. compelled certain men that would not agree to inclosures to yield, & bound a college that would not consent, having land within the manor so inclosed.—*CARTWRIGHT v. DROPE* (1619), Toth. 110; 21 E. R. 138.

860. — **Not parties to the agreement.]**—An agreement for an inclosure ordered to be performed, notwithstanding that all persons interested were not parties to the agreement, since such parties were not bound by the decree, & the inclosure was for the public good.—*THIRVETON v. COLLIER* (1664), 1 Cas. in Ch. 48; 3 Rep. Ch. 13; 1 Eq. Cas. Abr. 101, pl. 5; 22 E. R. 688; *sub nom.* ANON., Nels. 79.

861. — **Only freeholder of manor.]**—One who is the only freeholder of a manor in right of his church cannot be compelled to consent to an inclosure.—*CONSTABLE v. DAVENPORT* (1666), 1 Rep. Ch. 259; 21 E. R. 567.

862. Agreement by husband—Enforced against widow.]—A *feme covert* after the death of her husband bound by an inclosure to which he had agreed, it appearing that her estate was much improved by the inclosure & that by disturbing it she aimed

Sect. 1.—By agreement. *Sects. 2, 3, 4, 5, 6 & 7:*
Sub-sect. 1, A. & B.]

at an unreasonable advantage to herself.—**ROTHWELL v. WIDDRINGTON** (1687), 1 Vern. 456; 1 Eq. Cas. Abr. 104, pl. 9; 23 E. R. 582, L. C.

*Annotation:—*Refd. *Cecil v. Salisbury* (1691), 2 Vern. 224.

863. Grantee of the lord—By consent of tenants & lord.]—**TYSEN v. CLARKE** (1774), Lofft, 496; 3 Wils. 541; 98 E. R. 766.

864. Tenure of lands allotted.]—By agreement between the lord & the copyholders, waste lands of the manor were inclosed & allotted:—*Held*: the allotments taken by the copyholders were of freehold tenure.—**PAINE v. RYDER** (1857), 24 Beav. 151; 53 E. R. 314.

865. ——— Yearly tenancy—Rent-books showing property held at yearly rent.]—**WEILER v. STONE**, No. 857, *ante*.

866. Waiver of agreement—Conduct amounting to.]—By an agreement between a lord & his tenants for inclosing a common, it was agreed that the tenants should quit their right of common, & the lord should release them all quit-rents. The inclosure was prevented by pulling down the fence, & the tenants continued to use the common, & some of them to pay their quit-rents:—*Held*: a waiver of the agreement.—**LANESBOROUGH (LADY) v. OCKSHOTT** (1719), 1 Bro. Parl. Cas. 151; 2 Eq. Cas. Abr. 207, pl. 2; 1 E. R. 479, H. L.

867. Effect of agreement—Allotting portion of waste to trustees for commoners— In lieu of common rights— Passes whole of lord's interest.]—Where the lord of a manor by feoffment grants certain parcels of common or waste lands to trustees, for the benefit of themselves & the rest of the tenants of the manor, in lieu of their several claims of common in all the rest of the wastes & commonable grounds in the manor, the whole of the lord's interest passes, & there is no resulting trust for him as to the ownership of the soil.—**IRWIN (VISCOUNT) v. SIMPSON** (1758), 7 Bro. Parl. Cas. 306; 3 E. R. 199, H. L.

See, also, No. 611, *ante*, Nos. 988, 989, *post*.

SECT. 2.—BY CUSTOM.

868. Custom cannot be pleaded against prescription for common.]—**SPOONER v. DAY & MASON**, No. 80, *ante*.

869. Inclosure by lord—With consent of homage.]—In the manor of S. there was a custom that the lords of the manor might, upon the presentment of seven of the copyholders determine what waste ground was put to be set out & inclosed in order to build on the same, & that if such presentment was agreed to by a majority of the homage at the next ct., the inclosure might be made:—*Held*: this was a reasonable usage & fit to be established.—**WENTWORTH (LADY) v. CLAY** (1676), Cas. temp. Finch, 263; 23 E. R. 144.

*Annotation:—*Consd. *Ramsey v. Cruddas*, [1893] 1 Q. B. 228.

870. ——— Erection of houses—Reservation of right by lord presumed.]—**FOLKARD v. HEMMETT** (1776), 5 Term Rep. 417, n.; 101 E. R. 234.

*Annotations:—*Distd. *Arlett v. Ellis* (1827), 7 B. & C. 346. Consd. *Hilton v. Granville* (1844), 5 Q. B. 701; Hall v. Byron (1877), 4 Ch. D. 667. Refd. *Wakefield v. Buccleuch* (1867), L. R. 4 Eq. 613; *Robinson v. Dulcep Singh* (1879), 11 Ch. D. 798; *Ramsey v. Cruddas* (1892), 62 L. J. Q. B.

871. ——— Against freeholders with rights of common.]—**LASCELLES v. ONSLOW (LORD)**, No. 620, *ante*.

872. ——— After exhaustion of product.]—Trespass for breaking & entering three closes in S. Pleas in justification: (a) a right of common of

turbary; (b) of pasture. Replication, that the closes are parcel of S. Moss, within the manor of S.; that there are divers ancient messuages which had had common of turbary & pasture upon the waste. The replication then stated a custom within the manor of S., for the owners of S. Moss, by themselves, or their moss-reeves, to assign to the owners of such ancient messuages certain reasonable proportions of the moss-dales, to be by them held in severalty, for the purpose of getting turves, & after the moss-dales should have been cleared, the owners of the moss should hold them in severalty, discharged from all common of turbary & pasture. The replication then stated the clearing & approval of the closes accordingly. Rejoinder, traversing the custom, & verdict for plff. On motion in arrest of judgment it was objected, (a) that the custom was bad, as extending to messuages without the manor; (b) that it was bad, as repugnant to the right claimed in the plea; (c) that it was bad, as not being stated to extend to all the ancient messuages; (d) that it was bad, in stating that "reasonable proportions" were to be assigned:—*Held*: the custom, as stated in the replication, was good.—**CLARKSON v. WOODHOUSE** (1782), 3 Doug. K. B. 189; 5 Term Rep. 412, n.; 99 E. R. 606; *affd.* (1786), 3 Doug. K. B. 194, Ex. Ch.

*Annotations:—*Distd. *Arlett v. Ellis* (1827), 7 B. & C. 346. Consd. *Hilton v. Granville* (1844), 5 Q. B. 701. Refd. *Wakefield v. Buccleuch* (1867), L. R. 4 Eq. 613. Mentd. *Tyson v. Smith* (1839), 9 Ad. & El. 406; *Doe d. Egremont v. Pulman* (1842), 3 Q. B. 622; *Bristow v. Cornican* (1878), 3 App. Cas. 641.

873. ——— Evidence of custom—Erection of houses.]—Evidence that the lord of a manor has from time to time erected houses to the exclusion of those claiming a right of common, is not to be placed in competition with evidence of long enjoyment, coupled with an acknowledgment of debt, the lord of the manor, by deed, that the confirmation of the commoners was essential to an alienation of part of such common.—**DRURY v. MOORE** (1815), 1 Stark. 102, N. P.

874. ——— Leaving sufficiency of common.]—**ARLETT v. ELLIS**, No. 91, *ante*.

— *In forest.]—**See* Part III., Sect. 1, *ante*.

Approval by lord.]—*See, generally*, Part IX., Sect. 5, *ante*.

875. Inclosure by commoner— Right of lord to approve not abridged.]—**DUBERLEY v. PAGE**, No. 591, *ante*.

See, further, No. 163, *ante*; COPYHOLDS.

SECT. 3.—BY WAY OF APPROVEMENT.

See Part IX., Sect. 5, *ante*.

SECT. 4.—BY ENCROACHMENT.

See Part XII., *ante*.

SECT. 5.—IN WOODS AND FORESTS.

See Nos. 269, 273, 274, *ante*.

SECT. 6.—UNDER PARTICULAR ACTS FOR SPECIAL PURPOSES.

See Part IX., Sect. 6, *ante*.

SECT. 7.—UNDER INCLOSURE ACTS.

NOTE.—*The Acts now in force relating to Inclosure of Commons are Inclosure Acts, 1845 (c. 118), 1846*

(c. 70), 1847 (c. 111), 1848 (c. 99) & 1849 (c. 83), *Inclosure Commissioners Act*, 1851 (c. 63), *Inclosure Acts*, 1852 (c. 79), 1854 (c. 97), 1857 (c. 31) & 1859 (c. 43), *Inclosure, etc., Expenses Act*, 1868 (c. 89), *Commons Act*, 1876 (c. 56), *Commons (Expenses) Act*, 1878 (c. 56), *Commons Act*, 1879 (c. 37), *Commonable Rights Compensation Act*, 1882 (c. 15), & *Commons Act*, 1899 (c. 30), & are referred to in this Section as 1845 Act, 1846 Act, 1847 Act, 1848 Act, 1849 Act, 1851 Act, 1852 Act, 1854 Act, 1857 Act, 1859 Act, 1868 Act, 1876 Act, 1878 Act, 1879 Act, 1882 Act, & 1899 Act, respectively.

SUB-SECT. 1.—CONSTRUCTION OF ACTS.

A. In General.

876. Trustees for dividing common—Implied incorporation.]—Trustees under an Act of Parliament for dividing & inclosing a common:—*Held*: to be a corp'n. by implication.—*Ex p. NEWPORT MARSH TRUSTEES* (1848), 16 Sim. 346; 18 L. J. Ch. 49; 12 Jur. 932; 60 E. R. 907.

Annotation:—*Refd. Willingale v. Maitland* (1866), L. R. 3 Eq. 103.

877. To be interpreted according to its own provisions.]—*BELL v. DUDLEY (EARL)*, No 898, *post*.

878. To be interpreted as a whole.]—*Held*: in construing an Inclosure Act it is right to take the whole of the document as one complete document. It is not sufficient to take out one sect. & disregard others which are germane to the same subject.—*A.-G. & SETTLE RURAL DISTRICT COUNCIL v. LUNESDALE RURAL DISTRICT COUNCIL* (1902), 86 L. T. 822.

879. Recitals in Act—Not conclusive evidence.]—Recitals in an Inclosure Act are not conclusive evidence against persons claiming through original allottees under the Act but may be rebutted by other evidence.—*MERTTENS v. HILL*, [1901] 1 Ch. 842; 70 L. J. Ch. 489; 17 T. L. R. 289; *sub nom. MAITTENS v. HILL*, 81 L. T. 260; 65 J. P. 312; 49 W. R. 408.

Meaning of "soil"—Whether minerals included.]—*See* Nos. 892, 893, 894, 895, 896, *post*.

Meaning of "minerals."]—*See* Nos. 890, 891, *post*.

As to appeals.]—*See* Sub-sect. 11, *post*.

B. As to Sporting Rights.

880. Reservation of manorial sporting rights—Sporting rights extinguished—As incident to ownership of soil.]—To trespass *quare clausum fregit*, deft. pleaded, that by a private Act of Parliament, reciting that P. was lord of the manor of M. & as such lord, seised of the soil of the manor, common & waste lands in the parish of M. & that P. & others were proprietors of messuages etc., within the parish &, as such, entitled to rights of common over the waste lands, it was enacted, that the waste lands should be inclosed, that P. should have one-eighteenth part of them in compensation for his right to the soil, & that the rest should be allotted among the several proprietors of messuages etc., in lieu of their rights of common, provided that nothing in the Act should prejudice the right etc., of P., his heirs or assigns, to the seigniorial & royalties incident to the manor, but that P. his heirs etc. & all succeeding lords of the manor, should hold & enjoy all courts etc., fairs, markets, stallages, tolls, rights, royalties with free warren, & liberty of hunting, hawking, fishing & fowling etc. privileges, etc., matters & things whatsoever to the manor, or to the lord thereof for the time being, incident, belonging or

appertaining. The plea then alleged that the allotment was duly made, that the *locus in quo* was allotted to I., who took possession of & occupied the same by virtue of the allotment, & that from thence until the time when, etc., the same had been possessed in severalty by I. & pltf. & those claiming under I.; that P., at the time of the passing of the Act, was seised of the manor of M. with the rights, royalties, & appurtenances thereunto belonging; that all the estate etc. of P. had come to deft.; & deft. being so seised justified the trespass, for the purpose of hunting & fowling:—*Held*: (1) whether the legal seisin of the freehold was vested in the lord until the execution of the award or not, the plea showed that pltf. was entitled to the exclusive possession of the close, which sufficiently enabled him to maintain trespass; (2) the right of hunting & fowling over the allotments of the common lands was not reserved to the lord by the clause in the inclosure Act, the object of that clause being to reserve to the lord all those manorial rights which he possessed before the inclosure, as lord, except the right to the soil; & the power of the lord to sport over a waste within his manor, being, not a licence or liberty, but a mode of enjoyment of his own property.—*GREATHEAD v. MORLEY* (1841), 3 Man. & G. 139; 3 Scott, N. R. 538; 10 L. J. C. P. 246; 133 E. R. 1090.

Annotations:—*As to* (1) *Refd. Martyn v. Williams* (1857), 1 H. & N. 817. *As to* (2) *Distd. Ewart v. Graham* (1859), 7 H. L. Cas. 331. *Consd. Hilton & Walkerfield Overseers v. Bowes Overseers* (1866), L. R. 1 Q. B. 359. *Distd. Loconfield v. Dixon* (1867), L. R. 2 Exch. 202. *Consd. Sowerby v. Smith* (1874), L. R. 9 C. P. 524; *Devonshire v. O'Connor* (1890), 24 Q. B. D. 468. *Refd. Bruce v. Helliwell* (1860), 5 H. & N. 609.

881. ———.]—An inclosure Act after directing one-sixteenth of the common land to be allotted to the lord of the manor as a compensation for his right to the soil, & the residue, with certain exceptions, among the commoners, contained a proviso that nothing in the Act should defeat, lessen or prejudice the right, title or interest of the lord to the mines & minerals in or under the commons, or to any seigniorial or royalties incident & belonging to the manor, the same being thereby reserved to the lord, with full power for him at all times to hold & enjoy all rents, fines, duties, customs & services, & all etc. & perquisites & liberty of hunting, coursing, fishing & fowling within & throughout the manor, & all goods & chattels of felons, treasure-trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises & privileges whatsoever to the manor incident or appertaining, other than & except such right as could or might be claimed by him as owner of the soil & inheritance of the commons, in as full, ample & beneficial manner, to all intents & purposes, as if the Act had not been passed. As owner of the soil of the commons, the lord had before the Act the free & exclusive right & liberty of shooting & killing game thereon, but there was no right of free chase or free warren within the manor:—*Held*: the lord retained no right to shoot over the allotments.—*BRUCE v. HELLIWELL* (1860), 5 H. & N. 609; 29 L. J. Ex. 297; 2 L. T. 292; 157 E. R. 1323.

Annotations:—*Consd. Hilton & Walkerfield Overseers v. Bowes Overseers* (1866), L. R. 1 Q. B. 359; *Sowerby v. Smith* (1873), L. R. 8 C. P. 514; *Devonshire v. O'Connor* (1890), 24 Q. B. D. 468. *Refd. Sowerby v. Smith* (1874), L. R. 9 C. P. 524.

882. ———.]—An inclosure Act directed the comrs. appointed thereby to allot to the lady of the manor, her heirs & assigns, a certain proportion in value of the lands to be inclosed in lieu of & as a full compensation for, the right & interest of such lady of the manor in & to the soil of the

7. *-Under inclosure Acts: Sub-sect. 1, B. & C. (a).]*

lands, & to allot the residue amongst other persons entitled to rights of common; & it was enacted that the several allotments should be vested in allottees respectively in full bar & satisfaction of all rights of common & other rights & interests whatsoever in, over & upon the lands, except such manorial rights as were thereafter reserved to the lady of the manor, her heirs & assigns; & that all rights of common should cease over the lands. The reservation clause provided that nothing in the Act contained should prejudice the right, title or interest of the lady of the manor, her heirs & assigns, in or to the seigniority of royalties incident or belonging to the manor, but that she might hold & enjoy all rents, quit-rents & other rents, reliefs, duties, customs, & services & all cts., perquisites, & profits of cts., rights of fishery, & liberty of hawking, hunting, coursing, fishing & fowling within the manor, & all tolls, fairs, marts, markets, stallage, goods & chattels of felons or *deodans*, etc., royalties, jurisdictions, franchises, matters & things whatsoever to the manor, or to the lord or lady thereof incident or belonging, or which had been theretofore held & enjoyed by the lady of the manor or any of her ancestors, other than & except such common right as could or might be claimed by the lady of the manor as owner of the soil & inheritance of the commons or waste grounds: *Held*: the Act did not reserve to the lady of the manor the right of shooting which she formerly possessed over the lands allotted under the Act by virtue of her ownership of the soil. —*SOWERBY v. SMITH* (1874), L. R. 9 C. P. 524; 43 L. J. C. P. 290; 31 L. T. 309; 23 W. R. 79, Ex. Ch. *Annotation*:—*Apld.* *Devonshire v. O'Connor* (1890), 24 Q. B. D. 468.

883. — — — — — (1) By a private inclosure Act an allotment was directed of certain waste lands, the mines, etc., under the allotments being reserved to the lord; the allotments were declared to be the freehold of the allottees to all intents & purposes whatsoever. The reservation clause provided that nothing in the Act contained should prejudice the right, title, or interest of the lord of the manor, his heirs & assigns, of, in, or to the coal, etc., under the allotments, or of, in, or to the seigniories & royalties, franchises, & liberties, incident & belonging to the manor; but that he might have, hold, take, & enjoy “all rents, services, cts., etc., piscaries, fishing, hunting, hawking & fowling, etc., & all other royalties, liberties, franchises, privileges, pre-eminences, jurisdictions, & appurtenances whatsoever to the barony & manors or to the lord or lady thereof for the time being incident, appertaining or belonging, or which have been anciently used, exercised, & enjoyed by the lord or lady of the barony or manors, other than & except such right of common, pasturage, & free warren in respect of conies, which was intended to be extinguished, as could or might be claimed by him, her, or them as owner of the soil of the moors, commons & waste grounds, in as full, ample, & beneficial manner as he could or might have held & enjoyed them in case the Act had not been passed. The clause then dealt with the reservation of minerals & gave all necessary wayleaves & powers of search & working to the lord. It did not appear whether before the Act there was a general right of free warren in the lord:—*Held*: the Act did not confer on or reserve to the lord an exclusive right of shooting game over the allotments.

(2) A right of shooting game over allotments declared by an inclosure Act to be the freehold of

the allottees can only be reserved to the lord in express terms or by necessary implication.—*DEVONSHIRE (DUKE) v. O'CONNOR* (1890), 24 Q. B. D. 468; 59 L. J. Q. B. 206; 62 L. T. 917; 54 J. P. 740; 38 W. R. 420; 6 T. L. R. 155, C. A. *Annotations*:—*As to* (1) *Consd.* *Eccroyd v. Coulthard*, [1898] 2 Ch. 358. *Refd.* *R. v. Speyer*, *R. v. Cassel*, [1916] 1 K. B.

884. Sporting rights not extinguished—Vested exclusively in the lord.—An Act of Parliament, for allotting the land of a stinted pasture of a manor for the purposes of improvement, in which manor there was no right of free warren, declared all the allotments freehold to all intents & purposes. It then reserved to the lord the right to mines, & the right to get the minerals, making compensation for damage to the herbage; it declared the allotment to him to be in full recompense & satisfaction for all his right & interest as lord of the manor in & to the residue of the stinted pasture. It provided that he should enjoy seigniories, royalties, etc., also right of hunting, shooting, fishing & fowling in, through & over the stinted pasture, & every part & allotment thereof, & all other seigniories to the lords of the manor belonging, except those barred by the Act, in as full & ample a manner as if the Act had not been passed:—*Held*: the lord still possessed the exclusive right of hunting, shooting, etc., over the allotments.—*EWART v. GRAHAM* (1859), 7 H. L. Cas. 331; 29 L. J. Ex. 88; 33 L. T. O. S. 349; 23 J. P. 483; 5 Jur. N. S. 773; 7 W. R. 621; 11 E. R. 132, H. L.; *affg.* *S. C. sub nom. GRAHAM v. EWART* (1856), 1 H. & N. 550, Ex. Ch.

Annotations:—*Consd.* *Hilton & Walkersfield Overseers v. Bowes Overseers* (1866), L. R. 1 Q. B. 359. *Apld.* *Leconfield v. Dixon* (1867), L. R. 3 Exch. 30; *Musgrave v. Forster* (1871), L. R. 6 Q. B. 590; *Consd.* *Sowerby v. Smith* (1874), L. R. 9 C. P. 524; *Devonshire v. O'Connor* (1890), 24 Q. B. D. 468. *Refd.* *Blades v. Higgs* (1865), 20 C. B. N. S. 214. *Mentd.* *Jeffryes v. Evans* (1865), 19 C. B. N. S. 246; *Rogers v. St. Germans Union* (1876), 35 L. T. 332; *Fitzhardinge v. Purcell* (1908), 99 L. T. 151.

Act an allotment was directed of certain waste lands; by s. 21 the mines, etc., under the allotments were not to be taken into the valuation of the allotments, they being reserved to the lord; by s. 32, subject to the reservations in the Act, the allotments were to be the freeholds of the allottees; by s. 31 it was provided that the lord should have all rents etc., piscaries, fishing, hunting, hawking, & fowling, & all beasts & birds considered as game etc., & all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions & appurtenances in as ample a manner as they were then or had been theretofore used, exercised & enjoyed by him, or as he “might or could have held, used, etc., the same” in case the Act had not been passed; that sect. contained no reference to mines, but s. 35 reserved them to the lord, with certain powers of search & working. Before the Act there was no right of free warren in the lord:—*Held*: the Act reserved to the lord an exclusive right of sporting over the allotments.—*LECONFIELD (LORD) v. DIXON* (1867), L. R. 3 Exch. 30; 37 L. J. Ex. 33; 17 L. T. 288; 32 J. P. 4; 16 W. R. 157, Ex. Ch.

Annotations:—*Consd.* *Sowerby v. Smith* (1874), L. R. 9 C. P. 524; *Devonshire v. O'Connor* (1890), 24 Q. B. D. 468.

886. Waste converted into stinted pasture—Rights of game reserved—Rights of shooting vested in lord.—A manor, with all the wastes & rights of sporting etc. was conveyed to trustees in trust for the owners of ancient tenements within the manor. By an award confirmed by an inclosure Act, the waste of the manor was converted into a stinted pasture; a certain number of stints were allotted to the trustees as lords in trust of

the manor, & a proportionate number to each freeholder, ancient or otherwise. The award provided that the right & interest in all mines under the lands to be inclosed also the right to all manor game upon the said lands be not in any way affected or interfered with by the inclosure; & that all persons entitled to such mines & game had the same right of entry & other rights as heretofore used & enjoyed:—*Held*: the effect of the award coupled with 1815 Act, s. 116 was to pass the soil in the stints to the lords in trust & the freeholders as tenants in common & to leave the right of shooting in the lords so that the right was severed from the soil & became an incorporeal right in gross.—*HILTON & WALKERFIELD OVERSEERS v. BOWES OVERSEERS* (1866), L. R. 1 Q. B. 359; 7 B. & S. 223; 35 L. J. M. C. 137; 14 L. T. 512; 14 W. R. 368.

Annotations:—*Distd.* R. v. Rhymney Ry. (1869), L. R. 4 Q. B. 276. *Refd.* R. v. Battle Union Grdns. (1866), 8 B. & S. 12.

887. — Right of game not reserved—Exclusive right of shooting divested from lord.]—By an inclosure Act, the comrs. were authorised to apportion to the lord of the manor, in satisfaction for his right & interest as such lord, a certain quantity of the waste in cattlegates. By a subsequent sect., reciting that the waste was of such small value as not to bear the expense of being allotted, the comrs. were empowered to set it out in one inclosure, & to regulate the stint among the owners of land entitled to rights of common, awarding them sheepgates in proportion to their several rights. The proprietors or persons entitled to the greater part of the sheepgates were then empowered, with the consent of the lord, to appoint comrs. to divide this stinted pasture into allotments to & amongst the proprietors of the said common or waste land, in proportion to their respective rights & interests therein. A further sect. reserved to the lord the right to enjoy, search for, & work all mines, minerals, & other rights & privileges in the waste, except the right to the soil thereof, for which a compensation was thereinbefore directed to be made, in as full, ample, & beneficial a manner as if the Act had not been made:—*Held*: the effect of the Act was to take from the lord the right to the soil of the waste & with it the exclusive right of sporting thereon.—*ROBINSON v. WRAY* (1866), L. R. 1 C. P. 190; 14 L. T. 431.

Annotation:—*Distd.* Sowerby v. Smith (1873), L. R. 8 C. P. 511.

Jurisdiction of commissioners to separate sporting rights.]—*See* No. 912, *post*.

Shooting rights of the lord as owner of the soil.]—*See, generally*, Part IX., Sect. 1, *ante*.

Right of free warren.]—*See* Part V., *ante*.

C. As to Mining Rights.

(a) In General.

888. Express reservation of rights & royalties to lord—Mines under allotment to tenant not included.]—By the terms of an inclosure Act, for inclosing the wastes of a manor, a certain portion was to be made to the lord in lieu of his right & interest in the soil, & the residue was to be allotted to the several tenants in fee, discharged from all customary tenures, etc.:—*Held*: a saving clause, reserving to the lord all seigniories incident to the manor, & all rents, fines, services, etc., & all other royalties & manorial jurisdictions whatever, did not reserve mines under those allotments to the tenants, though there was a subsisting lease of such mines at the time the Act passed, granted by the lord of the manor.—*TOWNLEY v. GIBSON* (1788), 2 Term Rep. 701; 100 E. R. 377.

Annotations:—*Consd.* Bourne v. Taylor (1808), 10 East, 189; Doe d. Lowes v. Davidson (1813), 2 M. & S. 175. *Distd.* R. v. Pitt (1833), 2 Nev. & M. K. B. 363. *Consd.* Graham v. Ewart (1856), 1 H. & N. 550. *Distd.* Pretty v. Solly (1859), 26 Beav. 606; Wakefield v. Buccleuch (1867), 13 Q. B. 211.

Wilson (1865), 34 L. J. Q. B. 712, 111; Cambridge v. Greensmith, [1912] 2

889. Implied reservation of mineral rights—Lord to pay compensation—On entering on allotments to dig minerals.]—At the time an inclosure Act passed, the soil & freehold of a common thereby allotted were vested in the lord of the manor, subject to certain rights of pasture. The coal & minerals & unopened stone quarries under the surface of the common also belonged to the lord as part of the freehold, & he was entitled to work the mines. The Act did not recite the particular rights of the lord, but enacted that certain allotments should be made to the commoners in lieu of their rights, & to him for his right as lord to & in the soil of the said common, & also to & for the damage he would sustain by being obliged to make satisfaction to the proprietors of the lands inclosed, for digging for any coals or minerals: it also enacted that if the lord should enter upon any of the lands for the purpose of digging "any coals or other minerals," he should make satisfaction to the proprietors of the lands for damage done. The Act contained no clause in express terms excepting the mines & minerals:—*Held*: (1) the Act, by necessary implication, reserved to the lord his right to the mines & minerals under the land so inclosed; (2) he was entitled to work them, paying compensation to the owners of the surface for damage thereby done; (3) stones dug from quarries are minerals.—*MICKLETHWAIT v. WINTER* (1851), 6 Exch. 644; 20 L. J. Ex. 313; 17 L. T. O. S. 185; 155 E. R. 701.

Annotations:—*As to* (1) *Refd.* Bell v. Wilson (1865), 6 New Rep. 81. *As to* (3) *Refd.* Darvill v. Roper (1855), 3 Drew. 291; N. B. Ry. v. Budhill Coal & Sandstone, [1910] A. C. 116.

890. Minerals—Includes all "fossil" bodies.]—Certain waste lands in the manor of S., to the soil of which, & everything constituting the soil, the lord of the manor was entitled, were, by an inclosure Act, which recited the lord's title, taken away from the lord & allotted to the commoners, except as saved by a clause reserving to the lord all mines & minerals, of what nature or kind soever, lying & being within or under the commons & waste grounds, in as full, ample & beneficial a manner, to all intents & purposes, as he could or might have held & enjoyed the same in case the Act had not been made; & providing that he should & might at all times thereafter have, hold, win, work & enjoy exclusively all mines & minerals, of what nature or kind soever, within & under the commons & waste grounds, with full liberty of digging, sinking, searching for, winning, & working the mines & minerals, & carrying away the lead ore, lead, coals, iron-stone, & fossils, to be gotten thereout, provided that the lord, in searching for & working the mines & minerals, should keep the first layer or stratum of earth separate & apart by itself, without mixing the same with the lower strata. S. 33 provided for reimbursement to the owners of allotments, for injury done by searching for or working the mines & minerals:—*Held*: (1) the reservation clause must be construed with reference to the title of the lord to the whole of the soil; (2) inasmuch as the object of the Act was to give to the commoners the surface for cultivation, & leave in the lord what it did not take away for that purpose, the word "minerals"

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must be understood, not in its general sense, signifying substances containing metals, but in its proper sense, as including all fossil bodies or matters dug out of mines, that is, quarries or places where anything is dug; notwithstanding the provision in the latter part of the clause, authorising the carrying away the "lead ore, lead, coal, iron-stone, & fossils," as fossils might apply to stones dug in quarries; (3) the clause reserved to the lord the right to the stratum of stone in the inclosed lands.—*WAINMAN v. ROSSE (EARL)* (1848), 2 Exch. 800; 154 E. R. 714, Ex. Ch.; *affg. S. C. sub nom. ROSSE (EARL) v. WAINMAN* (1845), 14 M. & W. 859.

Annotations:—As to (1) Consd. Bell v. Wilson (1865), 2 Drew. & Sm. 395. *As to (2) Follid. Micklethwait v. Winter* (1851), 6 Exch. 644. *Expld. Darvill v. Roper* (1855), 3 Eq. Rep. 1004. *Distd. Bell v. Wilson* (1865), 2 Drew. & Sm. 395. *Consd. A.-G. for Isle of Man v. Mylchreest* (1879), 4 App. Cas. 291. *Follid. A.-G. v. Welsh Granite Co.* (1887), 35 W. R. 617. *Expld. Glasgow Corp'n. v. Farie* (1888), 13 App. Cas. 657. *Refd. Mid. Rty. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552; *Jersey v. Neath Poor Law Union Grdns.* (1889), 22 Q. B. D. 555; *N. B. Ry. v. Budhill Coal & Sandstone Co.*, [1910] A. C. 116. *As to (3) Follid. Micklethwait v. Winter* (1851), 6 Exch. 644.

— **Stone dug from quarries.**—*See* No. 889, *ante*.

891. — Includes "granite."—By an inclosure Act, passed in 1812, certain common lands in Wales were allotted, an allotment being made to the King as lord of the manor in respect of his right to the soil. The Act gave the Comrs. of Woods & Forests the right to sell the allotment made to the King, subject to the rights of the King to the mines, ores, minerals, coal, limestone, or matter whatsoever in or under the same, & contained a proviso reserving to the King his rights to any mines, ores, minerals, coal, limestone or slate in the common land, & all rights & royalties previously belonging to the King, & gave a right of compensation to the owners of the land for any damage done in digging, raising, & carrying away such mines, etc.:—*Held*: (1) the word "minerals" included granite; (2) the Crown was entitled to win the granite by open workings, making compensation for any surface damage done.—*A.-G. v. WELSH GRANITE CO.* (1887), 35 W. R. 617; 3 T. L. R. 573, C. A.

Annotation:—As to (2) Refd. Hayles v. Pease & Partners, [1899] 1 Ch. 567.

See, generally, MINES, MINERALS, & QUARRIES.

892. "Soil"—Allotment to lord in respect of interest in — **Extinguishes surface rights over commoners' allotments only — Right of lord to minerals not extinguished.**—(1) The word "soil" in an inclosure Act:—*Held*: to mean "surface."

(2) An inclosure Act directed allotments for public & specific purposes, & that one-fifth should be allotted to the lord of the manor for his interest in the soil, & that the remainder of the common lands should be divided amongst the commoners to be held in severalty, & it was declared that the lord's seigniorial rights were not to be prejudiced except the right to the "soil" & that the lord might thereafter enjoy all rents, heriots, etc., & all mines, minerals, quarries, & other royalties, & as if the Act had not been passed:—*Held*: the lord retained his rights to the mines & minerals under the land allotted to the commoners in severalty.—*PRETTY v. SOILY* (1859), 26 Beav. 606; 33 L. T. O. S. 72; 53 E. R. 1032.

Annotations:—As to (1) Refd. Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613. *As to (2) Refd. De Whiton v. Brecon Corp'n.* (1859), 33 L. T. O. S. 296.

893. — — — — —.—(1) "Soil":—*Held*: to mean "surface."

A local inclosure Act, after reciting in its preamble that the lord of the manor was entitled to the soil of the wastes thereof, & all mines & minerals in or under the same, directed allotments to be set out, with the ground & soil thereof, for public & specific purposes, & empowered the comr. to set out & sell a sufficient portion of the wastes to defray the expenses of the inclosure. It then directed one-sixteenth of the remainder of the wastes to be allotted to the lord, as a compensation for his interest in the soil, over & above such proportion as he should be entitled to as owner & the residue of the wastes to be divided, set out & allotted amongst the owners & proprietors included in the Act. The Act reserved to the lord all mines & minerals under the lands thereby directed to be divided & inclosed, except such parts as were set out for public & specific purposes, with full working powers. Powers were reserved to the lord not only to exercise such rights as he had before the Act, but also upon making compensation to do things which he could not have done before the Act, in as full & ample a manner as he could have done if the lands had remained open & uninclosed, & the Act had not been passed.

Inclosure Act, 1801 (c. 109), s. 32, incorporated with the local Act, so far as not controlled by the latter, enacted, that every allotment set out & sold to a purchaser to defray the expenses of any local inclosure should be absolutely discharged from all common & other right thereon or therein, & be vested in the purchaser in fee as his absolute property:—*Held*: (2) the local Act dealt with surface rights only, leaving the lord's right to the mines untouched; (3) the comr. had no control over & was not competent to convey the minerals under the lands sold to pay expenses; (4) the rights reserved to the lord were not restricted to such acts as he might have done before the Act; (5) the lord was entitled to work the mines under the lands sold to such an extent as might reach to the utter destruction of the land sold, subject only to a liability to pay compensation for damage done.—*WAKEFIELD v. BUCCLEUCH (DUKE)* (1867), L. R. 4 Eq. 613; 36 L. J. Ch. 179; 15 L. T. 462; 31 J. P. 35; 15 W. R. 217; *affd. sub nom. BUCCLEUCH (DUKE) v. WAKEFIELD* (1870), L. R. 4 H. L. 377, H. L.

Annotations:—As to (1) Refd. St. Catharine's College, Cambridge v. Rosse, [1916] 1 Ch. 73; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468. *As to (2) & (3) Refd. Aspdon v. Seddon* (1874), 10 Ch. App. 396, n.; *St. Catharine's College, Cambridge v. Greensmith*, [1912] 2 Ch. 280; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468. *As to (4) & (5) Consd. Hext v. Gill* (1872), 7 Ch. App. 699; *Benfieldside L. B. v. Consett Iron Co.* (1878), 38 L. T. 530; *Love v. Bell* (1884), 9 App. Cas. 286; *Consett Waterworks Co. v. Ritson* (1889), 64 L. J. Ch. 293, n.; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305; *Weldon v. Butterley Co.*, [1920] 1 Ch. 130. *Refd. Mordue v. Durham* (1873), 42 L. J. C. P. 114; *Dalton v. Angus* (1881), 6 App. Cas. 740; *A.-G. v. Welsh Granite Co.* (1887), 35 W. R. 617; *Shafte v. Bolckow, Vaughan & Ecclesiastical Comrs.* (1888), 4 T. L. R. 527; *Thompson v. Mein*, [1893] W. N. 202; *Bell v. Dudley*, [1895] 1 Ch. 182; *Westmorland v. New Sharlston Colliery Co.*, (1898), 79 L. T. 716; *St. Catharine's College, Cambridge v. Rosse*, [1916] 1 Ch. 73; *Thomson v. St. Catharine's College, Cambridge, etc.* (1918), 118 L. T. 758. *Generally, Mentd. Hall v. Byron* (1877), 4 Ch. D. 667.

894. — — — — —.—A special inclosure Act, which incorporated the Inclosure Act, 1801, recited that pl'tfs. as the lords of a manor were the owners of the soil of the commons & wastes within the manor, & of the mines & minerals therein, & directed that a certain portion of the commons & wastes should be allotted to the pl'tfs. as lords of the manor as a full compensation for their right to the soil of the commons & wastes, & that the

residue of the commons & wastes should be allotted to & amongst the persons having right of common on the commons & wastes, & directed that all parties should hold their respective allotments in severalty freed & discharged from all rights of common, & saved to plffs. all their estates, rights & interest in the commons & wastes directed to be inclosed except such rights & interests as the inclosure thereby authorised required to be barred, destroyed, or extinguished. Excepting the above recital, the Act & the award were silent as to mines & minerals:—*Held*: (1) the word “soil” was used throughout the Act not in its widest sense, but in the restricted sense of the surface of the soil; (2) the allottees of the commons & wastes took an estate in fee simple only in the surface of their allotments, the underlying mines & minerals being reserved to the lords.—*ST. CATHARINE’S COLLEGE, CAMBRIDGE (MASTER & FELLOWS) v. GREENSMITH*, [1912] 2 Ch. 280; 81 L. J. Ch. 555; 106 L. T. 1009; 56 Sol. Jo. 551.

Annotation:—As to (1) *Apprvd. St. Catharine’s College, Cambridge v. Rosse*, [1916] 1 Ch. 73.

895. *S. P. ST. CATHARINE’S COLLEGE, CAMBRIDGE v. ROSSE*, [1916] 1 Ch. 73; 85 L. J. Ch. 121; 113 L. T. 1172, C. A.

Annotation:—*Overd. Thomson v. St. Catharine’s College, Cambridge, etc.*, [1919] A. C. 468.

896. ——— Right of lord to minerals extinguished—Recital in Act.—A special Act passed in 1814 for the inclosure of lands in three manors, which were dealt with in similar terms, in each case recited that the lords of the manor were the owners of the soil & waste grounds within the manor & of the mines & minerals therein, & directed that a certain portion of the commons & wastes should be allotted to the lords of the manor as a full & sufficient recompense for their right to the soil of the commons & wastes, & that the residue should be allotted in severalty among the commoners in full bar & satisfaction of & for their respective rights of common, & saved to all persons, other than those to whom any allotment or compensation should be made, & except such rights & interests as the inclosure thereby authorised should absolutely require to be barred, destroyed, or extinguished, all such rights & interests in the commons & wastes as they would have enjoyed if the Act had not been made. Excepting the above recital the Act & award were silent as to mines & minerals:—*Held*: (1) the recital was not sufficient to cut down the ordinary meaning of the word “soil”; & the right to the minerals passed as part of the soil to the allottees of the several allotments; (2) as regards the parties to *St. Catharine’s College, Cambridge v. Rosse* (No. 895A, *ante*) in which the Ct. of Appeal had decided that the lords of the manor were entitled to the minerals under the lands allotted to the commoners, the lords of the manor were not entitled to let down the surface of those lands for the purpose of working the minerals thereunder.—*THOMSON v. ST. CATHARINE’S COLLEGE, CAMBRIDGE, ETC.*, [1919] A. C. 468; 88 L. J. Ch. 163; 120 L. T. 481; 35 T. L. R. 228; 63 Sol. Jo. 264, H. L.

Annotations:—As to (2) *Distd. Welldon v. Butterley Co.*, [1920] 1 Ch. 130. *Refd. Conselt Industrial & Provident Soc. v. Conselt Iron Co.* (1921), 124 L. T. 809.

897. Mines ratable where actually situated—Though allotments ratable elsewhere.—By an inclosure Act it was declared, that all the allotments to be set out to the several persons having right of common on a moor, should be deemed to be situate within the same townships & places respectively, wherein the lands lay in respect of which such allotments should be made: & it was

provided, that nothing in the Act should affect the right of P. to certain coal mines under the moor:—*Held*: the first clause affected only those portions of the soil, which were allotted to the commoners, and not the coal mines under those allotments, & such coal mines were ratable to the relief of the poor in the parish in which they were actually situate, as they were before the Act passed, though the allotments became ratable elsewhere.—*R. v. PITT* (1833), 5 B. & Ad. 505; 2 Nev. & M. K. B. 363; 1 Nev. & M. M. O. 422; 3 L. J. M. C. 4; 110 E. R. 899.

See, also, No. 953, *post*.

Jurisdiction of commissioners.—*See* No. 912, *post*.

Effect of award.—*See* No. 1022,

(b) Right to let down Surface.

898. General rules for construction of Acts.

(1) In construing Inclosure Acts each Act has to be interpreted according to its own provisions.

The general rules for the construction of such Acts are the following:—

(2) Where the ownership of the minerals & of the surface is severed, the *prima facie* inference is that the owner of the surface shall enjoy the surface allotted, & shall have the common right of support for his tenement.

(3) In order to rebut this inference the burden lies on the owner of the minerals to show affirmatively & by clear words that he has the right of letting down the surface, but express words are not required.

(1) The presence or absence of a compensation clause is an important element in the construction of such Acts. The *prima facie* inference in favour of the surface owner is strengthened by the absence of any provision for compensation, though the presence of a limited compensation clause is not of itself sufficient to rebut the inference.—*BELL v. DUDLEY (EARL)*, [1895] 1 Ch. 182; 64 L. J. Ch. 291; 72 L. T. 11; 59 J. P. 199; 43 W. R. 122; 11 T. L. R. 60; 39 Sol. Jo. 79; 13 R. 120.

Annotations:—As to (3) *Consd. Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305; *Welldon v. Butterley Co.*, [1920] 1 Ch. 130; *Conselt Industrial & Provident Soc. v. Conselt Iron Co.* (1921), 124 L. T. 809. As to (1) *Distd. Bishop Auckland Industrial Co-op. Soc. v. Butterknowle Colliery Co.*, [1901] 2 Ch. 419.

899. Right of working reserved - Without making satisfaction—Special provision for payment of compensation otherwise than by owner of minerals—No prescriptive right to let down surface.—A declaration alleged that plff. was lawfully possessed of lands, yet defts. so wrongfully, carelessly, negligently & improperly, & without leaving any proper or sufficient support, worked mines under the land, that great parts of it fell in, whereby plff.’s interest in the land was deteriorated, & a mare of plff. was killed. Deft. pleaded, as to working the mines without leaving any proper or sufficient support, an inclosure Act by which, after reciting that the lord of the manor of W. was seised of the soil of the commons, parcel of the manor, & of the coal mines under them, & certain persons were entitled to the right of common in the commons, & being willing & desirous to improve their estates & properties, & that the said commons might be cultivated & improved, & rendered of some use & value, had agreed, with the consent of the lord, that the same should be inclosed, allotted & divided amongst them, it was enacted that the commons should be set out, awarded & divided accordingly; & that the lord should hold & enjoy the mines

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under the commons so to be allotted & divided, together with all convenient & necessary ways & liberty of laying ways over the same, & of searching for & working the mines, as fully as if the Act had not been passed, without making any satisfaction for so doing; & after reciting that damage might be done to persons by reason of the searching & working the mines by the lord under their allotments, it was enacted, that when any person should sustain damage in his allotment by the searching for & working of the mines therein, or the laying of ways therein, compensation to be assessed by one or more justices of the peace should be made to him, & borne by the occupiers of the allotments in the same township: that the commons were allotted & divided under the Act, & the land of pltf. was parcel of the said commons: that from time immemorial up to the passing of the Act, the lord & his assigns had been used & accustomed as of right to search for, win & work the mines under the commons without leaving any support for the lands under which the mines were situate, & without making any satisfaction for any injury caused by such working; & that from the time of passing the Act the mines had been so worked, without leaving any support; & that defts. worked the mines under a lease thereof from the lord:—*Held*: (1) the plea was bad, such a prescription having been held void, as unreasonable, in *Hilton v. Earl Granville*, 5 Q. B. 701.

Deft. also pleaded as to working the mines without leaving proper & sufficient support, that the lord of the manor of W. was seised in fee of the mines within the manor, & that, for forty years next before the commencement of the action, the lord & his tenants had been used & accustomed of right to work the mines without leaving any support for the lands under which the mines were situate, & justifying the working of the mines as tenants to the lord in the exercise of the said right & custom. Another plea was similar, alleging the custom for twenty years:—*Held*: (2) these pleas were bad, as they did not show any acts done on pltf.'s land; & acts done on the land of another although done as of right for twenty or forty years, could not affect pltf.'s right.—*BLACKETT v. BRADLEY* (1862), 1 B. & S. 940; 31 L. J. Q. B. 65; 5 L. T. 832; 26 J. P. 358; 8 Jur. N. S. 588; 121 E. R. 963.

Annotations:—As to (1) *N.F. Gill v. Dickinson* (1886), 5 Q. B. D. 159. *Consd.* *Bell v. Love* (1883), 10 Q. B. D. 547; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305. As to (2) *Consd.* *Bell v. Love* (1883), 10 Q. B. D. 547. *Refd.* *Wakefield v. Buceleuch* (1867), L. R. 4 Eq. 613.

900. — Owner of minerals may let down surface —Without paying compensation.]—

To a statement of claim for working mines under pltf.'s land without leaving sufficient support for the surface, deft. pleaded in his statement of defence that he was the lessee of the mines from the lord of the manor, that pltf.'s land had, previously to the passing of an inclosure Act under which the waste of the manor was inclosed & allotted, formed part of such waste, that the lord of the manor from time immemorial had been accustomed to work the mines under the waste without leaving sufficient support for the surface & without making any compensation for injury so caused, that by the inclosure Act it was provided that the lord of the manor, his successors or assigns, might hold all mines & quarries lying under the waste together with liberty of searching for, winning & working the same as fully & freely as he or they might have had & enjoyed the same in case the Act had not been passed, & that without

making or paying any satisfaction for so doing, & that it was further provided by the Act that compensation for damage caused to any person's allotment by such working of the mines should be assessed by a justice of the peace, & should, when so assessed, be paid by the occupiers of the other allotments in the same township:—*Held*: the statement of defence was good, on the ground that, whether any valid custom such as alleged in the statement of defence existed previously to the Act or not, the Act expressly gave to the lord of the manor & his assigns the right to let down the surface by mining without making any compensation.—*GILL v. DICKINSON* (1880), 5 Q. B. D. 159; 49 L. J. Q. B. 262; 42 L. T. 510; 44 J. P. 587; 28 W. R. 415, D. C.

Annotations:—*Consd.* *Bell v. Love* (1883), 10 Q. B. D. 547; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305.

901. — — — — —.]—Inclosure Act, 1773, gave the Bishop of D., his successors & assigns, power to work the mines as fully & freely as he might have done in case the Act had not been made, & that without paying any damages or making any satisfaction for so doing; & after reciting that whereas great inconveniences might happen & damage be done to particular persons by reason of such working by the Bishop of D. without paying any damages or making any satisfaction for so doing, the Act went on to provide compensation for the allottees in such cases, the deficiency, if any, to be made up by a rate on the allottees:—*Held*: on the construction of the Act, the right of the bishop & his assigns to work the mines so as to let down the surface without compensation to the surface-owners was clearly implied.—*CONSETT WATERWORKS CO. v. RITSON* (1889), 22 Q. B. D. 702; 64 L. J. Ch. 293, n.; 124 L. T. 818, n.; 59 J. P. 199; 43 W. R. 122, n.; 5 T. L. R. 435; 13 R. 123, n., C. A.

Annotations:—*Consd.* *L. & N. W. Ry. v. Evans*, [1892] 2 Ch. 432; *Bell v. Dudley*, [1895] 1 Ch. 182; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305; *Manchester Corp'n. v. New Moss Colliery*, [1906] 2 Ch. 564; *Consett Industrial & Provident Soc. v. Consett Iron Co.* (1921), 124 L. T. 809. *Refd.* *Thompson v. Mein*, [1893] W. N. 202; *L. & N. W. Ry. v. Howley Park Coal & Cannel Co.*, [1911] 2 Ch. 97. *Mentd.* *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614.

902. — — — — —.]—THOMPSON v. MEIN (1893), 28 L. J. N. C. 895.

Annotation:—*Refd.* *Bishop Auckland Industrial Co-op. Flour & Provision Soc. v. Butterknowle Colliery Co.* (1904), 73 L. J. Ch. 335.

903. — — — — —.]—CONSETT INDUSTRIAL & PROVIDENT SOCIETY, LTD. v. CONSETT IRON CO., LTD. (1921), 124 L. T. 809; 37 T. L. R. 676; 65 Sol. Jo. 533; *reversd.* (1922), 153 L. T. Jo. 296, C. A.

— — — — — **Allottees with power of restraining working of mines.]—**A Canal Act provided that no owner of any mine should work the same under any works of the canal co. except as thereafter mentioned, without the consent of the co., & that nothing therein contained should be construed to extend to prejudice the right of any lord of any manor or waste, through which the canal cuts, water-courses, & other convenience should be made by the co. to the mines under such ground, & that the mines were thereby reserved to such lord, who was thereby empowered, subject to the conditions & restrictions therein contained, to work such mines, provided that in working them no injury were done to the navigation. By an Inclosure Act, certain land was allotted to the canal company, reserving to the lord of the manor his rights to mines as fully as before the Act; the co. proceeded to build

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works upon such land so allotted to them; but it did not appear that the works in question had increased the natural pressure upon the land:—

Held: the lord of the manor might work such mines in a reasonable & proper manner subsequently to the creation of the works of the co., as fully as he could have done before, & was not answerable for damage done to the works by so working his mines.—**STOURBRIDGE NAVIGATION CO. v. DUDLEY (EARL)** (1860), 3 E. & E. 409; 30 L. J. Q. B. 108; 3 L. T. 449; 7 Jur. N. S. 329; 9 W. R. 158; 121 E. R. 496, Ex. Ch.

Annotations:—**Consd.** *Dunn v. Birmingham Canal Co.* (1872), L. R. 7 Q. B. 244. **Refd.** *Mid. Ry. v. Checkley* (1867), L. R. 4 Eq. 19. **Mentd.** *Bagnall v. L. & N. W. Ry.* (1861), 7 H. & N. 423; *L. & Y. Ry. v. Knowles* (1887), 20 Q. B. D. 391.

905. ——— Right of support not taken away.—Before 1757 the lords of a manor had the right to work mines & minerals under the waste lands of the manor so as to let down the surface, provided enough pasturage was left to satisfy the rights of the commoners. By an inclosure Act of 1757 the waste lands were inclosed & allotted, & the lord of the manor was empowered to work the mines & minerals under the allotments as fully & freely as he might have done if the Act had not passed, & that without making or paying any satisfaction for so doing. A compensation clause in the Act provided that any damage done to an allottee by the exercise of the powers reserved to the lord should be paid for by an assessment upon the occupiers of the other allotments:—**Held:** the common law right of the surface owners to the support of the surface was not taken away by express words or necessary implication.—**BUTTERLEY COLLIERY CO. v. BISHOP AUCKLAND CO.**, [1906] A. C. 305; 75 L. J. Ch. 511; 91 L. T. 795; 70 J. P. 361; 22 T. L. R. 516, H. L.; *affg.* *S. C. sub nom. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. BUTTERLEY COLLIERY CO., LTD.*, [1904] 2 Ch. 419, C. A.

Annotations:—**Consd.** *Butterley Co. v. New Hucknall Colliery Co.*, [1910] A. C. 381. *Beard v. Moira Colliery Co.*, [1915] 1 Ch. 257; *Jones v. Consolidated Anthracite Collieries & Dynevor*, [1916] 1 K. B. 123; *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468; *Welldon v. Butterley Co.*, [1920] 1 Ch. 130; *Consett Industrial & Provident Soc. v. Consett Iron Co.* (1921), 124 L. T. 809. **Refd.** *Markham v. Paget*, [1908] 1 Ch. 697.

906. ——— Reservation impliedly subject to right of support — For public road—Set out under Act.—Comrs., acting under the powers conferred on them by a local inclosure Act for inclosing certain commons, set out public highways over the land, & directed that they should be maintained by the inhabitants & occupiers of the township in which they were situated, & that it should be lawful for all persons to use the same. The Act reserved to the lord of the manor, his successors & assigns, in the widest terms, all rights belonging to the manor, & all mines, minerals, & quarries under the commons, with power to do every act necessary for the draining, winning, & working such mines, minerals, & quarries as fully & freely as he or they could have had, held, used, or enjoyed the same in case the Act had not been made, without paying any damages or making any satisfaction for so doing. The assignees of the lord of the manor worked the mines so as to injure one of the roads set out by the comrs. In an action against them by the local board, on whom the duty of repairing the road fell, to recover the expense of doing so:—**Held:** the reservation to the lord of the manor must be taken to be subject to the public right created by the statute, & did not protect defts. from liability.—

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Annotations:—**Foll.** *Normanton Gas Co. v. Pope & Pearson* (1882), 48 L. T. 666. **Consd.** *L. & N. W. Ry. v. Evans*, [1893] 1 Ch. 10; *Consett Industrial & Provident Soc. v. Consett Iron Co.* (1921), 124 L. T. 809. **Refd.** *A.-G. v. Conduitt Colliery Co.*, [1895] 1 Q. B. 301; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53.

907. Subject to compensation—Includes right to work to utter destruction.—**BUCCLEUCH (DUKE) v. WAKEFIELD**, No. 893, *ante*.

908. ——— Right of support not taken away — House built on land—Measure of damages.—By an inclosure Act, in 1777, certain waste lands in the manor of B. were inclosed & allotted by the comrs. to the commoners & to the lord of the manor, & there was a clause in the Act providing that the lord of the manor, his heirs & assigns, should have the right to work the minerals under the lands just as he or they might have done if the Act had not been passed. There was a clause providing that if any person should suffer any loss or injury in his allotment by reason of the working of the minerals the person working such minerals should make full compensation for the damage caused thereby. In 1837, the then lord of the manor agreed to grant a lease to deft.'s predecessor in title of all the seam of coal known as the B. Bed, being under the lands allotted by the inclosure Act, for ninety-five years, & the lessee agreed to make compensation to the owners of the allotments according to the provisions of the Act. In 1861 & 1864, pltf. purchased the land allotted under the Act to the lord of the manor, & had built houses upon it. By reason of the working of the subjacent & adjacent coal by deft., pltf.'s land subsided, & he brought an action for damages. Deft. worked the mines in a skilful & proper manner, & according to the custom of the district: **Held:** (1) there was nothing in the Act or in the purchase deeds to interfere with pltf.'s common law right, as owner of the surface, to support by the subjacent & adjacent minerals, & he was entitled to recover damages; (2) as the injury was caused by a violation of pltf.'s common law right of support the damages were not necessarily nominal merely because if there had been no buildings on the land the damage would have been inappreciable.—**CHAPMAN v. DAY** (1883), 47 L. T. 705; *subsequent proceedings*, 48 L. T. 907, D. C.; 49 L. T. 436, C. A.

909. ——— Subject to satisfaction for surface damage—Right to support not taken away.—An inclosure Act enacted that allotments should be made to the persons having a right of common upon the waste of the manor, that is, to the owners of every separate ancient dwelling-house within the manor, that all right of common should be extinguished, & that the allotments should be held & enjoyed by the allottees by the same tenure & estates as the respective dwelling-houses: provided that nothing should prejudice, lessen or defeat the title & interest of the lords of the manor to & in the royalties, but that the lords & their successors as owners of the royalties should for ever hold & enjoy all rents, etc., perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, & all other royalties & jurisdictions whatsoever to the owners of the manor appertaining in as full, ample, & beneficial manner to all intents & purposes as they could or might have held & enjoyed the same in case the Act had not been made. The Act provided further, that in case the lords or any persons claiming under them should work any mines lying under any

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allotment, or should lay, make, or use any way or ways over any allotment, such persons so working the mines, or laying, making, or using such way or ways, should make satisfaction for the damages & spoil of ground occasioned thereby to the person or persons who should be in possession of such ground at the time or times of such damage or spoil, such satisfaction to be settled by arbitration & not to exceed the sum of £5 yearly during the time of working such mines or continuing or using such way or ways for every acre of ground so damaged or spoiled. At the time of passing the Act there were no customs which enlarged or cut down the common law rights of the lords to work the minerals under the wastes of the manor. Under the Act an allotment was made in 1772 to a commoner in respect of an ancient freehold dwelling-house. At that time no house had been built upon the allotment. More than twenty years after a house had been built upon it, the minerals underlying it were worked by lessees of the lords of the manor so as to cause the surface of the land to subside, whereby the house was damaged to an amount exceeding the sum recoverable under the proviso. The land would have subsided if there had been no house. An action for damages having been brought against the lessees by the allottee's successor in title and by his tenant in possession:—*Held*: (1) the proviso for satisfaction did not apply to damage from subsidence; (2) there was nothing in the Act giving the lords the right to let down the surface; (3) *pltf.*s. were entitled to have the house & land supported by the minerals, & to recover damages for the subsidence.—*LOVE v. BELL* (1884), 9 App. Cas. 286; 53 L. J. Q. B. 257; 51 L. T. 1; 48 J. P. 516; 32 W. R. 725, H. L.; *affg.* S. C. *sub nom.* *BELL v. LOVE* (1883), 10 Q. B. D. 547, C. A.

Annotations:—As to (1) *Consd.* *Consett Waterworks Co. v. Ritson* (1889), 64 L. J. Ch. 293, n.; *Hayles v. Pease & Partners*, [1899] 1 Ch. 567; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305; *Beard v. Moira Colliery Co.*, [1915] 1 Ch. 257; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468. *Refd.* *Mayhew v. Bromilow, Foster* (1886), 2 T. L. R. 400; *Bell v. Dudley*, [1895] 1 Ch. 182; *Bishop Auckland Industrial Co-op. Flour & Provision Soc. v. Butterknowle Colliery Co.* (1904), 73 L. J. Ch. 335; *Consett Industrial & Provident Soc. v. Consett Iron Co.* (1921), 124 L. T. 809. As to (2) *Consd.* *Shafte v. Bolekow, Vaughan & Ecclesiastical Comrs.* (1888), 4 T. L. R. 527; *Consett Waterworks Co. v. Ritson* (1889), 64 L. J. Ch. 293, n.; *Hayles v. Pease & Partners*, [1899] 1 Ch. 567; *Bishop Auckland Industrial Co-op. Soc. v. Butterknowle Colliery Co.*, [1904] 2 Ch. 419. *Distd.* *Welldon v. Butterley Co.*, [1920] 1 Ch. 130. *Refd.* *Marquiss v. Pease & Partners* (1888), 4 T. L. R. 696; *Twyerould v. Chamber Colliery Co.*, [1892] W. N. 27; *L. & N. W. Ry. v. Evans*, [1893] 1 Ch. 16; *Thompson v. Mein*, [1893] W. N. 202; *New Sharlston Collieries Co. v. Westmoreland*, [1904] 2 Ch. 443, n.; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468. As to (3) *Consd.* *Consett Waterworks Co. v. Ritson* (1889), 22 Q. B. D. 318. *Refd.* *Butterley Co. v. New Hucknall Colliery Co.*, [1910] A. C. 381. *Generally, Mentd.* *A.-G. v. Welsh Granite Co.* (1887), 35 W. R. 617.

910. ———.—*SHAFTO v. BOLCKOW, VAUGHAN & Co. & ECCLESIASTICAL COMRS.* (1888), 4 T. L. R. 527.

911. ———. No provision for compensation—*Subsidence unavoidable—Right to let down surface implied.*—An inclosure Act of 1791 reserved the rights of the owners of the coal under the commons & gave them full powers of getting & carrying it away without making satisfaction “in as full large ample & beneficial a manner to all intents & purposes whatsoever, as if this Act had not been passed.” There was no compensation clause. In 1791 & long previously, the coal was worked by the long wall system, which inevitably caused

subsidence of the commons, but did not interfere with the commoners' grazing rights. These facts were notorious at the date of the Act. In 1918 *defts.*, who were coalowners, proposed to work a shallow seam, under *pltf.*'s allotment by the long wall system, with the inevitable result of letting down her allotment & buildings. In addition to proving that the long wall system with its inevitable subsidence was to the knowledge of all parties in common practice at the date of the Act, & submitting that it was thereby authorised, they also proved the recently ascertained fact that the working of any seam, deep or shallow, by any system whatever necessarily caused subsidence, & that the long wall system did the least damage:—*Held*: (1) having regard to the common practice known to all parties at the date of the Act, the long wall system with its necessary results was thereby authorised; (2) apart from these special circumstances, that as the legislature had in any case given the coalowners a clear & unambiguous right to get the coal in some way or another they were entitled to get it, & as it was now proved that all systems caused subsidence, they were entitled to cause subsidence; the question whether the legislature knew the inevitable effect of exercising the right so clearly given being irrelevant.—*WELLDON v. BUTTERLEY Co.*, [1920] 1 Ch. 130; 88 L. J. Ch. 496; 121 L. T. 535.

912. Extent of working limited—Right of support not taken away.—An inclosure Act vested the surface of the land in allottees & the mines in the lord of the manor, & prohibited the lord from working the mines within forty perpendicular yards of the foundation of buildings on the surface:—*Held*: this prohibition did not affect the common law right of the owner of the surface to support, & he might maintain an action against the lord for working the mines so as to cause the buildings on the surface, belonging to the owner of the surface, to give way, though the mines had been worked with ordinary care & not within forty perpendicular yards of the foundation of the buildings.—*HAINES v. ROBERTS* (1857), 7 E. & B. 625; 119 E. R. 1377; *sub nom.* *ROBERTS v. HAINES*, 27 L. J. Ex. 49; 29 L. T. O. S. 233; 3 Jur. N. S. 886; 5 W. R. 631, Ex. Ch.; *affg.* S. C. *sub nom.* *ROBERTS v. HAINES* (1856), 6 E. & B. 643.

Annotations:—*Consd.* *Wakefield v. Buccleuch* (1866), L. R. 4 Eq. 613. *Expld.* *Bell v. Love* (1883), 10 Q. B. D. 547. *Consd.* *Westmoreland v. New Sharlston Colliery Co.* (1898), 79 L. T. 716. *Refd.* *Hext v. Gill* (1872), 7 Ch. App. 699; *Chapman v. Day* (1883), 47 L. T. 705; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305.

Effect of award.—See No. 1022, *post*.

See, generally, MINES, MINERALS & QUARRIES.

(c) Surface Rights.

913. Reservation of right of wagon-ways—Whether right properly exercised—Question for jury.—A private Act of Parliament for inclosing the waste lands of a manor reserved to the lord & his assigns all mines, etc., together with all convenient & necessary ways, etc., then already made, or thereafter to be made, & liberty of laying wagon-ways, etc., at his & their free will & pleasure, & to do all such other works, acts & things as might be necessary or convenient for the full & complete enjoyment thereof, in as full, ample & beneficial a manner as if that Act had not been made. An action of trespass having been brought against the lord's assignee for laying a wagon-way over one of the allotments in an improper direction & manner:—*Held*: the real question to be decided by the jury was, whether the wagon-way had been laid in such a direction

as a person of reasonable skill would have selected, & whether the mode adopted was such as a prudent person would have adopted if he had been making the road over his own land, & not over the land of another.—*ABSON v. FENTON* (1823), 1 B. & C. 195; 1 L. J. O. S. K. B. 94; 107 E. R. 73.

914. — For minerals gotten out of allotments or any other lands—Limited to mines owned by lord of manor—Mines not belonging to but worked by lord excluded.]—An Act of Parliament for inclosing the moors & commons within the manor of L., in the county of D., contained a saving of all the seigniorial rights of the Bishop of D. as lord of the manor, & also provided, that the bishop & his successors, & their lessees & assigns, should at all times thereafter work & enjoy all mines & quarries lying under the moors & commons, together with all convenient & necessary ways & wayleaves over same, & full & free liberty of making & using any new roads or wagon-ways over same, & for that purpose to remove obstructions, etc., & of winning & working the mines & quarries belonging to the see & bishopric of D., wheresoever same should be, & of leading & carrying away all the coals, minerals, etc., to be gotten thereout, or out of any other lands & grounds whatsoever, etc.:—*Held*: this clause entitled the bishop to carry over the lands inclosed under the Act, not only coals & minerals got within or under those lands, but also those got out of any other mines belonging to the see of D., but not to carry coals, etc., got out of other mines worked by the bishop but not belonging to the see.—*MIDGLEY v. RICHARDSON* (1845), 11 M. & W. 595; 15 L. J. Ex. 257; 153 E. R. 613.

Annotation:—*Apprvd. & Folld. Hedley v. Fenwick* (1861), 3 H. & C. 349.

915. — Mines within manor not belonging to lord excluded.]—By an inclosure Act for inclosing the moors & commons within the manor of L., in the county of D., the seigniorial rights of the bishop of D., as lord of the manor, & his successors, or his or their lessees or assigns, were saved; & it was enacted (*inter alia*) that the bishop & his successors, & his & their lessees & assigns, should, at all times thereafter, hold, work & enjoy all mines, minerals & quarries lying under the moors or commons, together with all convenient & necessary ways & wayleaves over the same moors, etc., & full & free liberty of making & using any new roads or wagon-ways over same, & for that purpose to remove hedges & other obstructions, etc., & of winning & working the mines & quarries, & also of all other mines & quarries belonging to the see & bishopric of D., wheresoever same should be; & of leading & carrying away all the coals, minerals, etc., to be gotten thereout, or out of any other lands or grounds whatsoever, & that without paying any damages or making any satisfaction for so doing. By s. 38, compensation was provided for damage done by the bishop & his successors, & his & their lessees & assigns, to owners of allotments, by winning or working the mines & quarries under the allotments, or leading or carrying away coals, etc., gotten thereout, or out of any other mines or quarries belonging to the bishop & his successors, or by making or using wagon-ways or other ways, etc., or using any other of the powers hereby reserved to the bishop & his successors & his & their lessees & assigns. In trespass for leading goods, gotten by defts., out of a mine worked by them within the manor of L., but not belonging to the see of D., across the close of pl'ts., being an allotment under the inclosure Act, defts. pleaded that from all time to the passing of the Act the bishop of D., being, as lord of the manor,

seised in fee of & in the commons, etc., & the mines, etc., lying & being within & under same, had been used, by himself, his servants & licensees, to enter upon the commons, etc., at all times at his & their will & pleasure, for the purpose of carrying across same coals gotten, not only from mines, etc., of which the bishop was so seised, but also from any other adjacent mines, etc., within the manor, of which the bishop was not seised, & which he, his servants, & licensees, might be lawfully entitled to work & carry away coal from; & that before the committing, etc., & while defts. were tenants & occupiers of, & lawfully entitled to work & carry away coal from, certain mines, adjacent to the mines in the manor, & of which the bishop was not seised, the bishop by deed, after the passing of the Act, granted to defts. full licence, etc., to carry coals won by them from the mines of which they were tenants, etc., over the close of pl'ts. Averment, that the trespasses complained of were the carrying of coals, etc., in pursuance of such licence:—*Held*: (1) the view taken in the case of

Igley v. Richardson (No. 914, *ante*) was right, & that s. 45 of the Inclosure Act was not to be construed as giving the right to the bishop of D. to grant wayleaves in respect of mines not belonging to the see, wherever such mines might be situated; (2) the compensation for damage incurred by carrying coal, etc., given by s. 48, was expressly confined by that sect. to the mines of the bishop & his successors.—*HEDLEY v. FENWICK* (1861), 3 H. & C. 349; 11 L. T. 571; 159 E. R. 566, Ex. Ch.

916. — For “coals & produce of any other mine”—Includes coke.]—An inclosure Act reserved to the lord of the manor his rights to mines & minerals in certain lands, & also liberty to make ways along certain commons, & to do every act then or thereafter in use for working & carrying away the mines & minerals & quarries within & under the commons, & also for carrying the coals & produce of any other mines & minerals from or under any other lands:—*Held*: this gave the lord power to convey coke along a railway which he had made on the commons, coke being a produce of a mine, & the word “other” meaning not other than coals, but other than the mines & minerals mentioned in the former clause.—*BOWES v. RAVENSWORTH (LORD)* (1855), 15 C. B. 512; 24 L. J. C. P. 73; 24 L. T. O. S. 257; 3 W. R. 241; 139 E. R. 523.

917. Reservation of right to dig gravel—Includes right to destroy surface—By enlarging pit—In ordinary mode of working.]—By a private Act of Parliament, passed in 1764, for the purpose of extinguishing the right of common over certain commonable lands in the parish of B., it was enacted that it should be lawful for the surveyors of highways of the parish at all times thereafter to cut, dig, gather, take & carry away any quantity of gravel, or other materials for repairing roads, out of & from any pit or pits then in the possession of the lessee of the lands subject to the rights of common, to be made use of for & towards the making, laying out or repairing any highway or road lying & being within the parish, without paying anything for the same, & the surveyors were thereby required to fence in the pits, & to repair the fences as occasion should require. One of the pits mentioned in the Act was situated in a field containing upwards of nine acres. This field had become vested in pl'tf., who filed a bill to restrain the local board, in whom the powers of the surveyors had become vested, from extending the area of the pit in a lateral direction, & from digging gravel so as to injure the surface of the

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field. There was no evidence as to the condition of the pit at the date of the passing of the Act, but it was proved that in 1826 the extent of the pit was one & a half acres, that it had been enlarged to two acres in 1862, & that since that time it had been further enlarged, such enlargement being made by destroying the surface & digging out the gravel:—*Held*: the Act gave power to get the gravel in the ordinary mode of working a gravel pit, & as the evidence showed that this gravel pit had been usually worked by extending its area, depths. were entitled to continue working the pit in that way, although the surface was thereby destroyed.—*ELLIS v. BROMLEY LOCAL BOARD* (1876), 45 L. J. Ch. 763; 35 L. T. 182; 24 W. R. 716, C. A.

918. Reservation to Crown of right to dig minerals—Includes right to win granite by open works—Subject to compensation.]—A.-G. v. WELSH GRANITE CO., No. 891, ante.

919. Reservation of royalties subject to compensation for damage by mining—Includes right to sink shafts & put up buildings—But not to use or destroy existing buildings of surface owner.]—An inclosure Act enacted that “nothing in this Act contained shall prejudice lessen or defeat the right title & interest” of the owner of the royalties “of in or to the royalties incident or belonging to the common but the owner, his heirs & assigns & all & every person or persons claiming under or in trust for him or them & all succeeding owners thereof shall & may at all times for ever hereafter hold & enjoy all rents, perquisites, profits, mines, quarries, waifs, estrays & other royalties & jurisdictions whatever to the owner of the royalties incident appendant & belonging or appertaining in as full, ample & beneficial manner to all intents & purposes as he or they could or might have held & enjoyed same in case this Act had not been made, provided always that in case the owner or owners for the time being of the royalties or any person or persons claiming under him or them shall after the inclosure work any mine or mines lying within or under any of the allotments or inclosures then such person or persons so working same shall make reasonable satisfaction for the damage & spoil of ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil”:—*Held*: on the true construction of the Act, the owner of the royalties was entitled to use the surface of any particular allotment, so far as was reasonably necessary, for the purpose of winning the minerals lying under not only that allotment but also any other allotment, & accordingly to sink pits & use existing pits & put up machinery on the particular allotment, but not to use existing engine-houses, engines or shops which were the property of the surface-owner.—*HAYLES v. PEASE & PARTNERS, LTD.*, [1899] 1 Ch. 567; 68 L. J. Ch. 222; 80 L. T. 220; 47 W. R. 370; 43 Sol. Jo. 244.

D. As to Rights in the Soil.

920. Waste allotted to certain commoners—For pasture, turf & fuel—Fee of soil remains in the

lord.]—By a private inclosure Act certain portions of the waste of a manor were allotted to the commoners, but 300 acres were by the Act directed to be set out & allotted for the purpose of pasture & of cutting turf & fuel of & by certain commoners. By the same Act one-sixteenth of the lands, not included in the 300 acres, was to be allotted to the lord of the manor in lieu of all claims, right, title or interest as such lord. Proceedings having subsequently been taken under 1845 Act to obtain the inclosure of the 300 acres, the lord of the manor, pursuant to 1845 Act, s. 27, refused his consent:—*Held*: notwithstanding the provisions of the private Act, the fee of the soil in the 300 acres was still in the lord of the manor, & his consent to their inclosure was necessary under 1845 Act.—*R. v. INCLOSURE COMRS. FOR ENGLAND & WALES* (1871), 23 L. T. 778; 35 J. P. 485.

Annotations:—*Consd.* *Re Christchurch Inclosure Act* (1888), 38 Ch. D. 520. *Distd.* *Simcoe v. Pethick*, [1898] 2 Q. B. 5.

See, also, Nos. 892–896, *ante*, No. 1022, *post*.

Loss of right by adverse possession.]—See LIMITATION OF ACTIONS.

SUB-SECT. 2.—THE COMMISSIONERS.

A. Appointment.

921. Enrolment.]—CASAMAJOR v. STRODE, No. 980, post.

See 1845 Act, s. 10; Board of Agriculture Act, 1889 (c. 30), s. 11 (1); Ministry of Agriculture & Fisheries Act, 1919 (c. 91), s. 1.

922. “Forthwith.”]—(1) A clause in an inclosure Act, directing vacancies in the number of comrs. to be filled up “forthwith,” is directory only, & will not receive too strict a construction.

(2) The comrs. of inclosure are the judges of the necessity for an inclosure rate, & in actions of ejectment to enforce the payment of it, evidence to show that the rate was unnecessary, is inadmissible.—*DOE d. FOWLER v. CLARK* (1842), 6 J. P. 701.

923. Presumption as to—After lapse of time.]—A local inclosure Act appointed a comr., with power to make allotments in the usual manner, & provided that, in case the comr. should die, or become incapable of acting, etc., another should be appointed in his place, by a majority in value of the commoners present at a meeting to be held in the manner therein mentioned; & a subsequent sect. enacted that the award should be made within six years from the passing of the Act:—*Held*: an award made nineteen years after the passing of the Act, & purporting to be made by a comr. other than the comr. appointed by the Act, was good, notwithstanding the lapse of time, & notwithstanding there was no proof of the due appointment of the comr. by whom it was made, the statute being directory only with regard to the time of making the award.—*DOE d. ROBERTS v. MOSTYN* (1852), 12 C. B. 268; 21 L. J. C. P. 178; 138 E. R. 907.

924. — Presumed duly made—After conveyance of land to defray expenses of inclosure.]—A local inclosure Act empowered the comr., by deeds executed in the presence of & attested by

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923 i. Of new commissioner—After statutory period—Award not invalidated.]—An Inclosure Act, after naming three comrs., J., W., & S., enacted that if any of them should die, neglect, or refuse to act, etc., the other or surviving comr. or comrs. were “authorised &

required,” within twenty days after such death, etc., should be known to them, by writing under their or his hand, to appoint another. W. having died, his death was immediately afterwards known to J. & S., who several months afterwards, by letters, appointed H. a new comr., who acted as

such, & executed an award:—*Held*: the award was valid although H.’s appointment was made after the twenty days prescribed—the statute being only directory as to the time of the appointment.—*ST. PATRICK’S HOSPITAL (GOVERNORS) v. DOWLING* (1826), Batt. 296.—*IR.*

two witnesses, to sell such portions of the waste lands as should be necessary to defray the expenses of carrying the Act into execution, before award made. In ejectment by a party claiming under a conveyance from the comr. in pursuance of such power, it appeared that the lessor of pltf. purchased the land with the view of exchanging it with deft., that he never took possession of it, & that deft., some years after the conveyance, fenced it in, & had occupied it by his tenants ever since, a period of less than 20 years. It did not appear that any award had been made under the Inclosure Act:—*Held*: pltf. was not bound, in order to recover in the ejectment, to prove that the comr. had duly qualified, & given the notice, etc. required by the General Inclosure Act, before the execution of the conveyance.—*DOE d. NANNEY v. GORE* (1837), 2 M. & W. 320; 150 E. R. 779.

Annotation:—*Consd.* *Doe d. Roberts v. Mostyn* (1852), 12 C. B. 268.

B. Jurisdiction.

Cannot alter the general law.]—*See* No. 1020, *post*.

925. After death of one—Statutory quorum left—Assessment invalid.]—Where three comrs. & their successors were appointed to transact the business under an inclosure Act, & the act of any two of them was to be valid, an assessment executed by two, after the death of one of the three, & before the appointment of a successor, was holden invalid.—*DOE d. NICHOLSON v. MIDDLETON* (1822), 3 Brod. & Bing. 214; 6 Moore, C. P. 532; 129 E. R. 1265.

926. Exchange of land—Power to award exchange for land & money.]—Where an inclosure Act gave the comrs. power to award lands in exchange for others in an adjoining parish, & also to award lands to those who bought them of persons entitled to allotments:—*Held*: (1) they might award lands given in exchange partly for other lands & partly for money; & (2) the award need not have an *ad valorem* stamp upon the money consideration.—*DOE d. SUFFIELD (LORD) v. PRESTON* (1827), 7 B. & C. 392; 1 Man. & Ry. K. B. 713; 6 L. J. O. S. K. B. 150; 108 E. R. 769.

927. — Powers not strictly complied with—Award invalid.]—The comrs. under an inclosure Act, were required to allot the lands directed to be inclosed, unto the several proprietors thereof, in such shares, quantities, etc. as they should adjudge to be a just compensation for their several & respective lands, rights of common, etc. therein; & were empowered also to set out, allot, & award any lands, etc. within the parish of A., “in lieu of or in exchange for any other lands, etc. within the parish, provided that all such exchanges should be ascertained, specified & declared in & by the award to be made by the consent of the owners of the lands exchanged.” The comrs. awarded a certain allotment to B. “as a compensation for his open field, lands & rights of common, & an old inclosure given up by B. to be allotted by the comrs. in exchange”:—*Held*: the comrs. had not pursued the powers vested in them by the Act, & B. could not make a good title to the allotment.—*WINGFIELD v. THARP* (1830), 10 B. & C. 785; 5 Man. & Ry. K. B. 745; 8 L. J. O. S. K. B. 318; 109 E. R. 641.

Annotations:—*Refd.* *A.-G. v. Cullum* (1836), 5 L. J. Ch. 220; *Goodtitle v. Milburn* (1837), 2 M. & W. 853.

928. — Partition not provided by special Act.]—Inclosure (Consolidation) Act, 1801 (c. 109), s. 16, authorised the comrs. to make partition of land held in common upon the request in writing of the tenants in common, or any or either of them. A local Act for inclosing land within the parish of

M., enabled comrs. to make exchanges of land with the consent of the owners, whether tenants in fee simple or for life, & s. 32 provided for the costs of partition, but there was no clause in terms authorising partitions. The local Act received the Royal assent on May 19, 1819, at which time C. was seised of an undivided moiety of certain land in M. for the life of K., the other moiety being vested in S. in fee. On Aug. 2, 1819, C. & S. made a claim in writing under the Act of 1801 in respect of the land so held by them as tenants in common; & on Sept. 13, 1819, S. died intestate, leaving E. his heir. On Aug. 11, 1826, the comrs. made their award, & thereby made three allotments to C. & S., in respect of their interests in the open lands to be allotted & divided; & they also, under the “exchanges,” allotted to E. an undivided moiety of certain land sought to be recovered in this action, as also of the three allotments, the other moiety being therein stated to be already vested in E. in exchange for, as well the undivided moiety of E. in certain other old inclosed lands, which the comrs. thereby allotted to C., the other moiety thereof being therein stated to be then already vested in him, as also the entirety of a close belonging solely to E.:—*Held*: (1) the local Act having contemplated partitions, but containing no authority for that purpose, the legislature must have intended that they should be effected under the Act of 1801, s. 16; (2) this allotment could not have been supported as a partition under that Act, because, (a) C. was only tenant *pur autre vie*, & as such, had no authority to consent to a partition, (b) one of the tenants in common was to take as his share in severalty a close which, before the partition, formed no part of the land held in common, but was the separate property of the other tenant in common; (3) the words “tenants for life” in s. 31 of the local Act included “tenants *pur autre vie*,” & the allotment was good under that Act as an exchange; (4) the allotments made to C. & S. were not void by reason of their having been made after the death of S., & when E., his heir, was entitled.—*DOE d. KNIGHT v. SPENCER* (1848), 2 Exch. 752; 151 E. R. 693.

Annotations:—*As to* (1) *Consd.* *Re Frith & Osborne* (1876), 3 Ch. D. 618. *Refd.* *Bradshaw v. Fane* (1856), 25 L. J. Ch. 413.

— **Apart from inclosure.]—***See* REAL PROPERTY & CHATTELS REAL.

929. Power to allot to occupiers of commonable messuages—Limited to occupiers entitled before Act.]—By an Act for inclosing common lands in G., after reciting that the corpn. of G. claimed the right of soil as lords of the manor, & that certain individuals were proprietors of the common lands intended to be inclosed, it was enacted, that the comrs. might set out & allot plots of ground out of the E. & W. commons, in G., as a compensation for the rights of common of all the owners & proprietors of commonable messuages or cottages, for such messuages or cottages only, as well on the said commons as on certain other lands named; such plots of ground to be used & enjoyed as the comrs. should by their award direct. Parties dissatisfied with the award might bring an action against the persons in whose favour the determination should be, within three months, or might appeal within six months to the justices in Quarter Sessions, who were to determine the matter, & award costs & damages. In default of such action or appeal, the determination of the comrs. was to be final. The comrs. by their award, allotted a plot of land on the W. common as common pasture, to the owners & proprietors of commonable messuages or cottages, & their respective tenants

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or occupiers of the messuages & cottages only having right of common on the W. common; & they limited the use of the pastures as the Act empowered them. Before the passing of the Act, the rights attached to the commonable messuages could only be exercised by such occupiers as were freemen of the borough of G. Subsequently to the Act, one of the messuages on W. common being in the hands of a person not a freeman, the corpn. brought trespass against him, for turning his cattle on the allotment:—*Held*: (1) the Act, though general in its words, did not authorise the comrs. to extend the benefit of their allotments in lieu of common, to occupiers who were not freemen, & the award itself did not purport to do so, nor could it have done so unless the Act had given power to the comrs. to ascertain who should be entitled to the newly granted rights; (2) the present action was maintainable, though brought more than six months after the award.—*GOD-MANCHESTER CORPN. v. PHILLIPPS* (1833), 5 B. & Ad. 198; 2 Nev. & M. K. B. 713; 110 E. R. 765; *subsequent proceedings* (1836), 4 Ad. & El. 550.

930. Under Hainault Forest (Allotment of Commons) Act, 1858 (c. 37), s. 7—Over rights of common in the forest.]—*Re HAINAULT FOREST ACT*, 1858, No. 443, *ante*.

931. Not to make freehold lands allotted subject to heriots & reliefs.]—Comrs. of inclosure have no powers in making allotments in respect of freehold lands subject to heriots & reliefs, to make the allotted lands so subject.—*BASINGSTOKE CORPN. v. BOLTON (LORD)* (1854), 3 Drew. 50; 3 W. R. 142; 61 E. R. 821.

932. As to old public ways—No power to close ancient towing path by navigable river.]—If an Act of Parliament for inclosing & allotting the common & waste lands of a parish through which a navigable river flows, empower comrs. to set out such public & private roads & ways as they shall think necessary, & direct that all roads & ways not so set out shall be deemed part of the lands to be allotted, an ancient towing path upon the bank of the river though not set out by the comrs. still subsists, for it is not within their jurisdiction.—*SIMPSON v. SCALES* (1801), 2 Bos. & P. 496; 126 E. R. 1404.

933. — To close part only.]—(1) An inclosure Act empowered comrs., with the concurrence of two justices, to stop up, divert or turn, & to direct to be discontinued any public road or footpath through any part or parts of the lands & grounds in the parish of T. which to the comrs. should appear useless; subject to an appeal to the Quarter Sessions. The comrs. & two justices made an order stopping up a public footpath in the parish of T. which was continued as a footpath into the parish of S., whereby the part in the latter parish became useless as a public way:—*Held*: the comrs. had power to stop up the part of the footpath in the parish of T., & that if any injury was thereby done, the remedy was by appeal.

(2) The part of the footway in the parish of T. still remained a public way, though a *cul-de-sac*.—*GWYN v. HARDWICKE* (1856), 1 H. & N. 49; 25 L. J. M. C. 97; 27 L. T. O. S. 72; 20 J. P. 359; 4 W. R. 486; 156 E. R. 1113.

Annotations:—*As to* (1) *Refd.* R. v. Waller (1875), 31 L. T. 777. *As to* (2) *Refd.* Esher & Dittons U. C. v. Marks (1902), 71 L. J. K. B. 309.

— **Effect of award.]—***See* Sub-sect. 8, D. (a), *post*.

934. As to new public roads—Power to allot herbage to allottees of common—Does not give

power to sell herbage by auction.]—An inclosure Act, authorising comrs. to make roads through inclosed lands, & declaring that the commoners of inclosed lands shall be entitled to the herbage of the roads, in the manner in which the comrs. shall award, does not authorise them to sell the herbage by auction or otherwise to one individual commoner.—*RAIMES v. ROBINSON* (1786), 2 Chit. 501.

— **Effect of award.]—***See* Sub-sect. 8, D. (c), *post*.

935. As to new private roads—No power to make repairable by parish or township at large.]—The comrs. appointed by an Act for dividing & inclosing certain lands in the parish of C., enacting that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, & that the private roads should be repaired by such person or persons as they should award, have no power to impose on the parish at large the burden of repairing any of the private roads set out in pursuance of the Act.—*R. v. COTTINGHAM (INHABITANTS)* (1794), 6 Term Rep. 20; 101 E. R. 413.

Annotations:—*Consd. & Distd.* A.-G. v. Tamworth R. D. C. (1901), 85 L. T. 190. *Appl.* A.-G. & Settle R. D. C. v. Lunedale R. D. C. (1902), 86 L. T. 822. *Refd.* R. v. Edmonton (1831), 1 Mood. & R. 24.

936. — — —.]—On indictment for encroaching on a public highway, it appeared that in 1771, comrs. under an inclosure Act had been empowered to set out public & private roads, the former to be repaired by the township, the latter by such persons as the comrs. should direct. The public roads were to be sixty feet wide between the fences. The comrs. in their award described a road as private, & eight yards wide, but in setting it out a space of sixty feet was left between the fences, & they directed both the public & private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road, & the township repaired it. The space said to be encroached upon was at the side of this road, & there was a diversity of evidence as to the use made of this space by the public, & its condition, since the time of the award:—*Held*: the comrs. had exceeded their authority in awarding that private roads should be repaired by the township.—*R. v. WRIGHT* (1832), 3 B. & Ad. 681; 1 L. J. M. C. 74; 110 E. R. 248; *subsequent proceedings* (1834), 1 Ad. & El. 434, Ex. Ch.

Annotations:—*Refd.* R. v. Leake (1833), 2 Nev. & M. K. B. 583; *Beckett v. Upton* (1855), 1 Jur. N. S. 1136; *R. v. United Kingdom Electric Telegraph Co.* (1862), 2 B. & S. 648, n.; *Neeld v. Hendon U. D. C.* (1899), 81 L. T. 405. *Mentd.* *Harvey v. Truro R. C.*, [1903] 2 Ch. 638; *Offin v. Rochford R. C.*, [1906] 1 Ch. 342.

937. — Discretion as to formation & completion—Accommodation footways.]—(1) A valuer, who makes an award under 1845 Act, has a discretion in each case as to the amount of formation & completion of private or occupation roads & ways set out by him in his award.

(2) The valuer may, where it is necessary, set out footways to accommodate inclosed lands or adjoining owners.—*REYNOLDS v. BARNES* (1909), 2 Ch. 361; 78 L. J. Ch. 641; 101 L. T. 71; 73 J. P. 330.

See, also, No. 967, *post*.

— **Effect of award.]—***See* Sub-sect. 8, D. (d), *post*.

938. As to drains & watercourses—Not to alter drains—So as to obstruct drainage in another township.]—An Act of Parliament, empowering comrs. to inclose the common lands in a certain township, enacted that it should be lawful for the comrs. to set out & make such ditches, watercourses & bridges, of such extent & form, & in such situations, as they should deem necessary in the

lands to be inclosed; & also to enlarge, cleanse or alter the course of & improve any of the existing ditches, watercourses or bridges, as well in & on the lands, as also in any ancient inclosures or other lands in the township, as they should deem necessary:—*Held*: the Act did not empower the comrs. to alter the drains in the common lands, so as to overload an ancient drain which flowed through the common lands from another township, & thereby to obstruct the drainage of the lands in such other township, to the damage & injury of the owners of such lands.—*DAWSON v. PAVER* (1847), 5 Hare, 415; 16 L. J. Ch. 274; 8 L. T. O. S. 493; 11 Jur. 766; 67 E. R. 974.

Annotations:—*Mentd.* East Lancashire Ry. v. Hattersley (1849), 8 Hare, 72; Lond v. Murray (1851), 17 L. T. O. S. 248; Goldsmid v. Tunbridge Wells Improvement Comrs. (1865), 14 W. R. 92; Lingwood v. Stowmarket Co. (1865), L. R. 1 Eq. 77; *Re Wilton's S. E.*, [1907] 1 Ch. 50.

939. — Power to make repairable by surveyor of highways—& to raise expenses by rate.—An inclosure Act provided that the comr. should set out such watercourses as he should think proper, & should order & direct by whom & at whose expense such watercourses should be repaired & cleansed. The Act further provided that the comr. should assign land for the getting of materials for repairing public roads. The comr., in pursuance of such Act, by his award appointed certain roads to be set out, & awarded to the surveyor of highways land for the getting of materials for the repair of public roads. He further ordered that a watercourse should be made, & directed that such watercourse should for ever thereafter be repaired & cleansed by the surveyor of highways for the time being, the expenses attendant upon such repairing & cleansing to be paid out of a rate to be made for the repair of highways in the township:—*Held*: it was within the jurisdiction of the comr. to order the surveyor of highways to repair & cleanse the watercourse & to raise the expenses of so doing by means of a rate.—*A.-G. v. TAMWORTH RURAL DISTRICT COUNCIL* (1901), 85 L. T. 190.

— *Effect of award.*—*See* Sub-sect. 8, E., *post*.

940. Allotment of common & rentcharge in lieu of tithe—Incumbent at date of award holding two preferments—Allotment of common to one preferment but rentcharge apportioned—Within jurisdiction of commissioners.—By an inclosure Act comrs. were empowered to divide & inclose common lands, & to allot to H., who was then both rector of B. & perpetual curate of U. & his successors, rectors of B. & curates of U., lands of a stated yearly value, & a rentcharge to be payable out of other portions of the lands to be inclosed, which allotments were to be in lieu & satisfaction of all tithes, etc. belonging to H. & his successors. At this time the patron of the rectory was the same person as the patron of the curacy. The award gave certain lands to H. & his successors, simply as "rectors of B."; but awarded the rentcharge in certain proportions between the rectory & the curacy. The preferments were separated in 1829, & in 1864 this bill was filed by plff., who was both the patron & incumbent of the curacy, against the patron & rector of B., but not against the proprietors of the lands on which the rent was charged, for a declaration that the lands allotted should have been allotted to H. both as rector & as curate, & that his successors were entitled to the lands in the same proportions as they were entitled to the tithes, etc. before the award; that a new commission for partitioning the lands might be issued, & for necessary consequential directions:—*Held*: (1) the comrs. had power to apportion the lands & rentcharge between the rectory & curacy, & the apportionment made was not made *per incuriam*

or mistake; (2) in no view of this case would the ct. be competent to adjust the rights between the rector & the curate in this or any other suit. (3) *Seem*: the ct. cannot be made subsidiary to a tribunal created by Parliament for adjusting such rights on the ground that that tribunal has miscarried (*TURNER, L.J.*)—*BATEMAN v. BOYNTON* (1866), 1 Ch. App. 359; 35 L. J. Ch. 568; 14 L. T. 371; 12 Jur. N. S. 383; 14 W. R. 598, L. JJ.

Annotation:—*As to* (3) *Consd.* Micklethwait v. Vincent (1893), 69 L. T. 57.

941. As to minerals—Under part of common sold to defray inclosure expenses—No power to divest from lord.—*WAKEFIELD v. BUCCLEUCH (DUKE)*, No. 803, *ante*.

— *Construction of Acts.*—*See* Sub-sect. 1, C., *ante*.

Effect of award.—*See* Sub-sect. 8, F., *post*.
942. Sporting rights—Power to sever from ownership of soil.—The Inclosure Comrs., under 1848 Act, s. 1, are authorised to make it a condition of the inclosure of a waste that the right of sporting shall be severed from the soil, & the tencement thus created shall remain in the lord, whilst the soil is allotted to others. The intention to impose such a condition is sufficiently manifested by a clause in the provisional order, that one-sixteenth part in value of the lands be allotted to the lords of the manor in lieu of their right & interest in the soil of the lands, exclusively of their right & interest in the game, & in all mines, minerals, stone, & other substrata under the lands.—*MUSGRAVE v. FORSTER* (1871), L. R. 6 Q. B. 590; 40 L. J. Q. B. 207; 24 L. T. 614; 35 J. P. 820; 19 W. R. 1141.

Annotation:—*Mentd.* Musgrave v. Inclosure Comrs. (1874), L. R. 9 Q. B. 162.

— *Construction of Acts.*—*See* Sub-sect. 1, B., *ante*.

As to raising expenses of award.—*See* Sub-sect. 10, *post*.

Partition—Apart from inclosure.—*See* PARTITION.

SECT. 3.—WHAT LANDS MAY BE ALLOTTED.

943. Encroachment or ancient inclosure—Not after twenty years.—1852 Act, s. 13, empowers the valuer acting in the matter of an inclosure to apply to justices to recover possession of any encroachment or inclosure which, under 1845 Act, shall be deemed to be parcel of the land subject to be inclosed, possession of which the actual occupier neglects or refuses to deliver up, after the determination of claims under 1845 Act:—*Held*: (1) the justices have jurisdiction to inquire into the circumstances attending the encroachment or inclosure in question, notwithstanding that the occupier has made no claim before the valuer or the Inclosure Comrs., & has not appealed against the award of the comrs., which includes the land in dispute; (2) the justices were right in refusing to order possession to be given to the valuer of a piece of land proved to them to have been first inclosed more than twenty years before the first meeting of the comrs. for the examination of claims, such land being, under 1845 Act, s. 52, an ancient inclosure, & that sect., taken with s. 50, showing that inclosures, only, of less than such twenty years standing are, under that Act, to be deemed to be parcel of the land subject to be inclosed.—*CHILCOTE v. YOULDON* (1860), 3 E. & E. 7; 29 L. J. M. C. 197; 2 L. T. 370; 24 J. P. 758; 6 Jur. N. S. 1054; 8 W. R. 559; 121 E. R. 347.

Annotation:—*As to* (2) *Distd.* Blackett v. Ridout, [1915] 2 K. B. 415.

Sect. 7.—Under inclosure Acts: Sub-sects. 3 & 4, A. & B.; sub-sect. 5, A.]

944. — Adverse possession interrupted by award.]—The rector of a parish brought an action in 1913 to recover possession of a piece of land which had, in 1866, been allotted to a former rector by an inclosure award made by a valuer & confirmed by the Inclosure Comrs. under the provisions of the Inclosure Acts. Deft. set up the defence that he & his predecessors in title had been in possession of the land for sixty years. The effect of the evidence was that deft.'s father had encroached upon the land in question & inclosed it, & that acts of ownership had been exercised thereon by deft.'s father & deft. for more than sixty years before the commencement of the action:—*Held*: (1) deft. failed to establish a sixty years' possessory title, because the sixty years' possession required by s. 29 of Real Property Limitation Act, 1833 (c. 27) would not begin to run against pltf. as an ecclesiastical corpn. sole until 1866, the date of the award; (2) it was not open to deft. to say by way of defence to the action that the encroachment was at the date of the award an ancient inclosure under 1845 Act, s. 52, because by ss. 49, 50, 105, of that Act the question whether an encroachment was an ancient inclosure was a question for the determination of the valuer & the comrs., & the award itself must be taken to be a decision binding & conclusive on all persons that the encroachment was not an ancient inclosure.—*BLACKETT v. RIDOUT*, [1915] 2 K. B. 415; 84 L. J. K. B. 1535; 113 L. T. 267, C. A.

Annotation:—*As to* (2) *Consd.* *Collis v. Amphlett*, [1918] 1 Ch. 232.

945. Not bed of river—Over which no rights of common exercised.]—By a private inclosure Act, passed in 1796, an allotment was directed of certain waste lands in a manor, the mines etc., being reserved to the lord, & the allotments were declared freehold of the allottees to all intents & purposes. There was a saving clause providing that nothing in the Act should affect the title of the lord to the mines or to the seigniories & royalties, franchises & liberties incident to the manors, but that the lord, his heirs & assigns, should enjoy, *inter alia*, all piscaries, fishing, etc., which could or might be claimed by him or them as owner or owners of the soil of the moors, commons & waste grounds, in as full, ample & beneficial a manner to all intents & purposes as if the Act had not been passed. The waste lands were bounded on one side by the river E., & the soil of half the bed belonged to the lord. There was no evidence that any of the tenants had ever enjoyed any rights of fishing, or any other commonable rights, over any part of the bed of the river; but there was evidence that at the time of the passing of the Act the lord exercised & let to tenants the right of fishing over half the bed. The comrs. allotted to L. a part of the waste called S., described as bounded on the west by the river, & gave an acreage which was correct for the land if the half-bed was not included. In 1890 the successor of the lord granted to pltf. the right of fishing in half the river between two points lying above & below S. Pltf. brought his action to establish his right of fishing in front of S., & a right of landing on S. for fishing purposes. The L. family insisted that the allotment to L. passed the soil of the bed *ad medium filum*, & that they had the exclusive right of fishing over so much as adjoined S., & by counterclaim asked an injunction to restrain pltf. from fishing opposite S., & from landing on S. for fishing purposes:—*Held*: (1) as the half-

bed of the river had been enjoyed & let by the lord as a separate tenement up to the passing of the Act, & the commoners had never exercised any rights of common over it, it did not form part of the waste lands which the comrs. were authorised to allot, & that even if they had expressly included half the bed in the allotment to L., he would have taken no interest in the bed, & that he had no right of fishing; (2) according to *Duke of Devonshire v. O'Connor* (No. 883, *ante*) the saving clause in the Act did not reserve to the lord any merely territorial right, & as it did not appear that he had any franchise of fishing, his right to land upon S. for fishing purposes was a merely territorial right incident to his ownership of the soil, & was extinguished by the allotment.—*ECROYD v. COULTHARD*, [1898] 2 Ch. 358; 67 L. J. Ch. 458; 78 L. T. 702; 14 T. L. R. 462, C. A.

Annotations:—*As to* (1) *Consd.* *Hough v. Clark & Hall* (1907), 23 T. L. R. 682. *As to* (2) *Refd.* *Hanbury v. Jenkins*, [1901] 2 Ch. 401.

See, also, Nos. 957, 1044, *post*.

See 1845 Act, ss. 13 (as amended by Forest of Dean Act, 1866 (c. 70)), 50, 51, 52.

SUB-SECT. 4.—WHO ENTITLED TO ALLOTMENTS. *A. Lord of Manor.*

946. In respect of demesne lands — In addition to rights as owner of soil.]—*Held*: a lord of the manor was entitled to an allotment under an inclosure Act, in respect of his demesnes of the manor, over & above the allotment awarded to him by the Act in respect of his right as lord of the manor.—*ARUNDELL v. PALMOUTH (VISCOUNT)* (1814), 2 M. & S. 440; 105 E. R. 444.

Annotations:—*Folld.* *Lloyd v. Powis* (1855), 4 E. & B. 485. *Consd.* *Musgrave v. Inclosure Comrs. for England & Wales* (1874), 30 L. T. 160; *Thomson v. St. Catharine's College, Cambridge, etc.* (1918), 118 L. T. 758. *Refd.* *Askew v. Wilkinson* (1832), 3 B. & Ad. 152.

947. — Commoner acquiring lordship of manor.]—A., being the owner & in possession of a farm from 1833 to 1850, exercised the right of turning out on the waste of the manor the sheep levant & couchant upon that farm. In 1818 A. became lord of the manor. Upon an inclosure of the wastes of the manor, under 1845 Act, A., who received an allotment in respect of his manorial rights, claimed besides to be compensated for common of pasture or feeding or right of pasturage in respect of the farm, & an issue was framed in those terms:—*Held*: assuming that a right of common of pasture appurtenant to the farm existed previously to A. becoming lord of the manor, he would after that have an interest in respect of which he ought to be compensated, & which might be described in popular language in the terms of the issue.—*LLOYD v. POWIS* (1855), 4 E. & B. 485; 24 L. J. Q. B. 145; 24 L. T. O. S. 212; 1 Jur. N. S. 230; 119 E. R. 177.

Annotations:—*Refd.* *Sowerby v. Smith* (1873), L. R. 8 C. P. 514; *Musgrave v. Inclosure Comrs. for England & Wales* (1874), 30 L. T. 160.

Unity of possession of commoner & lord of manor, *see* Part XI., Sect. 1.

948. — Right of pasture.]—*MUSGRAVE v. INCLOSURE COMRS.*, No. 787, *ante*.

See, also, No. 992, *post*.

949. In respect of rights as owner of the soil—Rabbit warren—Though not mentioned in particular Act.]—*CASAMAJOR v. STRODE*, No. 980, *post*.

—*See, also*, No. 953, *post*.

Rights of the lord as owner of the soil.]—*See, generally*, Part IX., *ante*.

Right of the lord to share of compensation money

on compulsory acquisition of common.]—See Part VIII., *ante*.

B. Commoners.

950. Commoner having two rights of common—In respect of same tenement—Entitled to allotment in respect of both rights.]—The owner of a tenement may have two distinct rights of common for his cattle, levant, & couchant, upon such tenement, upon different wastes in different manors under several lords; & therefore an allotment under one inclosure Act, in lieu of his right of common upon one of such wastes, will not do away with or lessen his claim for an equal allotment with other commoners, under a subsequent Act for inclosing the other waste. *Semble*: if the different wastes had appeared to have been originally holden under the same lord, it would have been otherwise.—*HOLLINSHEAD v. WALTON* (1806), 7 East, 485; 103 E. R. 188.

Annotation:—*Folld. Barwick v. Matthews* (1814), 5 Taunt. 365.

951. — — — — —.]—A copyholder having a right of common in two manors, & having received an allotment out of one, in lieu of his right in that manor, is entitled to his full allotment out of the other, when inclosed, whether the manors be held under the same, or under different lords; & though the estate, in respect of which he claims, be partly enfranchised freehold, that does not extinguish his right as to the part enfranchised.—*BARWICK v. MATTHEWS* (1814), 5 Taunt. 365; 1 Marsh. 50; 128 E. R. 730.

Annotation:—*Reid. Derry v. Sanders*, [1919] 1 K. R. 223.

SUB-SECT. 5.—PROCEEDINGS BEFORE AWARD.

A. In General.

952. Time for lodging claims—Effect of not lodging claim within time limit—Subsequent dispute as to allotment.]—In 1813, the comrs. for the inclosure of a parish, the tithes of which were vested in several lay impropiators, appointed meetings for receiving claims, & various claims were put in, but none in respect of tithes, within the time limited by Inclosure (Consolidation) Act, 1801 (c. 109), notwithstanding this, the comrs. in 1817, made J. an allotment in respect of the impropriate tithes of certain land occupied by him, which tithes, as well as the land, J. claimed under the will of P. In 1820 W., who claimed these tithes under the heir of P., on the ground that they did not pass by P.'s will, brought an ejectment for the allotment made in respect of them:—*Held*: having omitted to make his claim before the comrs. within the time limited by the Act, he could not recover.—*DOE d. WATSON v. JEFFERSON* (1824), 2 Bing. 118; 9 Moore, C. P. 260; 2 L. J. O. S. C. P. 138; 130 E. R. 250.

Annotation:—*Reid. Doe d. Sweeting v. Holland* (1829), 9 B. & C. 789.

953. How consents & dissents to inclosure calculated—Interest of lord of manor in subsoil to be considered.]—The ct. granted a prohibition against the Inclosure Comrs., to prohibit them from proceeding with an inclosure under 1845 Act, where the assistant-comr. had, in taking the consents & dissents under s. 27, excluded from his estimate of the interest of the owner of the soil of the land to be inclosed, & over which rights of common existed or were claimed, the value of the brick-earth thereunder, which would have more than sufficed to overtop the consents to the inclosure, notwithstanding the provisional order contained the following so-called exception, "that

all mines, minerals, stone & other substrata be reserved to C., with a right to enter the lands when inclosed, for the purpose of opening, working, or winning such mines, minerals, stone & other substrata, making compensation for any damage to the surface which may thereby be done."—*CHURCH v. INCLOSURE COMRS.* (1862), 11 C. B. N. S. 664; 31 L. J. C. P. 201; 8 Jur. N. S. 893; 112 E. R. 956.

Annotations:—*Mentd. Glasgow Corpn. v. Farie* (1888), 13 App. Cas. 657; *Jersey v. Neath Union Grdns.* (1888), 52 J. P. 582.

See, also, No. 920, *ante*.

954. Claims must be allowed—Unless objected to.]—*MUSGRAVE v. INCLOSURE COMRS.*, No. 787, *ante*.

955. Order prohibiting inclosure—Pending final award—Breach of order indictable.]—By Epping Forest Amendment Act, 1872 (c. 95), s. 5, the Epping Forest Comrs. might make orders prohibiting, until after their final report, any inclosures or waste of land within the forest, subject in their judgment to any forestal or common rights. The comrs. made a general order prohibiting all persons from committing waste upon a piece of land described, until the final report or until further order; all persons affected to be at liberty to apply to them as there might be occasion. Deft. applied to the comrs. by counsel as a person affected, but they refused to enter into the question raised. Deft. was convicted upon an indictment moved by *certiorari* for breach of this order:—*Held*: the order & the indictment were good.—*R. v. WALKER* (1875), L. R. 10 Q. B. 355; 44 L. J. M. C. 169; 33 L. T. 167; 40 J. P. 230; 13 Cox, C. C. 94.

Annotations:—*Reid. Lascelles v. Onslow* (1877), 41 J. P. 436. *Mentd. Dale's Case, Enraght's Case* (1881), 6 Q. B. D. 376; *Willingale v. Norris*, [1909] 1 K. R. 57; *Wiffen v. Bailey & Romford U. D. C.* (1914), 78 J. P. 187.

956. Grounds for restraining commissioners from signing award—Not mere dissatisfaction of allottees—Apart from misfeasance by commissioners.]—Comrs. were empowered to make allotments by their award to the several proprietors of the lands within a manor, & it was by the Act provided that the award of the comrs. should be final & conclusive upon all parties. The proprietors of lands within the manor were only four persons—the Corpn. of D., M., S., & P. The comrs. made an allotment which was complained of as unfair by S., the portion of land allotted to him being, as he insisted, much less than he ought to have. The comrs. then proceeded to make another allotment, which was complained of by P., as being unequal & unfair with respect to him. The comrs. then proceeded to make a third allotment, which the Corpn. of D. insisted was unfair & greatly injurious to them, & accordingly they complained to the comrs., but the comrs. paid no attention to their complaint & declared that they would, on April 10, sign their award:—*Held*: (1) the ct. would not by injunction restrain the comrs. from signing their award, as the arbitrators had done nothing yet, & the ct. would not presume that they meant to do wrong; (2) if the ct. did not interpose then it could interpose later.

Semble: the ct. could interpose after the award was made.—*DONCASTER CORPN. v. MILBOURNE* (1785), Rom. 106, L. C.

957. — — — — — Lands allotted alleged not to be commonable.]—The Inclosure Comrs. under 1845 Act, having made provisional orders & being about to confirm the valuer's report, pursuant to a local Act a bill was filed by parties alleging certain particular lands in the report to be lands not subject to inclosure & praying an injunction. Upon the evidence it appeared that the lands were

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commonable:—*Held*: the ct. had no authority to interfere by injunction to restrain the comrs. from making their award.—*TURNER v. BLAMIRE* (1853), 1 Drew. 402; 22 L. J. Ch. 766; 21 L. T. O. S. 52; 1 W. R. 237; 61 E. R. 506, L. JJ.

Annotations:—*Consd.* *Harris v. Jose* (1866), 13 L. T. 699. *Refd.* *Chilcote v. Youldon* (1860), 3 E. & E. 7. *Mentd.* *Rooke v. Kensington* (1856), 2 Jur. N. S. 755.

958. — Disputed ownership to lands allotted.]
—*Re PORTSMOUTH (LORD) & PARTRIDGE v. INCLOSURE COMRS.*, No. 1044, *post*.
See, also, No. 953, *ante*.

Rectification of mistake—After provisional order authorised by Act of Parliament.]—See No. 968, *post*.

B. Appeals.

See Sub-sect. 11, post.

SUB-SECT. 6.—EFFECT OF PROVISIONAL ALLOTMENT.

959. Whether allottee can convey—Contract for sale before award—Purchaser having notice—Specific performance ordered.]—Specific performance was granted of a contract for sale of an allotment under Inclosure (Consolidation) Act, 1801 (c. 109), before the award, the Act expressly enabling a sale, & declaring the conveyance valid, before the award, & the purchaser having notice of the circumstances.—*KINGSLEY v. YOUNG* (1809), 18 Ves. 207; 34 E. R. 295, L. C.

Annotations:—*Distd.* *Farrer v. Billing* (1818), 2 B. & Ald. 171. *Refd.* *Doe d. Harris v. Saunder* (1836), 5 Ad. & El. 664.

960. — Construction of special Act.]—By Inclosure (Consolidation) Act, 1801 (c. 109), the legal title to an allotment is not acquired until the execution & proclamation of the comrs.' award. A local Act directed that the comrs. by notice might cause all rights of common to be extinguished, & might then allot the waste land amongst the proprietors, & that the owners might fence their allotments after they had been marked, staked out & confirmed, & before the signing of the award, & might also, within three months before the execution of the award, sell & convey their interests in the allotments, the comrs. being thereby authorised to allot to the purchasers, & the latter, after the execution of the award, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that, where the allotments were copyhold, the deed should be enrolled in the ct. rolls, of the manor, & that the purchaser should be admitted tenant thereto at the same time as the other allottees of copyhold lands, namely, after the execution of the award:—*Held*: this authority to inclose & so to enjoy in severalty, & the power to sell & convey, might well, considering the language in which that power was given, be enjoyed & exercised without the legal seisin of the land, & these provisions, not sufficiently counter-vailing those of the public Act, the legal freehold did not pass to the allottee till after the execution & proclamation of the award.—*FARRER v. BILLING* (1818), 2 B. & Ald. 171; 106 E. R. 329.

Annotations:—*Distd.* *Greathead v. Morley* (1841), 3 Man. & G. 139. *Refd.* *Ellis v. Arnison* (1821), 5 B. & Ald. 47; *Doe d. Harris v. Saunder* (1836), 5 Ad. & El. 664. *Mentd.* *Doe d. Roberts v. Mostyn* (1852), 12 C. B. 268.

961. — — —.]—Where comrs., under an inclosure, had made an allotment in respect of R.'s land in 1824:—*Held*: the allotment passed by a subsequent conveyance of the land in 1824,

although the comrs.' award was not executed till 1827.—*DOE d. DIXON v. WILLIS* (1829), 5 Bing. 441; 3 Moo. & P. 24; 7 L. J. O. S. C. P. 170; 130 E. R. 1131.

Annotations:—*Distd.* *Williams v. Phillips* (1881), 8 Q. B. D. 437. *Refd.* *Doe d. Harris v. Saunder* (1836), 5 Ad. & El. 664.

962. — — — Right to mortgage.]—A local inclosure Act provided that the several lands, etc., to be allotted & awarded in pursuance thereof, immediately after such allotments were made, should be, remain & enure to the several persons to whom same should be respectively allotted, who should from thenceforth stand & be seised & possessed thereof to the same uses, estates, trusts & purposes, & subject to the same settlements, etc., charges & incumbrances, as the several & respective lands, etc., in lieu of which such allotments should be respectively made, were then held under, subject to, etc., or might or would have been held under, etc., if the Act had not been made. The comrs., in 1812, marked out an allotment, in lieu of lands belonging to S., & put him in possession, but their award, in which they made same allotment to S. in lieu of same lands, was not executed till 1825. In 1818, S. mortgaged the allotment:—*Held*: S. had legal seisin of the allotment from the time of his being put into possession, & might mortgage before execution of the award.—*DOE d. HARRIS v. SAUNDER* (1836), 5 Ad. & El. 664; 2 Har. & W. 350; 1 Nev. & P. K. B. 119; 6 L. J. K. B. 53; 111 E. R. 1316.

Annotation:—*Refd.* *Doe d. Beaufort v. Neeld* (1841), 3 Man. & G. 271.

963. — — — Purchaser let into possession.]—Under an inclosure Act, an allotment had been made, to the impropiator, in lieu of tithes; & by the Act, the tithes were to cease on the allotment being made; but the Act did not authorise the sale of allotments before the execution of the award. In the interim, the impropiator agreed to sell his allotment for £700, to be paid on Mar. 25 then next, on a good & valid title being made & executed. The award was not made until several years after the agreement, but the purchaser had been, all along, in possession of the allotment:—*Held*: the purchaser must pay four per cent. interest on his purchase-money from Mar. 25 next after the date of agreement, although a good title could not be made until the award was executed.—*A.-G. v. CHRIST CHURCH, OXFORD (DEAN), Ex p. MADDOX* (1842), 13 Sim. 214; 12 L. J. Ch. 28; 6 Jur. 1007; 60 E. R. 83.

Annotation:—*Mentd.* *Ballard v. Shutt* (1880), 15 Ch. D. 122.

964. Rights of purchaser—In possession.]—An inclosure Act directed that a vendee let into possession of any of the allotments, should have the same rights as the vendor:—*Held*: this was only applicable to the relative rights of the vendor & vendee.—*DOE d. MILBURN v. EDGAR* (1836), 2 Bing. N. C. 498; 1 Hodg. 437; 2 Scott, 732; 5 L. J. C. P. 147; 132 E. R. 195.

Annotation:—*Refd.* *Hodgson v. Hooper* (1860), 3 E. & E. 149.

965. Legal title to purchase-money—Or compensation-money.]—The legal title to purchase-money or compensation-money to be ascertained by the award of a comr. under an inclosure Act, is not complete till the award is made.—*CATOR v. CROYDON CANAL CO.* (1843), 4 Y. & C. Ex. 593; 13 L. J. Ch. 89; 2 L. T. O. S. 225; 8 Jur. 277; 160 E. R. 1149, L. C.

966. Right of valuer—To enter upon lands allotted—Not liable for trespass.]—If, upon preliminary proceedings being taken for an inclosure, the comrs. state, in their provisional order, that certain lands shall be allotted to a particular person, this is only a direction to those who have

to make the allotment, & the land in question remains subject to the powers contained in the Inclosure Acts, & the valuer is justified in entering upon it, & valuing it, in same manner as any other portion of the land to be enclosed & is not liable in an action of trespass.—*GRUBB v. BROWN* (1858), 1 F. & F. 352; 32 L. T. O. S. 89; 7 W. R. 8.

*Annotation:—**Reid. Grubb v. Inclosure Comrs.* (1861), 9 C. B. N. S. 612.

967. Private road may be granted over allotment—Though not mentioned in provisional order—Unless expressly exempted.]—Held: it is competent to the Inclosure Comrs., under 1845 Act, to order the valuer to set a private or occupation-road over land directed by the provisional order to be allotted to an individual in lieu of his rights in the lands to be inclosed, unless the provisional order expressly declares that his allotment shall be exempt from such a burden.—*GRUBB v. INCLOSURE COMRS.* (1861), 13 C. B. N. S. 805; 31 L. J. C. P. 221; 5 L. T. 590; 10 W. R. 92; 143 E. R. 317, Ex. Ch.

Jurisdiction of commissioners as to roads.]—*See* Sub-sect. 2, B., *ante*.

968. Provisional order authorised by Act of Parliament—Subsequent discovery of mistake—As to title of claimants—Power of court to give relief.]—*BEAUCHAMP (EARL) v. DARBY*, [1866] W. N. 308.

On time limit for appeals.]—*See* Sub-sect. 11, *post*.

SUB-SECT. 7.—THE AWARD—IN GENERAL.

969. Form of award—No technical form necessary—Closing old way.]—No technical form is necessary in the awards of comrs. of inclosure, but if they substantially pursue their powers in shutting up old roads, those roads effectually cease.—*PICK v. CLARKSON* (1779), 2 Wm. Bl. 1318; 96 E. R. 773.

970. Construction of award—Admissibility of evidence.]—To explain an ambiguous award of a road under an inclosure Act, evidence of contemporaneous acts of the occupiers of the land may be received.—*WADLEY v. BAYLISS* (1814), 5 Taunt. 752; 128 E. R. 887.

*Annotations:—**Reid. Doe d. Kinglake v. Bevis* (1849), 7 C. B. 456; *Hastings v. N. E. Ry.*, [1899] 1 Ch. 656; *Watcham v. East Africa Protectorate*, [1919] A. C. 533. *Mentd. Waterpark v. Fennell* (1859), 7 H. L. Cas. 651.

971. Custody of.]—In an Act of Parliament for inclosing a parish, no direction was given as to the place in which the award was to be deposited. The comrs. gave it to their clerk & solr., who, on resigning business, delivered it to his son & successor, who permitted every person to inspect it who thought proper. The churchwardens & overseers applied to the ct. to have the award given up & deposited in the parish chest, but the rule was discharged with costs.—*WARTNABY'S CASE* (1823), 2 L. J. O. S. K. B. 3.

972. Stamp duty on.]—*DOE d. SUFFIELD (LORD) v. PRESTON*, No. 926, *ante*.

Whether invalidated by non-compliance with statutory direction—As to appointment of commissioner.]—*See* No. 923, *ante*, No. 980, *post*.

973. Admissibility as evidence—Of estate in respect of which allotments claimed.]—(1) An award, allotting land under an inclosure Act, coupled with the terms of the original claim to such allotment, is admissible in evidence to show that the claimant's interest in the lands in respect of the possession of which he claimed the allotment was less than the fee.

(2) By an inclosure Act, the expenses attending

the inclosure were to be raised by sale of part of the commonable lands, the balance, if any, of the proceeds to be repaid to the landowners. Accordingly, sales were made, & the surplus proceeds divided among the landowners according to a "return rate" divided into two proportions, one calculated according to the possessioners' interest for life or years, the other the reversioners' proportion, calculated according to the time likely to elapse before their interest accrued into possession. A landowner in possession, aged seventy, received a sum calculated on the assumption that his estate was held for his life; but it did not appear that the party had any knowledge of the paper containing the rate, or of the data by which the sum he had received was fixed:—*Held:* the return rate was not evidence to cut down his interest to less than a fee.

(3) By an inclosure Act, claims to allotments were to be made in writing, & sent to the comrs. The claims made were entered by their clerk in a book, though not required by the Act to be so kept. The claims allowed by the comrs. were marked in the book "allowed," & attested by their initials affixed thereto. The entries were made in the course of business, & at the time they purported to bear date. *Scmble:* they were admissible in evidence, on proof of the clerk's death, & of a negative search for the original claims in the proper repository.—*DOE d. WELSH v. LANGFIELD* (1847), 16 M. & W. 497; 153 E. R. 1285.

*Annotations:—**Generally, Mentd. Mid. Ry. v. Bromley* (1856), 17 C. B. 372; *Reed v. Lamb* (1860), 6 H. & N. 75; *Nash v. Ash* (1862), 8 Jur. N. S. 998.

See, generally, EVIDENCE.

Presumption that improperly made.]—*See* No. 1008, *post*.

Jurisdiction of court to restrain signature.]—*See* No. 956, *ante*, No. 1008, *post*.

SUB-SECT. 8.—EFFECT OF AWARD.

A. In General.

974. Whether operating as conveyance—Allotment to surveyor of highways.]—An inclosure Act having directed that the allotments made by the comrs. should for ever remain for the benefit of the appointees:—*Held:* (1) an award & assignment of the herbage of a certain close to the surveyors of the highways & their successors, for the benefit of the parish of B., though bad as a common law conveyance, the appointees not being a corp., was good as a parliamentary declaration of the persons entitled to take same, as if the terms of the award had been specially enacted; (2) the lord of the manor, in whom the fee of the soil remained, was a trustee for the surveyors of the highways for the time being.—*JOHNSON v. HODGSON* (1806), 8 East, 38; 103 E. R. 258.

*Annotations:—**Generally, Mentd. Smith v. Adkins* (1841), 8 M. & W. 362; *Re Leeds Institute of Science, Art & Literature & Leeds City Council*, [1909] 1 Ch. 500.

975. — Allotment to churchwardens & overseers—In trust for occupiers of cottages.]—An allotment of land made in pursuance of 1845 Act, ss. 34, 73, to the churchwardens & overseers of a parish in trust to allow the occupiers of certain ancient cottages in the parish to get turf therefrom vests the legal estate in the land in the churchwardens & overseers.—*SIMCOE v. PETHICK*, [1898] 2 Q. B. 555; 67 L. J. Q. B. 919; 79 L. T. 432, C. A.

See, also, Nos. 959–963, ante.

976. Extinguishes rights of common—Presumption that statutory notices given.]—The execution

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of an award under Inclosure (Consolidation) Act, 1801 (c. 109), extinguishes, *per se*, all rights of common intended to be extinguished thereby, & it is not necessary for the party relying upon the award to prove that the notices required by the Act have been previously given.—**TAYLOR v. THWAITE** (1843), 1 L. T. O. S. 34, N. P.

See, also, No. 1000, *post*.

977. Effect of omission from award—Determination of township for rating—Place of rating omitted—Award invalid.]—An inclosure Act gave power to the comrs. to award in what townships the allotments should be assessed to the rates & taxes. They awarded that certain allotments which before were within the district of H. were within the township of C.:—*Held*: they did not thereby become ratable in C.—**FENTON v. BOYLE** (1808), 1 Taunt. 344; 127 E. R. 866.

978. — Waste lands—Remain vested in the lord.]—By an inclosure Act certain waste lands of a manor were to be allotted in certain proportions. A part of the waste lands was not portioned out in the award of the Inclosure Comrs.:—*Held*: the freehold of such land remained in the lord of the manor.—**PACKE v. MEE** (1861), 9 W. R. 335.

979. — — Remain waste of manor.]—(1) In 1873, a particular common was not dealt with by an inclosure award as part of the waste of a manor, nor allotted to anyone:—*Held*: no inference could be drawn that it had ceased to be waste.

(2) Acts of ownership by persons who have successfully encroached upon small portions of a common do not give rise to the inference that such persons can make a title to the waste surrounding their encroachments.—**SMITH v. LISTER** (1895), 64 L. J. Q. B. 154.

980. Award in respect of right not mentioned in Act—Purchaser not compelled to accept title of allotment.]—(1) The provision in Inclosure (Consolidation) Act, 1801 (c. 109), that the comrs.' oath, & the appointment of any new comr., shall be annexed to & enrolled with the award is merely directory.

(2) An inclosure Act, reciting that S. was entitled, as lord of a manor, to the soil & royalties, & as lay rector, to all tithes within the manor, & that he claimed right of common on the waste in respect of the soil & royalties, directed certain allotments to be made to him in compensation for his right to the soil of the waste, & to the tithes, & that the residue of the waste should be divided among S. & the other persons having right of common upon such waste, in proportion to their respective claims; & it reserved to the lord the seignior & royalties. The Act made no mention of any right of warren existing in the lord; but there was some evidence that S. had used part of the waste as a rabbit warren. The award gave an allotment to S. for his right of warren, & also three other allotments, which purported to be made for his right to the soil, his right to the tithes, & his right of common & other rights & interests in the waste, respectively; which allotments were declared to be a full compensation for all his right & interest in the lands directed to be inclosed:—*Held*: S.'s title to the warren allotment was not such as a purchaser could be compelled to take.—**CASAMAJOR v. STRODE** (1834), 2 My. & K. 706; *Coop. temp. Brough*. 418, 510; 39 E. R. 1114, L. C. *Annotations*:—*As to* (2) *Refd.* **Holliday v. Lockwood**, [1917] 2 Ch. 47. *Generally, Mentd.* **McConnel v. Murphy** (1873), L. R. 5 P. C. 203.

981. Allotment passes under executory devise—

Of land in respect of which allotted.]—The lord of a manor being seised of it in fee, subject to an executory devise over, purchased an estate, partly freehold & partly copyhold of the manor, & afterwards, under an inclosure Act, carried in two claims, one in respect of the devised & the other in respect of the purchased estate, & obtained two allotments accordingly. He afterwards died, & the executory devise took effect:—*Held*: the copyhold part of the purchased estate, being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as was proportionate to the value of the copyhold part.—**KING v. MOODY** (1826), 2 Sim. & St. 579; 4 L. J. O. S. Ch. 227; 57 E. R. 467.

982. Allotment for stone for roads & use of inhabitants—User limited to repair of roads.]—Where an inclosure Act directed that the comrs. should set out & allot a certain portion of the common lands for the getting of stone, gravel & other materials, for the repairs of the highways & other roads to be set out under the Act, & for the use of the inhabitants within the parish:—*Held*: this did not authorise the inhabitants to take such materials for their private purposes, but only for the repairs of the roads.—**RYLATT v. MARFLEET** (1815), 14 M. & W. 233; 14 L. J. Ex. 305; 153 E. R. 462.

983. Prescriptive right of way—May be gained over lands allotted—After inclosure.]—In an action for trespass it was pleaded that, by custom, the inhabitants of a township had a right to take water for domestic purposes from a well in the close; that plff. choked it up, & justifying the acts complained of as done by inhabitants of the township to clear out the well. On the trial it appeared that the inhabitants had, from time immemorial, taken the water from the well. About fifty years before the action the *locus in quo* was inclosed under a special inclosure Act, incorporating Inclosure Act, 1801 (c. 109). Neither in the special Act, nor in the award of the comrs., was any mention made of this well, or of any access to it:—*Held*: (1) the right to take water from the well was not extinguished by the inclosure; (2) whether the ancient right of access to the well for that purpose was or was not extinguished, the inhabitants might in other modes legally get access to the well, so that the fifty years enjoyment *de facto* since the inclosure might have a legal origin. (3) *Seem*: the ancient right of access was not extinguished.—**RACE v. WARD** (1857), 7 E. & B. 381; 26 L. J. Q. B. 133; 28 L. T. O. S. 288; 21 J. P. 678; 3 Jur. N. S. 512; 5 W. R. 288; 119 E. R. 1289.

Conclusiveness of award.]—*See, generally*, Sub-sect. 8, B., *post*.

As evidence.]—*See* No. 973, *ante*, Nos 984, 985, *post*.

On common by vicinage.]—*See* No. 128, *ante*.

B. Whether Conclusive.

984. As to right in respect of which allotment made—After expiry of time for appeal.]—Plff. pleaded a right of common under an award of comrs. appointed by an inclosure Act, which authorised them to award such rights in respect of certain messuages in G., & gave an appeal in three months after the award:—*Held*: the limited time having elapsed, it was not necessary for him to show the original right in respect of which the comrs. had given him the right in the award.—**PHILLIPS v. MAILE** (1830), 7 Bing. 133; 4 Moo. & P. 770; 9 L. J. O. S. C. P. 9; 131 E. R. 51.

Annotations:—**Consd.** Godmanchester Corpn. v. Philipps (1833), 5 B. & Ad. 198. **Distd.** Casamajor v. Strode (1834), 2 My. & K. 706. **Consd.** Micklethwait v. Vincent (1893), 69 L. T. 57.

985. As to exoneration of land from tithe.]—Debt for not setting out tithes. Pltf. was originally lay impropiator of the tithes of certain fen lands in the parish of M., which were from 1816 down to the time of the action occupied by deft. An Act for inclosing lands in the parish of M. gave an option to the Inclosure Comrs. to make an allotment to the impropiator in lieu of these tithes. By their award, made in 1812, they stated that they had procured to be made an accurate survey & plan of the waste lands to be inclosed, & of the ancient inclosed lands, except the fen lands, & then proceeded to allot to the impropiator certain allotments in lieu of & as a compensation for all the tithes growing & renewing within M. & due to him. A schedule & also a map or plan were annexed to the award, but neither comprised deft.'s lands or the fen lands. From 1816 to 1828 deft. had paid no tithes to pltf. in respect of his land, but for a period of twenty years from 1828, deft. had either paid tithes in kind or compounded for them to pltf. In 1841, on an Assistant Tithe Comr. being sent down with a view of awarding a sum to be paid as a commutation of the tithes of the parish of M., deft. claimed that his lands were exempt from tithes by virtue of the inclosure Act & award; but the Tithe Comr. decided that his lands were not thereby exempted:—**Held:** (1) the decision of the Assistant Tithe Comr. was not conclusive against the exemption, since Tithe Act, 1836 (c. 71), s. 90, took away his jurisdiction if the tithes had been extinguished by virtue of the inclosure Act, & he could not give himself jurisdiction by deciding that they were not so extinguished; (2) though the award professed to give the allotment in lieu of all the tithes in M., yet as the comrs. had an option whether they would extinguish all the tithes, & as there was evidence on the face of the award, maps & survey, that the fen lands were not taken into consideration, it was a question for the jury whether the award in reality awarded any compensation to pltf. for the tithes on deft.'s land.—**BUNBURY v. FULLER** (1853), 9 Exch. 111; 23 L. J. Ex. 29; 23 L. T. O. S. 131; 17 J. P. 790; 1 C. L. R. 893; 156 E. R. 47, Ex. Ch.

Annotations:—**Generally, Mentd.** R. v. Nunneley (1858), 10 B. & E. 852; Pease v. Chaytor (1863), 3 B. & S. 620; **Re The Charkieh** (1873), 28 L. T. 190; Colonial Bank of Australasia v. Willan (1874), L. R. 5 P. C. 417; **Ex p. Wake** (1883), 11 Q. B. D. 291; R. v. Woodhouse, [1906] 2 K. B. 501; R. v. Bradford, [1908] 1 K. B. 365; May v. (1914), 30 T. L. R. 287.

See, also, No. 992, post.

986. Whether award intra vires—After lapse of time.]—A landowner who claimed to be owner of part of one of the N. Broads brought an action for an injunction to restrain a person claiming (*inter alia*) as one of the public, from shooting or fishing over pltf.'s part of the broad. Pltf. claimed to be owner under an award made in 1808 by comrs. under a local inclosure Act of 1801. Such award purported to allot the part of the broad so claimed to one of his predecessors in title. Deft. impeached the validity of the award, & challenged the claim to ownership on various grounds, alleging (*inter alia*) that the award was *ultra vires*, as the inclosure Act gave the comrs. no power to allot any part of the broad itself:—**Held:** after the lapse of so many years without any dispute as to the propriety of the award, the ct. would not now consider whether the award was *ultra vires* or not.—**MICKLETHWAITE v. VINCENT** (1893), 69 L. T. 57; 9 T. L. R. 268; 2 R. 603, C. A.

Jurisdiction of commissioners.]—*See* Sub-sect. 2, B., *ante*.

As to lands liable to be allotted.]—*See* Sub-sect. 3, *ante*.

As to boundaries.]—*See* BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., pp. 265, 316, 321, Nos. 11 *et seq.*, 368, 415.

As to title to land allotted.]—*See* No. 980, *ante*.

As to right of way claimed by prescription.]—*See* No. 1008, *post*.

Presumption that statutory procedure observed.]—*See* Nos. 976, *ante*, No. 1000, *post*.

C. Tenure of and Estate in Lands Allotted.

987. General rule—Freehold.]—An award by comrs. of lands in general terms, without stating their tenure, is *prima facie* evidence of their being freehold.—**CATTELL v. CORRAIL** (1840), 4 Y. & C. Ex. 228; 9 L. J. Ex. Eq. 37; 160 E. R. 989.

Annotation:—**Mentd.** *Re Marshall & Salt's Contract*, [1900] 2 Ch. 202.

988. In respect of customary freeholds—Freehold.]—Where allotments were made & awarded to W., in respect of several customary estates, of which he was seised in fee according to the custom of the manor, under an agreement between the lord of the manor & the commoners, & an award made thereon, which were confirmed by an inclosure Act, & which agreement contained a clause saving to the lord all mines, & all royalties & privileges *in tam amplo modo* as he had enjoyed same within the ancient customary tenements, & the award contained also a clause saving to the lord all seigniories & royalties incident to the manor, & the Act saved to him the seigniories & all rents, services, courts, etc., & all other royalties, jurisdictions, & pre-eminences incident to the manor *in tam amplo modo* as he might have enjoyed same in case the Act had not been made; & also contained a clause that nothing should alter or annul any settlements, etc., affecting the lands to be inclosed, but that the several allotments should be held by the several persons to whom allotted to the same uses, & for the same estates, & subject to such limitations, etc., as the lands in respect of which such allotments were made, were limited to:—**Held:** the allotments so made were freehold & not customary estate, & therefore were not within the custom of the manor, that customary estates are not devisable by will.—**DOE d. LOWES v. DAVIDSON** (1813), 2 M. & S. 175; 105 E. R. 348.

Annotations:—**Consd.** Paine v. Ryder (1857), 24 Beav. 151. **Distd.** Pochin v. Duncombe (1857), 1 H. & N. 842. **Refd.** Hicks v. Sallitt (1854), 3 De G. M. & G. 782; Graham v. Ewart (1856), 1 H. & N. 550.

See, also, No. 931, ante.

989. In respect of copyholds—Statute for enfranchisement not complied with.]—(1) In 1766 an Act was passed for allotting, dividing, inclosing & draining fens within the manor & parish of B. S. 10 provided, that in case any of the proprietors of allotments, to be made by virtue of the Act in the common fens, in lieu of copyhold estates, should desire to have their allotments enfranchised, it should be lawful for the comrs. to allot a quantity of land, equal to two-thirteenth parts of such allotments respectively, to the lord of the manor; & that such allotments, in lieu of copyhold interest, should for ever, after the executing the award, be deemed freehold. The Act contained a saving of the rights of the lords of the manor. The comrs. in pursuance of the Act allotted to the lords certain lands as a compensation for their brovage & right to the wastes & soil in the fens. They also allotted certain lands to the owners of commonable houses, etc., & of enclosures being copyholds within the manor. The comrs. allotted these lands

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as copyhold, & from the time of the passing of the Act fines had constantly been paid to the lord on the admission of tenants to such allotments:—*Held*: allotments so made in respect of copyhold tenements within the manor, not having been enfranchised under s. 10, were of copyhold tenure.

(2) By an inclosure Act, passed in 1766, the comrs. were to allot a cowpasture, to be enjoyed by the owners of commonable houses, & to be used as a cowpasture only from May Day to Martinmas, & from Martinmas to Lady Day, & it was provided the same should for ever thereafter remain, go along with & be of the same tenure with such houses, etc., but should not be subject or liable to any fee or fine whatsoever to the lord. The comrs. made their award & set out the cowpasture. By an Act passed in 1772, for the purpose of dividing the cowpasture, it was enacted, that the comrs., after making certain other allotments, should set out the residue of the cowpasture unto & amongst all & every the proprietors of commonable houses, etc.; & that all the allotments which should be made of the cowpasture, should for ever thereafter remain & be of same tenure with such houses, etc. The cowpasture was divided & allotted under the Act of 1772, to the owners of commonable houses:—*Held*: the provision in the Act of 1766, that such parts of the cowpasture as were copyhold should be held without payment of fines to the lord, exempted the owners of the copyhold tenements in the cowpasture, when divided & held in severalty, from payment of fines to the lord.—*POCHIN v. DUNCOMBE* (1857), 1 H. & N. 842; 28 L. T. O. S. 320; 5 W. R. 354; 156 E. R. 1440.

Annotation:—*Generally, Mentd. Ridsdale v. Clifton* (1877), 2 P. D. 276.

990. — Grant of waste severed from manor—To use of copyholders in free-socage—Subsequent inclosure—Freehold.]—*REVELL v. JODRELL*, No. 286, *ante*.

991. Claim by expectant life tenant—Allottee takes life estate only.]—An Act of Parliament was passed for inclosing the waste lands within the manor of W. The comrs., by their award, allotted to T. for & in respect of an ancient auster tenement, certain portions of the waste:—*Held*: though T. was the only person named in the award, yet the allotment being made to him in respect of the copyhold estate, & in lieu of right of common incident to that estate, the effect of it was, to vest the legal estate in the allotment in the several persons entitled in succession to the copyhold estate, & the legal estate in that allotment vested, on the death of T. in J., & he might maintain ejectment.—*DOE d. SWEETING v. HELLARD* (1829), 9 B. & C. 789; 4 Man. & Ry. K. B. 736; 8 L. J. O. S. K. B. 79; 109 E. R. 293.

Annotations:—*Refd. Doe d. Harris v. Saunder* (1836), 5 Ad. & El. 664; *Bateman v. Boynton* (1866), 14 W. R. 598.

992. In respect of land subject to modus in lieu of tithe—Modus extends to allotments.]—An inclosure Act recited, that the Duke of N. was lord of a barony & of manors in which certain wastes were situate, & as such lord, was entitled to the soil & royalties belonging to the manors; & that he & other owners of lands within the barony were also entitled to right of common on the wastes. It then directed the comrs. to set out to the duke an allotment in respect of his right of soil, & afterwards to allot the residue of the wastes to him & the other persons entitled to common, in certain proportions, according to a rate already

charged upon the lands in respect of which such common was claimed. Allotments were made to the duke accordingly. The lands in respect of which in part his allotments were given were exempted from all tithe by a modus. In an action brought for tithes of corn grown upon the allotment given in lieu of the duke's right in the waste, it was left to the jury whether the modus had extended to that right; & they found that it had:—*Held*: (1) the question was properly left, for the duke's right upon the waste, though it could not strictly be a right of common appurtenant or appendant to land which was the duke's own, was yet treated by the Act as a *quasi*-right of common annexed to the land, & it might, as such, be legally comprehended within the same modus; (2) the modus, as it covered all tithes both on the demesne land & common before the inclosure, covered likewise the tithe of any crop, as grain, raised afterwards upon the allotment given in lieu of common.—*ASKEW v. WILKINSON* (1832), 3 B. & Ad. 152; 1 L. J. K. B. 141; 110 E. R. 56.

Annotation:—*Mentd. Sowerby v. Smith* (1873), L. R. 8 C. P. 514.

See, also, No. 985, ante.

993. In respect of land subject to mortgage—Legal estate vests in allottee—Not mortgagee.]—A man mortgaged an estate in fee without noticing rights of common. Afterwards allotments were made to him in respect of his rights of common by virtue of an inclosure Act, which enacted that the allotted land should be subject to same uses as the lands in respect of which they were allotted:—*Semble*: the legal estate in the allotments passed to the mtgor. & not to the mtgee.—*LLOYD v. DOUGLAS* (1811), 4 Y. & C. Ex. 448; 10 L. J. Ex. Eq. 34; 160 E. R. 1082.

994. In respect of lands subject to outstanding term—Allotments subject to same term.]—Where an inclosure Act provides that every proprietor shall stand & be seised of the lands to be allotted to him, to such & same uses, & for such & same estates, as the lands in respect of which such allotments shall be made, would have been subject to in case the Act had not been made, the allotments made under it are held subject to an outstanding term to which the original lands were subject.—*GARRARD v. TUCK* (1849), 8 C. B. 231; 18 L. J. C. P. 338; 14 L. T. O. S. 517; 13 Jur. 871; 137 E. R. 498.

Annotations:—*Refd. Bateman v. Boynton* (1866), 14 W. R. 598. *Mentd. Alleyne v. R.* (1855), 5 E. & B. 399; *Melling v. Leak* (1855), 16 C. B. 652; *Knight v. Bowyer* (1858), 2 De G. & J. 421; *Drummond v. Sant* (1871), L. R. 6 Q. B. 763; *Locking v. Parker* (1872), 8 Ch. App. 30.

995. Copyhold pasture exempt from fines—Allotments copyhold exempt from fines.]—*POCHIN v. DUNCOMBE*, No. 989, *ante*.

D. As to Roads and Rights of Way.

(a) Old Public Roads.

Form of award.]—*See No. 989, ante.*

996. Where statutory requirements not complied with—Inoperative.]—A local inclosure Act empowered the comrs., with the concurrence & order of two justices of the peace, to stop up & discontinue any of the roads or ways, in, through, over or on the sides of the inclosed lands. The comrs. published in the newspaper the roads set out, & advertised the required meeting also in the newspaper, announcing therein, that any person injured or aggrieved by the setting out such roads, or by the omission of any other, might attend, & they would be heard. After the meeting, the comrs. & two magistrates made & signed an order confirming the map, & the roads & footways therein described, excepting three which were

specified, & the map was annexed to the award. A proprietor of one of the new inclosures brought an action of trespass for breaking his close, etc.; deft. justified under an alleged right of way, & proved an ancient footpath over the *locus in quo*. On a special case, stating that such old footpath had been omitted by the comrs. in preparing the map of roads, etc., set out:—*Held*: the old way was not stopped up & extinguished, according to a true construction of the local Act & Inclosure (Consolidation) Act, 1801 (c. 109), ss. 8, 10, 11, by what had been done by the comrs. & magistrates, for that purpose, & with that intention, the positive concurrence & order of two magistrates being indispensably necessary to the stopping up of roads, whether they be public carriage roads or private or bridle & footroads. Nothing short of an order of the magistrates expressly stopping up the road would satisfy the statute; merely not setting out a road, is not sufficient to extinguish it, even in the case of a private road, bridle or foot way.—*HARBER v. RAND* (1821), 9 Price, 58; 117 E. R. 20.

Annotation:—*Distd.* *Williams v. Eyton* (1859), 5 Jur. N. S. 770.

997. — Roads over waste.—A public footway passed over a common into & across a farm-yard, to a public road on the other side of the farm-yard. A local Act for inclosing the common, giving power to divert & stop up roads over it, provided, that the comrs. should not divert, or turn, or stop up any old road leading over parts, not to be inclosed, without the concurrence & order of two justices. The comrs. awarded the public footway over both closes to be a private footway:—*Held*: the old right of public footway remained over both closes, for the concurrence & order of two justices was necessary under Inclosure (Consolidation) Act, 1801 (c. 109), s. 8, in order to extinguish the public right over the allotment of common, as well as that over the farm-yard.—*LOGAN v. BURTON* (1826), 5 B. & C. 513; 8 Dow. & Ry. K. B. 299; 4 Dow. & Ry. M. C. 50; 4 L. J. O. S. K. B. 217; 108 E. R. 191.

Annotation:—*Refd.* *R. v. Cricklade* (1850), 14 Q. B. 735.

998. — Road running into old road.—By a local Act inclosure comrs. were empowered to divide, alter, turn or stop up roads, & all roads which were not set out or finally ordered & directed to be set out & continued were to be forever stopped up & extinguished, & were to be deemed & taken as part of the lands & grounds to be divided & allotted, provided, that no roads passing or leading through any of the old inclosures were to be stopped up, diverted, turned or in any other way altered, without an order for that purpose under the hands & seals of two justices:—*Held*: (1) a footway & a highway passing through old inclosures were not stopped up by the operation of the award, in which they were not set out & continued, there being no order of justices for the purpose; (2) highways passing over waste land & running into the highway mentioned, were also not stopped up by the effect of the award.—*R. v. DOWNSHIRE (MARQUIS)* (1836), 4 Ad. & El. 698; 1 Har. & W. 673; 6 Nev. & M. K. B. 92; 3 Nev. & M. M. C. 539; 5 L. J. M. C. 72; 111 E. R. 950.

Annotations:—As to (1) *Consd.* *Gwyn v. Hardwicke* (1856), 1 H. & N. 49; *Bailey v. Jamieson* (1876), 1 C. P. D. 329. *Refd.* *R. v. Cricklade St. Mary* (1850), 15 L. T. O. S. 296; *R. v. Rathmines & Rathgar Improvement Comrs.* (1864), 11 L. T. 281. *Generally, Mentd.* *R. v. Milverton* (1836), 5 Ad. & El. 841; *R. v. Jones* (1840), 12 Ad. & El. 684; *R. v. Kent JJ.* (1904), 73 L. J. K. B. 858.

999. ——Some common uninclosed lands, over every part of which there was an ancient bridle-way, were inclosed by comrs. under

a local Act. The comrs. set out a road over part of the lands which by their award they directed should be a private carriage-way for particular persons interested in parts of the inclosure, & a public bridle-way; & they directed that the road should be kept in repair by the parish as a bridle-way, & by the particular persons interested, as a private carriage-way. No certificate of justices was ever obtained in respect of the road thus set out:—*Held*: the award did not operate as a diversion of the old road & setting out of a new road, & the parish was bound to keep the road in repair as a bridle-way.—*R. v. CRICKLADE (INHABITANTS)* (1850), 14 Q. B. 735; 4 New Mag. Cas. 112; 19 L. J. M. C. 169; 15 L. T. O. S. 296; 14 J. P. 401; 14 Jur. 690; 117 E. R. 283.

Annotation:—*Mentd.* *R. v. Russell* (1854), 23 L. J. M. C. 173.

1000. — Compliance presumed.—By Inclosure (Consolidation) Act, 1801 (c. 109), s. 8, in case the comr. should be empowered to stop up any old or accustomed road passing through any part of the old inclosures, etc., same should in no case be done without the concurrence or order of two justices. Flint Inclosure Act, 1813, s. 1, appointed a comr. to carry the Act into execution, subject to such of the regulations, restrictions & provisions, etc., in the Act of 1801 as were not altered, varied, controlled by or repugnant to, the provisions of the local Act. S. 19 enacted that it should be lawful for the comrs. to stop up any old or accustomed public road or roads over the marshes, commons & waste lands, subject nevertheless to the concurrence of two justices, & under such regulations as were contained in the Act of 1801, & provided that the old roads should not be discontinued till the new roads were properly formed. The marshes were allotted in 1819, when a gate, which had since been kept locked, was put up across an old road, but the road had since been used by foot passengers occasionally. The award of the comrs., executed in 1830, set out the new roads, & directed the old roads to be stopped up. A certificate of two justices, that the new roads had been formed & completed, under the Act of 1801, s. 9, was put in & proved; but no order of two justices for stopping the old road was produced:—*Held*: it might be presumed that an order of two justices for stopping up the old road had been duly made.—*WILLIAMS v. EYTON* (1859), 4 H. & N. 357; 28 L. J. Ex. 146; 32 L. T. O. S. 336; 23 J. P. 243; 5 Jur. N. S. 770; 7 W. R. 291; 157 E. R. 878, Ex. Ch.

Annotations:—*Folld.* *Leigh U. C. v. King*, [1901] 1 K. B. 747. *Mentd.* *Cababé v. Walton-upon-Thames District Council*, [1913] 1 K. B. 481.

See, also, No. 976, *ante*.

—On time for appeal.]—See Sub-sect. 11, *post*.

1001. Inclosure of waste—Does not stop up way—Unless mentioned in award.—An old footway passed from a public highway over wastes to old inclosures into another public highway. By an award of the comrs. under a local Act for inclosing the wastes, the part of the waste over which the footway ran was allotted, but the footway was not mentioned in the award, nor was any new way set out therein. No power to stop up ways over old inclosures was given by the particular inclosure Act:—*Held*: the old footway was not extinguished by the allotment.—*THACKRAH v. SEYMOUR* (1832), 1 Cr. & M. 18; 1 Nev. & M. M. C. 258; 3 Tyr. 87; 2 L. J. Ex. 10; 149 E. R. 296.

Annotation:—*Distd.* *Gwyn v. Hardwicke* (1856), 1 H. & N. 49.

See No. 969, *ante*.

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1002. Change of township by award—Township of allotments adjoining road changed—Township of road not changed.—By an Act for inclosing lands in several parishes & townships, it was directed that the allotments to be made in respect of certain messuages, etc., should be deemed part & parcel of the townships respectively in which the messuages, etc., were situate. The comrs. under the Act were directed, in their award, to make such orders as they should think necessary & proper concerning all public roads, & in what township & parish same were situated & by whom they ought to be repaired. The comrs. by their award directed that there should be certain roads. One of these, called the S. road, passed between new allotments. The road was ancient. The part of the common over which it ran was, before the award, in the township of H., & the road was still in that township unless its situation was changed by the local Act & the award. The new allotments on each side were declared by the award to be in other townships than H. The award did not say in what townships the road was situate, nor by whom it was repairable:—*Held*: (1) the Act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of road, & the road in question continued to be in H.; (2) where the herbage of a road becomes vested, by Inclosure (Consolidation) Act, 1801 (c. 109), s. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors.—*R. v. HATFIELD (INHABITANTS)* (1835), 4 Ad. & El. 156; 111 E. R. 746.

Annotations:—As to (1) *Distd.* *R. v. East Hagbourne* (1859), 23 J. P. 116. *Refd.* *R. v. Cricklade St. Mary* (1850), 15 L. T. O. S. 296. *Generally, Mentd.* *R. v. Arnould, etc.*, Berkshire JJ. (1857), 22 J. P. 545.

1003. Presumption as to ownership of soil of road—Ownership of adjoining land.—Ownership of land adjoining either side of a road is *prima facie* evidence of a right to the soil extending to the centre of the road. A recent right founded on an inclosure under an Act of Parliament, does not make a distinction with regard to the general law.—*COOKE v. GREEN* (1823), 11 Price, 736; 147 E. R. 621.

1004. — Herbage vested in adjoining owners.—*R. v. HATFIELD (INHABITANTS)*, No. 1002, *ante*.

— **Medium flum rule.**—*See, generally, HIGHWAYS, STREETS & BRIDGES.*

Jurisdiction of commissioners.—*See* Nos. 932, 933, *ante*.

(b) *Old Private Ways.*

1005. Form of award immaterial—Substantial exercise of powers sufficient to close.—*PICK v. CLARKSON*, No. 969, *ante*.

1006. — — Road omitted from award.—Pltf., having an allotment made to him by a comr., under an inclosure Act, of land, over which defts. had a private right of way before the passing of the Act, but which way was not noticed or described amongst those set out by the comr. appointed for executing that Act, the operation of which, as to the powers of setting out or stopping up roads, was left to Inclosure (Consolidation) Act, 1801 (c. 109), may, under s. 11 of the latter Act, justify the stopping up of such way, without any directions from the comr. for that purpose in the award, or any other road being set out or appointed in lieu of it.—*WHITE v. REEVES* (1818), 2 Moore,

1007. Old right of way over lands allotted expressly reserved—Allottee has no power to

substitute another way.—By an inclosure Act, W. field was inclosed & allotted to deft., & all then existing ways over it were to be extinguished after a certain date, provided that nothing in the Act should deprive pltf. of the right of ingress & egress to & from a certain watercourse there. Deft. stopped up the old path by which pltf. had approached the watercourse & substituted another & more circuitous one:—*Held*: pltf. was entitled to his old right of way.—*ADEANE v. MORTLOCK* (1839), 5 Bing. N. C. 236; 1 Arn. 488; 7 Scott, 189; 8 L. J. C. P. 138; 3 Jur. 105; 132 E. R. 1095.

1008. Interrupts enjoyment—Under Prescription Act, 1832 (c. 71).—To a declaration in trespass deft. pleaded a right of way from time immemorial, & a user for forty years & twenty years respectively. A user in fact for more than forty years was proved. In 1839, all ways not set out in a certain award were extinguished by an Act of Parliament, & this way was not set out:—*Held*: it could not be presumed from the user that the award was otherwise than properly made; & (2) less than twenty years having elapsed since the award no right had been gained under the above Act, s. 2.—*HOLDEN v. TILLEY* (1859), 1 F. & F. 650.

1009. Sale by allottee of original holding with all ways, etc.—Allotment to allottee of waste crossed by ways of necessity—Right of way extinguished—Allottee not bound to grant new rights of way.—The words of 1845 Act, s. 68, are positive that all roads & ways not set out by the valuer on making his award “shall be for ever stopped up & extinguished.”

H. was possessed of lands in a neighbourhood where the Act was about to be applied. He sold some of these lands to T., expressly reserving to himself the allotments that might afterwards be made. The conveyance to T. contained the usual words, “together with all ways, paths, passages, easements, privileges, advantages & appurtenances to the land appertaining, or held, used, or occupied therewith.” Between the lands purchased by T. & the high road there were certain wastes over which the former holders of T.’s land had, for above forty years, enjoyed the use of certain paths & trackways, which were paths & trackways of convenience, but not of necessity. The wastes were allotted to H.; the valuer, to whom T. had not referred any claim of right to the paths & trackways, made his award, in which other paths & ways were set out, but not those from T.’s lands to the high road. Before the award was made H. had sold his interest in the allotment to C., who, after the making of the award, refused to allow T. the use of the ways in question:—*Held*: by the effect of the award they had been stopped up & extinguished, & the conveyance by H. did not bind him to grant new easements over any land he might acquire by the allotment.—*TURNER v. CRUSH* (1879), 4 App. Cas. 221; 48 L. J. Q. B. 481; 40 L. T. 661; 43 J. P. 540; 27 W. R. 553, H. L.; *affg.* S. C. *sub nom.* *CRUSH v. TURNER* (1878), 3 Ex. D. 303, C. A.

Annotations:—*Mentd.* *Hall v. L. B. & S. C. Ry.* (1886), 17 Q. B. D. 230; *Thomas v. Kelly* (1888), 13 App. Cas. 506.

(c) *New Public Roads.*

1010. Liability to repair—Not upon allottee of adjoining inclosure.—The repair of a road newly laid out under an inclosure Act, is to be borne by those to whom the former highway was chargeable & not by the owner of an inclosure made in pursuance of the Act.—*R. v. FLECKNOW (INHABITANTS)* (1758), 1 Burr. 461; 2 Keny. 261; 97 E. R. 403.

Annotations:—*Consd.* R. v. Ramsden (1858), E. B. & E. 949. *Refd.* Esher & Dittons U. C. v. Marks (1902), 71 L. J. K. B. 309.

See, generally, HIGHWAYS, STREETS & BRIDGES.

1011. Ownership of soil—Not in adjoining owners.]—*Semble:* roads set out under an inclosure Act do not by presumption of law belong to the adjoining owners.—*R. v. EDMONTON (INHABITANTS)* (1831), 1 Mood. & R. 24.

Annotations:—*Refd.* C. L. Ry. v. City of London Land Tax Comrs., [1911] 2 Ch. 467. *Mentd.* R. v. Blakemore (1852), 2 Den. 410.

1012. — Includes ownership of trees growing on roadside waste—Though subject to public rights of way.]—In 1811 a public road was set out across L. common by the R. Inclosure Comrs. of a width of fifty feet, & allotments of the land on either side of the road were at same time made. About twenty-five feet only of the fifty feet allotted by the comrs. had been used as the actual road; the sides which were left uninclosed had become covered with furze & heath, & fir trees had been allowed during the last twenty-five years to come up through the furze. In 1868 the highway board commenced cutting down, & advertised a sale of some of these fir trees growing within the fifty feet allotted by the comrs. in 1811 for the public highway. On a bill by the owner of the adjoining land to restrain such cutting:—*Held:* (1) the right of the public was to have the whole width of the road, & not merely that part which had been used as a *via trita*, preserved free from obstructions, & such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years.

(2) *Semble:* the highway board were only entitled to remove the trees which were an obstruction to the road, & not as against the owner of the soil to sell the timber of the trees when cut.—*TURNER v. RINGWOOD HIGHWAY BOARD* (1870), L. R. 9 Eq. 418; 21 L. T. 745; 18 W. R. 424.

Annotations:—*As to* (1) *Consd.* Cubitt v. Maxse (1873), L. R. 8 C. P. 704; *Harris v. Northamptonshire County Council* (1897), 13 T. L. R. 440. *Refd.* Nicol v. Beaumont (1883), 53 L. J. Ch. 853. *As to* (2) *Refd.* Bagshaw v. Buxton L. B. of Health (1875), 34 L. T. 112; *Harrison v. Rutland*, [1893] 1 Q. B. 142; *Harvey v. Truro R. D. C.* (1903), 89 L. T. 90.

1013. — Presumption as to—Long continued exercise of acts of ownership.]—By an award made under an inclosure Act passed in 1774 certain lands were allotted & certain roads were set out as public highways. From a short time after the passing of the Act the pasturage of one of the roads set out was let annually by the inhabitants of the parish in vestry assembled. The money received from the tenants was devoted to different parochial purposes, & there had been no interference or claim by the lords of the manor until the present action, in which pltf., as lord of the manor, claimed damages from deft., who was tenant to the vestry, for trespass in pasturing his sheep in the road. There was no evidence in whom the soil of the road was vested before the passing of the Act. No grant of the road was produced, & there was no evidence of the enrolment of any such grant:—*Held:* (1) a lawful origin must be presumed from the long usage; (2) the presumption was that the road was vested in some person or persons as trustees for the parishioners; (3) a presumption might be made either that the grant of the road had been enrolled, or that the grant had been made for some purpose which had since been lost sight of, but which did not require that the deed should be enrolled; (4) the churchwardens & overseers, as trustees under Poor Relief Act, 1819 (c. 12), s. 17, of the lands belonging to the parish, had gained a title to the road under Stat. Limitations, subject

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to the public right of way.—*HAIGH v. WEST*, [1893] 2 Q. B. 19; 62 L. J. Q. B. 532; 69 L. T. 165; 57 J. P. 358; 4 R. 396, C. A.

Annotations:—*As to* (1) *Consd.* Eliot v. Bristol Corpn. (1894), 71 L. T. 659. *Refd.* Eliot v. Bristol Corpn. (1895), 72 L. T. 752. *As to* (2) *Refd.* Chesterfield v. Harris, [1908] 2 Ch. 397. *As to* (3) *Consd.* C. L. Ry. v. City of London Land Tax Comrs., [1911] 2 Ch. 467. *Refd.* Brown v. Dunstable Corpn., [1899] 2 Ch. 378; *Foley's Charity Trustees v. Dudley Corpn.* (1909), 8 L. G. R. 320; *A.-G. v. Horner*, [1913] 2 Ch. 140. *As to* (4) *Consd.* A.-G. & Spalding R. C. v. Garner, [1907] 2 K. B. 480. *Refd.* Wimbledon & Putney Commons Conservators v. Nicol (1894), 10 T. L. R. 247. *Generally, Distd.* Neaverson v. Peterborough R. C., [1902] 1 Ch. 557. *Mentd.* Reynolds v. Presteign U. D. C. (1896), 65 L. J. Q. B. 400.

Boundaries of.]—*See* BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 279, No. 111.

1014. Highway authority—Not subject as allottees to obligations under award—Soil of highway not specifically allotted.]—Where an inclosure award of the usual type made under a local inclosure Act sets out public highways, but does not specifically allot the soil of such highways, the highway authority are not, by virtue of their control of the highways, owners of allotments under the award so as to come within the scope of special provisions in the award imposing obligations on the owners of the allotments in regard to receiving & disposing of water flowing from other allotments.—*IRVING v. CARLISLE RURAL DISTRICT COUNCIL* (1907), 71 J. P. 212; 5 L. G. R. 776, D. C.

Jurisdiction of commissioners.]—*See* No. 934, *ante*.

(d) *New Private Roads.*

1015. Allottee may enlarge user—Change of user of adjoining allotments.]—By an award under an inclosure Act, it was directed that certain of the allottees & the owners for the time being of their allotments should for ever thereafter have a way-right & liberty of passage for themselves, their respective tenants & farmers, as well on foot as on horseback, & with their carts & carriages, & to lead & drive their horses, oxen & other cattle from the common highway over the east end of the allotments to their respective allotments, doing as little damage to the soil or the corn, grass, or herbage, as might be, & in case the allottees should "street out" the way, that same should always remain eleven yards wide, but the road was not to be a way of right for any other persons whomsoever than as aforesaid. The owner of one of the allotments commenced building houses upon it, & began to lay down a metalled road where there had only been an ordinary cart-track over the adjoining allotments:—*Held:* the allottees were not confined to the use of the road for agricultural purposes only, but were entitled to construct a substantial roadway suitable for the purposes to which the land was now in course of being applied.—*NEWCOMEN v. COULSON* (1877), 5 Ch. D. 133; 46 L. J. Ch. 459; 36 L. T. 385; 25 W. R. 469, C. A.

Annotations:—*Consd.* Finch v. G. W. Ry. (1879), 5 Ex. D. 254. *Foldd.* Harris v. Flower (1904), 90 L. T. 669. *Refd.* New Windsor Corpn. v. Stovell (1884), 27 Ch. D. 665.

1016. Ownership of soil—In allottees of adjoining land—Ad medium filum.]—An inclosure Act provided for the allotment of land to the lord of the manor in compensation for all right of soil:—*Held:* the soil of land set out as a private road in pursuance of the Act was vested in the allottees of the adjacent land *ad medium filum*.—*NEAVERSON v. PETERBOROUGH RURAL COUNCIL*, [1901] 1 Ch. 22; 70 L. J. Ch. 35; 83 L. T. 496; 65 J. P. 56; 49 W. R. 154; 17 T. L. R. 35; 45 Sol. Jo. 79; *reversd.* without affecting this point, [1902] 1 Ch. 557, C. A. **Annotation:**—*Mentd.* C. L. Ry. v. City of London Land Tax Comrs., [1911] 2 Ch. 467.

See, generally, HIGHWAYS, STREETS & BRIDGES.

Sect. 7.—Under inclosure Acts: Sub-sect. 8, D. (d), E.

1017. Surveyor authorised to let herbage—For pasturing of sheep—No power to pasture other stock—Legal origin not presumed for usage contrary to statute.]—NEAVERSON *v.* PETERBOROUGH RURAL COUNCIL, No. 1016, *ante*.

1018. — Right of action for trespass to herbage—In parish council not district council—Under Local Government Act, 1894 (c. 73), s. 6 (1).]—By an inclosure award made under an inclosure Act the comrs. awarded that the grass & herbage growing upon a certain private drove or road in the parish should be let annually in Easter week by public auction by the surveyor of highways in the parish, or by such other persons & under such restrictions & regulations as the occupiers of hereditaments in the parish should appoint, & that the money arising from such letting should be expended for the repairs of the public & private roads in the parish. The herbage on this drove had been annually let by auction before 1894 by the vestry of the parish, & since the above Act by the parish council, & the proceeds handed over to the district council, as being the authority liable for the repair of the roads, & applied by them in reduction of the amount required from the parish for road repairs. Deft., a farmer, occupied some land abutting on this private drove, & he had the right to drive his cattle along the drove to & from his land, but, under the pretence of driving his cattle to water at the further end of the drove, he took them twice a day along the drove, & his cattle ate the herbage on the drove & diminished the letting value of the same. In an action by the A.-G. & the district council, claiming damages & an injunction in respect of the damage to the herbage:—*Held*: (1) the district council could not maintain the action; the property in the herbage being in the parishioners, it was the parish council who under the above sect. were the beneficial owners, as trustees for the parish, of the herbage, & it was the parish council, & not the district council, who were the proper parties to sue; (2) as the rights involved were the rights, not of the community in general, but only of a limited portion of the public, namely, the parishioners of the parish, & the A.-G. was not a necessary party to the action even with the proper plffs. as relators, the A.-G. was not entitled to sue for an injunction either alone or with the parish council as relators. —A.-G. & SPALDING RURAL COUNCIL *v.* GARNER, [1907] 2 K. B. 480; 76 L. J. K. B. 965; 97 L. T. 486; 71 J. P. 357; 23 T. L. R. 563; 5 L. G. R. 944.

Jurisdiction of commissioners.]—*See* Nos. 935, 936, 937, 967, *ante*.

Dedication of road set out as private way.]—*See* HIGHWAYS, STREETS & BRIDGES.

E. As to Ditches, Drains and Sea Walls.

1019. Liability to maintain—Extent of liability—Drainage arising from ordinary course of husbandry—Not increased flow arising from alteration in system of drainage.]—By an award made in 1795, under an inclosure Act, the owners or occupiers of the lands over which the drains, directed to be made, should pass, were to make & for ever thereafter cleanse & keep same of sufficient depth to carry off the water intended to run down same:—*Held*: the award must be taken to have meant only such water as would be drained off the respective closes according to the course of good husbandry then in use, & no obligation to repair the drain was imposed, so as to render it

capable of carrying off water accumulated by a system of under-draining adopted long after the making of the award.—SHARPE *v.* HANCOCK (1844), 7 Man. & G. 354; 8 Scott, N. R. 46; 13 L. J. C. P. 138; 3 L. T. O. S. 57; 135 E. R. 148; *sub nom.* SHARPE *v.* HISCOCK, 8 Jur. 382.

1020. — Limited by ordinary law.]—By a private inclosure Act, certain comrs. were required to make, appoint & stake out all the public bridges, roads & highways within a certain township, & also set out or appoint such private ways or roads, hedges, fences, ditches, bridges, causeways, banks, sluices, drains, sewers, cloughs, etc., within the township as they should think convenient, the Act providing that all such public roads, bridges, sewers & drains should be made, repaired, & kept in repair in such manner as the other public highways, bridges, sewers & drains within the township were by law to be repaired & kept in repair. The Act went on to provide that all such private ways, etc., should be supported & repaired by all or any of the proprietors of lands within the township in such manner as the comrs. should by their award appoint, & required the comrs. by their award to describe all manner of public highways, bridges, sewers & drains & all private ways, cloughs, banks, bridges, sewers & drains, within the inclosed lands. The comrs., by their award, appointed, amongst others, two public sewers, & directed that they should be kept in repair & preserved of a certain width & depth by the owners & proprietors of the inclosed lands according to an acreage rate. The owners & proprietors contributed to the repair of these two sewers during eighty years after the Act:—*Held*: a presentment that one of these sewers ought to be made of an increased gauge & repaired by the proprietors of the inclosed lands according to an acreage rate, without disclosing any liability upon the part of these owners *ratione tenuræ*, or by reason of benefit, was illegal, as the Act did not alter the law regulating the repair of public sewers, & the award, if it purported to do so, was *ultra vires*, & any one distrained upon in pursuance of the presentment might maintain trespass without appealing from the order of the comrs.—BIGLIN *v.* WYLIE (1867), 36 L. J. Q. B. 307; 31 J. P. 771.

Ditch included in fence.]—*See* BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 295, No. 206.

1021. — Allottees receiving benefit—Sea wall.]—Prior to 1853 a sea wall had been constructed to protect the C. Level against incursions of the tide, but the sea wall did not extend along the entire front of the level. There was a gap about half a mile wide in front of the C. & R. Moors. The sea wall for the protection of the land lying to the east & west of these two moors was turned round inland northward. The tide came over the two moors, & was kept from the two parts of the level which lay to the east & west of the moors by these side or wing walls. The moors were waste land subject to certain rights of pasture. In 1853 the moors were inclosed under the provisions of 1845 Act, & by the award they were apportioned among the persons entitled to rights of common on them, & it was thereby provided that the owners should, amongst other things, construct & maintain a sea wall in the gap. The owners of the inclosures constructed a sea wall accordingly, & thenceforth there was a continuous defence against the incursions of the tide throughout the whole length of the C. Level. In 1903, there occurred an extraordinary flood & tempest which seriously damaged large portions of the old wall lying to the west of the new wall constructed under the inclosure award. The

comrs. of sewers made a rate to cover the costs of the repair of the sea wall so damaged :—*Held* : the owners of the inclosures were liable to the rate, inasmuch as at the time when the damage was done the inclosed land received benefit from the old walls, & it was immaterial that those walls as originally constructed were of no benefit to that land :—*BAKER v. PARRY* (1905), 3 L. G. R. 684.

See, generally, BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., pp. 290, 295, Nos. 172, 210 ; SEWERS & DRAINS.

See, also, Nos. 938, 939, *ante*.

F. As to Mining Rights and Rights in the Soil.

1022. Common of pasture awarded exclusively to commoners—Rights of lord to take stone not affected—Extent of right.]—Where comrs. under an inclosure Act awarded, that certain persons, entitled to a right of common in certain commonable lands, should for ever thereafter use & enjoy the commonable place as a common pasture, exclusive of all others whatsoever :—*Held* : (1) the right of the commoners was still subservient to the right of the lord to take stone, it appearing that, both before & since the award, the lord had exercised that right, & an action was not maintainable against his lessee, although the soil had latterly been subverted to an unusual extent.

(2) *Semble* : if the lord wantonly & unnecessarily exercises his manorial rights to the injury of the commoners of pasture, he is liable to an action.—*PLACE v. JACKSON* (1824), 4 Dow. & Ry. K. B. 318 ; 2 L. J. O. S. K. B. 156.

See, also, No. 920, *ante*.

1023. Common law right of support—Modified by award—Agreement between surface owners.]—In 1770 a private Act was passed to provide for the allotment of commons & commonable lands, etc. These lands were described as having mines under the surface. Comrs. were appointed to allot, having due regard to the mines, according to the rights of the various persons interested in the lands, some of which were divided into small parcels. The comrs., by their award, allotted the lands, so that some of the mines allotted to A. were situated under portions of the land allotted to B. The persons interested executed this award, which contained a clause declaring that the proprietors agreed with each other & their heirs, that the lands so allotted should be lawfully held & enjoyed by the allottees without molestation, & without any mine owner being subject to any action for damages on account of working & getting the mines, or by reason that the lands might be rendered uneven & less commodious to the occupiers thereof, or by sinking in hollows, & being otherwise defaced & injured where such mines should be worked, the several proprietors having agreed with each other, & being willing & desirous to accept their respective allotments in their several situations, subject to any inconvenience or incumbrance which might arise from that cause. The mines were worked by A. & his assignee, & the surface of the land thereby, but without negligence, injured :—*Held* : (1) whatever is the general right in the surface to support, the clause in the award operated as a grant of a right to disturb the surface of the land, & B. could not maintain an action for damage on that account.

(2) *Qu.* : whether the clause could operate as a release of the right to support.

Held : (3) the circumstance that, some years after the award, but many more than twenty years before the injury complained of, houses were erected on the land did not make any difference with regard to the relative rights of the parties

under the award.—*ROWBOTHAM v. WILSON* (1860), 8 H. L. Cas. 348 ; 30 L. J. Q. B. 49 ; 2 L. T. 642 ; 24 J. P. 579 ; 6 Jur. N. S. 965 ; 11 E. R. 463, II. L. ; *affg.* (1857), 8 E. & B. 123, Ex. Ch.

Annotations :—*As to* (1) *Consd.* *Shafto v. Johnson* (1863), 8 B. & S. 252, n. ; *Hext v. Gill* (1872), 7 Ch. App. 699 ; *Bell v. Love* (1883), 10 Q. B. D. 547 ; *Dixon v. White* (1883), 8 App. Cas. 833 ; *Pountney v. Clayton* (1883), 11 Q. B. D. 820. *Distd.* *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305. *Refd.* *Dugdale v. Robertson* (1857), 3 K. & J. 695 ; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585 ; *Blackett v. Bradley* (1862), 1 B. & S. 940 ; *Murchie v. Black* (1865), 19 C. B. N. S. 190 ; *Proud v. Bates* (1865), 6 New Rep. 92 ; *Richards v. Harper* (1865), 4 H. & C. 55 ; *Williams v. Bagnall* (1866), 15 W. R. 272 ; *Buccleuch v. Wakefield* (1870), L. R. 4 H. L. 377 ; *Kadon v. Jeffcock* (1872), L. R. 7 Exch. 379 ; *Smith v. Darby* (1872), L. R. 7 Q. B. 716 ; *Hall v. Byron* (1876), 4 Ch. D. 667 ; *Dalton v. Angus* (1881), 6 App. Cas. 740 ; *Darley Main Colliery Co. v. Mitchell* (1880), 11 App. Cas. 127 ; *Consett Waterworks Co. v. Ritson* (1889), 64 L. J. Ch. 293, n. ; *Sitwell v. Londesborough*, [1905] 1 Ch. 460 ; *Westhoughton U. D. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159 ; *Davies v. Powell Duffryn Steam Coal Co.* (1921), 37 T. L. R. 607. *Generally, Refd.* *Woodall v. Hingley* (1866), 14 L. T. 167 ; *Richards v. Jenkins* (1868), 18 L. T. 437 ; *Aspden v. Seddon* (1875), 10 Ch. App. 394 ; *Butterley Co. v. New Hucknall Co.*, [1910] A. C. 381 ; *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488 ; *Thomson v. St. Catharine's College, Cambridge & Mappin's Masbro' Old Brewery* (1918), 118 L. T. 758, C. A. *Mentd.* *Bononi v. Backhouse* (1859), E. B. & E. 646 ; *Brown v. Robins* (1859), 4 H. & N. 186 ; *Scots Miners Co. v. Leadhills Mines* (1859), 34 L. T. O. S. 34 ; *Jones v. Tapling* (1862), 8 Jur. N. S. 333 ; *Hammersmith, etc., Ry. v. Brand* (1869), L. R. 4 H. L. 171 ; *Ramsay v. Blair* (1876), 1 App. Cas. 701 ; *N. B. Ry. v. Park Yard Co.*, [1898] A. C. 643 ; *G. N. Ry. v. I. R. Comrs.*, [1901] 1 K. B. 416.

1024. Allotment of stone to highway surveyors & herbage to commoner—Gives commoner no right to soil—Though surveyors cease to take stone.]—An inclosure Act, directed the comrs. to set out land for getting stone, etc., for repairing the parish roads, which should be vested in the surveyors of highways & their successors, & enacted that all the grass & herbage growing, arising & renewing on the roads & on the land to be set out & appointed for getting stone, etc., should belong to & be the property of the persons to whom the comrs. should allot the same, exclusive of all other persons whomsoever, or should be applied to some parochial or other use or purpose. The comrs., in pursuance of the Act, awarded, set out, allotted & appointed to the surveyors of highways & their successors an allotment No. 158, containing 1 acre, save & except the grass & herbage thereof, upon trust & for the purpose of getting stone, etc., for repairing the roads, & they awarded, set out, allowed & assigned to P. & his heirs contiguous allotments, No. 157 & No. 159, together with the grass & herbage of No. 158 ; they also ordered & directed that the grass & herbage growing, arising, & renewing on the public roads & ways should be let from year to year, & the moneys arising thereby be applied to the repair of the highway, etc. The surveyors obtained gravel for the highways from No. 158 down to the year 1813, when they discontinued to do so, & purchased gravel from pits in the neighbouring parishes, & thenceforth until 1858 they never entered upon or exercised in No. 158 any right under the award. In 1813, P. built a cottage & barn, & other buildings, on part of No. 158, & inclosed part of it with a fence ; he also cut off a corner of it, which had ever since formed part of the adjoining arable field, & cleared out the old pit, & converted it into a pond :—*Held* : the award of the comrs. did not vest in P. any right to the soil, but only the right of taking the grass upon its surface.—*THEW v. WINGATE* (1862), 10 B. & S. 714 ; 38 L. J. Q. B. 310, n.

Annotation :—*Folld.* *Smith v. Stocks* (1869), 10 B. & S. 701.

Construction of Acts.]—*See* Sub-sect. 1, C., *ante*.

Sect. 7.—Under inclosure Acts: Sub-sect. 8, F. & G.; sub-sects. 9, 10 & 11, A., B. & C.]

Jurisdiction of commissioners.]—See No. 894, ante.

G. As to Lands Abutting on River.

1025. Allotment of waste abutting on river—Confers no right to bed of river—Right of fishing reserved to lord of manor.]—ECROYD v. COULTHARD, No. 945, ante.

1026. ———.]—HOUGH v. CLARK & HALL, No. 248, ante.

Medium flum rule.]—See, generally, HIGHWAYS, STREETS & BRIDGES; WATERS & WATER-COURSES.

SUB-SECT. 9.—JURISDICTION OF COURT TO SET ASIDE OR CORRECT AWARD.

1027. Not for obscurity.]—OVER-KELLET INCLOSURE ACT CASE (1798), 2 Tidd's Practice, 9th ed., 844.

1028. After award made.]—DONCASTER CORPN. v. MILBOURNE, No. 956, ante.

1029. ——— None apart from fraud.]—BATEMAN v. BOYNTON, No. 940, ante.

Jurisdiction of court to restrain signature of award.]—See Nos. 956, 957, ante, No. 1044, post.

Jurisdiction of court to restrain commissioners from undue sale of common.]—See No. 1030, post.

Rectification of mistake—After provisional order authorised by Act of Parliament.]—See No. 968, ante.

SUB-SECT. 10.—HOW EXPENSES OF INCLOSURE RAISED.

1030. By sale of part of common—In accordance with statutory provisions.]—An inclosure Act empowered comrs. to sell by private contract any part of the commonable lands fronting or adjoining the houses or gardens of the purchasers, & also empowered the comrs. to sell by auction such parts at the greatest distance from the houses of the respective proprietors, as the comrs. should think fit, for defraying the expenses of the Act, & the surplus of the produce of such sales was directed to be divided among the proprietors. On a bill by one proprietor, on behalf of himself & the others, to restrain the comrs. by injunction from proceeding in an agreement made by them for the sale of a pond by private contract, to a person who was not the owner of any property adjoining or fronting the pond, it appearing that the pond was of much public utility & was sold at an under-value:—*Held*: the comrs. must be restrained.—*HAWES v. JAMES* (1818), 1 Wils. Ch. 2; 37 E. R. 1, L. C.

Effect on underlying minerals.]—See No. 894, ante.

1031. By rate—Rate made for improper purpose—Appeal to sessions.]—Where an inclosure Act gave the comrs. power to set out & make roads, etc., & directed that the expenses of making & repairing those roads & all other expenses should be borne by the proprietors in certain proportions, to be ascertained by the comrs. in one general rate; & then gave an appeal to the sessions in all cases where the parties should think themselves aggrieved:—*Held*: an objection to the rate, on account of the comrs. having expended money on an improper object, could not be tried in an action of trespass, but that the party aggrieved must appeal to the sessions.—*BONNELL v. BEIGHTON* (1793), 5 Term Rep. 182; 101 E. R. 103.

1032. ——— Power to make—Though award executed.]—Where comrs., by an inclosure Act,

were empowered, *inter alia*, to make roads & to defray the expense by a rate on the several proprietors, & they executed their award as to the allotments before the roads were completed, or sufficient funds were raised for that purpose:—*Held*: they might afterwards make a rate to defray the expense of completing the roads.—*HAGGERSTON v. DUGMORE* (1817), 1 B. & Ald. 82; 106 E. R. 31.

1033. ——— Not lost by failure to account before justices annually.]—(1) Comrs. under an inclosure Act having set apart & sold a portion of the lands to be allotted, in order to defray expenses, found that there was a deficiency, & made a rate upon the parties interested, in order to provide for that deficiency. One of those parties refused to pay:—*Held*: the comrs. might bring ejectment under Inclosure (Consolidation) Act, 1801 (c. 109), s. 29, to recover the land allotted to him in respect of which the rate was imposed.

(2) The comrs., instead of laying their accounts before a justice annually, had done so only twice in fourteen years, & had not done so for several years before the rate was made, but there never was any appeal against the accounts or the rate:—*Held*: the comrs. had power to make such rate, notwithstanding their neglect in passing their accounts.—*DOE d. HARRIS v. BODENHAM* (1829), 9 B. & C. 495; 109 E. R. 184.

Annotation:—As to (2) Folld. Smith v. Jones (1830), 1 B. & Ad. 328.

—— Election of rating officer—Voting by attorney.]—See AGENCY, Vol. I., p. 302, No. 274.

1034. ——— Whether necessary—Decision of commissioners final.]—*DOE d. FOWLER v. CLARK*, No. 922, ante.

1035. Recovery of rate—By ejectment.]—*DOE d. HARRIS v. BODENHAM*, No. 1033, ante.

1036. ——— By distress—Though statutory provisions as to accounting not complied with.]—A local inclosure Act directed that the costs of carrying it into effect, & all the charges of the comrs. should be borne by the parties interested in the lands to be allotted, etc., as the comrs. should direct, & should be levied according to the General Inclosure Act: the comrs. were required, once a year at least, to lay before a justice a statement of all sums by them received & expended, or due to them for their own trouble & expense: no charge or item in such accounts was to be binding or valid unless same should have been duly allowed by such justice. Comrs. under the Act levied by distress a sum of money, part of which was due for their own trouble & expense during several preceding years, & had not been accounted for annually, nor until a short time before the issuing of the distress warrant:—*Held*: the accounting was not a condition precedent to the levy, & the distress was legal.—*SMITH v. JONES* (1830), 1 B. & Ad. 328; 8 L. J. O. S. K. B. 402; 109 E. R. 809.

1037. ——— Not by action.]—A private inclosure Act gave the comrs. power by their award to direct by whom & in what manner certain necessary drainage works were to be made & maintained. The comrs. directed by their award that the expenses of the works should be paid by a rate to be levied & recovered by certain surveyors in the same manner as parish rates were by law recoverable in the parish:—*Held*: the rate must be recovered by distress & not by action.—*DANBY v. WATSON* (1877), 46 L. J. M. C. 179; 36 L. T. 412; 41 J. P. 406; 25 W. R. 464, D. C.

Liability of commissioners for advances by bank—To defray expenses—Before rate made.]—See BANKERS & BANKING, Vol. III., p. 261, No. 790.

SUB-SECT. 11.—APPEALS.

A. From Valuer to Commissioners.

See 1845 Act, s. 55.

1038. Withdrawal of notice of appeal—Effect on jurisdiction of court.]—HARVEY v. FEATHERSTONAUGH, No. 1039, *post*.

B. From Commissioners to High Court.

See 1845 Act, ss. 44, 56.

1039. Who may be heard—Any objector—Though only notice of appeal withdrawn.]—If one person interested in an inclosure award gives notice of appeal from valuer to comr., general in its terms, the ct. must hear & determine on objections made by any other person interested, even though the original objector withdraw his objection, & no notice of dissatisfaction has been given by any other person. It is not a condition precedent in such a case that the after-coming objector should have given notice of objection to the valuer's award.—HARVEY v. FEATHERSTONAUGH (1865), 13 L. T. 442.

1040. Feigned issue—Plaintiff proving a right less than that claimed—Not entitled to judgment.]—IVATT v. MANN, No. 162, *ante*.

1041. ——— Plaintiff's claim already dealt with by commissioner—Amendment of issue & new trial refused.]—IVATT v. MANN, No. 162, *ante*.

1042. ——— Delay in bringing to trial—Defendant entitled to judgment—As in case of nonsuit.]—Notice of trial having been twice given & countermanded on both occasions:—*Held*: deft. entitled to judgment as in case of a nonsuit on a feigned issue under 1845 Act, s. 56.—HANCOCK v. CARLISLE (EARL) (1819), 4 Exch. 447; 7 Dow. & L. 219; 19 L. J. Ex. 45; 14 L. T. O. S. 205; 13 J. P. 796; 154 E. R. 1288, Ex. Ch.

1043. ——— Grounds for granting stay.]—Where an action at law upon a feigned issue has been brought under 1845 Act, s. 56, the ct. will not grant an injunction to stay such action upon the mere grounds of alleged miscarriage at law, & that the ct. of law is not at the time sitting *in banco*.—PORTSMOUTH (EARL) v. PARTRIDGE (1860), 3 L. T. 12; 8 W. R. 658.

1044. ——— Grounds for setting aside.]—At the instigation of A. an inclosure was commenced by the comrs. appointed under 1845 Act, & the assistant comr. having heard the evidence of A. & others, decided that A. was lord of the manor of the lands to be inclosed; B. put in a claim as being lord of the manor over a part of the lands, & framed a feigned issue, according to s. 56 of the Act; A. then moved for a prohibition to prevent the comrs. from proceeding in the inclosure, & also to set aside the feigned issue:—*Held*: (1) the prohibition could not issue, & the comrs. would not only be right in proceeding with the inclosure, but were bound to do so; (2) the feigned issue could not be set aside, as the comr. had not exceeded the powers given him by s. 56, & as A. might have become a party to the issue if he had chosen to do so.—*Re* PORTSMOUTH (LORD) & PARTRIDGE v. INCLOSURE COMRS. (1861), 3 L. T. 779; 9 W. R. 336.

1045. ——— Discovery.]—A feigned issue was brought under 1845 Act, the question being whether pltf., as lord of the manor of L., was interested in the soil of certain lands proposed to be inclosed, in right of the manor, so as to be entitled to dissent from the inclosure. Defts.' case was, that by an agreement made in 1800, between A., the then lord of the manor, & all the persons entitled to rights of common, & an award made thereunder, 146 acres were allotted to the

lord in lieu of his manorial rights, & that certain leases & agreements for leases of part of the land so allotted had been subsequently granted by the lords of the manor:—*Held*: under Evidence Act 1851 (c. 99), s. 6, defts. were entitled to have inspection of the following documents: (a) certain deeds of conveyance of the manor to A., & by A. to pltf.; these, although title deeds, being capable of being used for the purpose of substantiating defts.' case, & not merely of negating that of pltf. (b) the leases, & agreements for leases alleged to have been made under the agreement of 1800, which was not in the possession of pltf., as these might be material to show that the lords of the manor had acted as owners in severalty of the lands in question, & not in virtue of their ordinary manorial rights.—RICCARD v. INCLOSURE COMRS. (1854), 24 L. J. Q. B. 49; 24 L. T. O. S. 129; 1 Jur. N. S. 495; 3 C. L. R. 119.

See, generally, DISCOVERY, INSPECTION, & INTERROGATORIES.

1046. ——— Costs—Unsuccessful plaintiff liable.]—Where the ct. has granted an application for a feigned issue, under 1845 Act, s. 44, to try whether a certain close is part of a particular manor, & appet., pltf. in the feigned issue, fails on the trial, the ct. will order him to pay the costs of it to deft. in the feigned issue.—R. v. KELSEY (1851), 20 L. J. Q. B. 283.

1047. ——— ——— New trial.]—Under 1845 Act, s. 56, the successful party to an issue is only entitled to the ordinary costs allowed in other cases, so that where, in a rule for a new trial, no mention is made of the costs of the first, he is not entitled to them, although successful on the second.—ROMNEY (EARL) v. INCLOSURE COMRS. (1854), 2 C. L. R. 1651; 23 L. T. O. S. 190.

1048. ——— ——— Plaintiff partly successful.]—Deft. had rights of pasture awarded to him by the valuer, under 1845 Act, in respect of 198 acres of land, & this award was confirmed by the assistant comr. Pltf. appealed against this decision, under s. 56, & brought an action on an issue, in which pltf. affirmed & deft. denied that the decision of the comr. was erroneous, so far as it confirmed the allowance of the claims of deft. to rights of pasturage in respect of the 198 acres. At the trial of the issue, pltf. called witnesses to disprove that deft. had rights of common in respect of any of the 198 acres; deft. gave evidence that he was entitled to rights of common in respect of the whole of the 198 acres. A verdict was returned for pltf. in respect of part of the 198 acres, & for deft. in respect of the residue; the value of the rights thus disallowed & allowed being about equal. By 1845 Act, s. 56, after verdict & final judgment, "the comrs. shall act in conformity thereto, & allow or disallow the claim thereby determined according to the event of such trial; & the costs attending such trial shall abide the event of the trial": *Held*: "event of the trial" did not mean "event" as if it were an ordinary action, & pltf. was not entitled to the general costs of the cause, but each party was entitled to the costs of that part of the issue on which he had succeeded.—HARDY v. FETHERSTONAUGH (1869), L. R. 4 Q. B. 725; 10 B. & S. 628; 38 L. J. Q. B. 337.

Bond of indemnity to commissioners—For expenses of appeal.]—See BONDS, Vol. VII., p. 173, No. 117.

C. To Quarter Sessions.

See 1845 Act, s. 63.

1049. When appeal lies—Road not set out as a public road—Not a cause of complaint—Private Act.]—A private inclosure Act which gives an

Sect. 7.—Under inclosure Acts: Sub-sect. 11, C. ct. 1: Sub-sects. 1 & 2.]

appeal to the quarter sessions within four months after the cause of complaint shall have arisen, to the party aggrieved by any thing done in pursuance of that Act or of Inclosure (Consolidation) Act, 1801 (c. 109), other than & except such determinations as are by those Acts declared to be binding, final & conclusive, does not give any appeal to a party complaining that the comrs. have omitted to set out a particular road as a public road, against their determination; & supposing it did, yet he must appeal within four months, & cannot after that time when the comrs. set out the road as a private road appeal against that determination, his cause of complaint being that it is not set out as a public road, & not that it is set out as a private road. It seems that an indictment against the comrs. for not obeying an order of sessions directing them to set out the road as a public road, would not be such a remedy to the party, supposing him entitled to have the road so set out, as would make the ct. refuse to interfere by mandamus.—*R. v. DEAN INCLOSURE COMRS.* (1813), 2 M. & S. 80; 105 E. R. 311.

Annotations:—Mentd. R. v. Severn & Wye Ry. (1819), 2 B. & Ald. 616; *R. v. Cumberland JJ.* (1822), 1 B. & C. 64; *R. v. Jeyes* (1835), 3 Ad. & El. 416; *Ex p. Robins* (1839), 1 Will. Woll. & H. 578.

1050. — Against allowance by justice—Of commissioners' account—Private Act.]—A clause in a private inclosure Act, declaring that no item or charge in the accounts of the comrs. shall be binding on the parties concerned, or valid in law, unless same shall have been duly allowed by a justice of peace in the manner therein pointed out, does not take away an appeal given by a subsequent clause to the party aggrieved by any thing done in pursuance of that Act or Inclosure (Consolidation) Act, 1801 (c. 109), other than & except such determinations as were by those Acts declared to be binding, final & conclusive, the allowance of the accounts by a justice not falling within the exception.—*R. v. CUMBERLAND JJ.* (1822), 1 B. & C. 64; 2 Dow. & Ry. M. C. 61; 107 E. R. 25.

1051. — Order of commissioner & justice disallowing new private road—Order not final—Inclosure (Consolidation) Act, 1801 (c. 109) ss. 8, 10.]—By the above Act, s. 8, when complaints were made against public roads set out by a comr., he & a justice were to hear them, & finally direct what was to be done; & by s. 10, private roads were to be set out, subject to the same provisions as were contained in s. 8 respecting public roads. A private inclosure Act, in which the above Act was recited, gave an appeal in all cases, except as to such acts, determinations, & proceedings of the comr. as were by either Act directed to be final, binding, & conclusive. The comr. under the Act of 1801 having set out a private road which was objected to, he & a justice, upon hearing the complaint, ordered that the road should be disallowed:—*Held:* the appeal against such order was not taken away, because it was not an order of the comr. alone, but of him & a justice together; & because s. 10 of the Act of 1801 did not expressly say that the order of the comr. should be final respecting private roads.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1823), 2 B. & C. 228; 3 Dow. & Ry. K. B. 306; 2 Dow. & Ry. M. C. 10; 107 E. R. 368.

1052. Notice of appeal—How time for giving calculated—From time allotment staked out—Not from final award.]—Though a statute, giving an appeal to the sessions within four months after the cause of complaint shall arise, directs the

justices at the sessions to hear & determine the matter of such appeal, etc., yet it seems that they have an incidental power of adjourning it to another sessions, upon lawful cause, such as the absence of a material witness, of the sufficiency of which they are to judge.

Where an appeal was brought against the sufficiency of an allotment under an inclosure Act, & it appeared that the ground was staked out in Mar., when applt. took possession of & cropped it, though no final award was made of it by the comrs. till long afterwards:—*Held:* an appeal lodged at the Oct. sessions was out of time, though a small part of the allotment was, with the applt.'s consent, exchanged so late as July.—*R. v. WILTS. JJ.* (1811), 13 East, 352; 104 E. R. 406.

Annotations:—Reid. R. v. Surroy JJ. (1845), 3 Dow. & L. 343. *Mentd. R. v. Kimbolton* (1837), 6 Ad. & El. 603; *R. v. Belton* (1848), 11 Q. B. 379; *Bowman v. Blyth* (1856), 7 E. & B. 26; *R. v. Cambridge Union Grdns.* (1861), 1 B. & S. 61.

1053. — From notice exonerating land from tithe—Not from provisional allotment by map.]—By an inclosure Act the party aggrieved by any thing done in pursuance of the Act might appeal to the quarter sessions within six calendar months after the cause of complaint. The comrs. in 1812 made an allotment upon the map to the vicar in lieu of his tithes, which the vicar inspected at a meeting held in Nov. 1812, & appointed an agent, who attended a subsequent meeting, when an alteration was made in the map, which the agent approved, & it was understood that all objections to the vicar's allotments were reconciled. In Nov. 1813 the comrs. gave notice that they had ordered all tithes, etc., to cease from Sept. 29 then last:—*Held:* the vicar was not out of time to appeal to the next quarter sessions after that notice.—*R. v. GLOUCESTERSHIRE JJ.* (1814), 3 M. & S. 127; 105 E. R. 558.

1054. — From conclusive allotment—Not from preparation of maps & plans.]—The preparation of plans & maps for the purpose of carrying an inclosure into effect is no evidence of an allotment under an Act which required an appeal against an allotment to be made within six months after the cause of complaint had arisen. It is sufficient to appeal within six months from the time when the conclusive allotment has been made.—*R. v. MIDDLESEX JJ.* (1819), 1 Chit. 366.

1055. — From date of award—Though statutory formalities not complied with.]—By a clause in an inclosure Act, a comr. was authorised to stop up any way, provided it be done by the order, & with the concurrence of two justices, & that order was to be subject to an appeal in like manner, & under such form & restrictions as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved was to be at liberty to appeal at any time within six months after the cause of complaint. Under this Act, the comr., with the concurrence & order of two justices, stopped up a road without giving the public notices required by Highways Act, 1815 (c. 68):—*Held:* a party aggrieved might, in the circumstances, appeal at any time within six months.—*R. v. TOWNSEND* (1822), 5 B. & Ald. 420; 106 E. R. 1244.

See, also, No. 1014, ante.

1056. — Given within statutory period—Good though appeal cannot be heard within period.]—1845 Act, s. 63, enacted that any person within four months after the first Sunday on which a notice of an intention to stop up a way had been given on the church-door, might make his complaint by appeal to the justices at the quarter sessions on giving the valuer fourteen days' notice

in writing of such appeal, together with a statement in writing of the grounds thereof:—*Held*: notice of intention to appeal, given to the valuer within the four months, against the stopping up of a highway under the powers of the Act, was good, although the sessions were not held nor the appeal heard until after the four months had expired.—*R. v. ESSEX JJ.* (1864), 34 L. J. M. C. 41; 11 L. T. 486; 28 J. P. 776; 13 W. R. 186.

1057. — As to part only of road proposed to be stopped—Good.]—(1) A valuer appointed under 1845 Act, s. 62, having given notice of intention to stop up a road from A. to B., a notice of appeal under s. 63 of the Act against the stopping up of a part of the road is good & the Quarter Sessions are bound to hear the appeal.

(2) *Qu.*: whether the legal effect of the appeal,

if successful, would be to leave the whole road open.—*R. v. HUNTINGDONSHIRE JJ.* (1865), 1 L. R. 1 Q. B. 36; 13 L. T. 443; *sub nom.* *JOHNSON v. SMITH*, 14 W. R. 209.

1058. Extension of time for hearing—Whether justices must grant—On application by appellant—Private Act.]—By an inclosure Act an appeal was given to the next sessions within six months after the cause of complaint. Applt. moved the ct. of sessions in due time to receive & respite his appeal to the next sessions, which was refused:—*Held*: the Ct. of K. B. would not grant a mandamus to the justices to receive it.—*R. v. DERBYSHIRE JJ.* (1791), 4 Term Rep. 488; 100 E. R. 1134.

1059. Justices may adjourn—Upon lawful cause.]—*R. v. WILTS. JJ.*, No. 1052, *ante*.

Part XIV.—Regulation of Commons.

SECT. 1.—NON-METROPOLITAN COMMONS.

SUB-SECT. 1.—UNDER STATUTE.

1060. Local Inclosure Act—Town pasture—Allotment to freemen for pasture on inclosure—No power to convert into garden plots.]—*ASTELL v. MITCHELL* (1843), 1 L. T. O. S. 334.

1061. Commons Act, 1876 (c. 56)—Power of surveyor of highways to take gravel—Justices may restrain absolutely.]—By Highway Act, 1835 (c. 50), s. 51, power is given to a surveyor of highways to get & carry away gravel, etc., in any waste land or common ground. By Commons Act, 1876, s. 20, such right is not to be exercised, as regards certain classes of commons, without the consent of the person or persons having the regulation or management of same, or in default of such consent without an order of two or more justices in petty sessions assembled who may in their order prescribe such conditions as to mode of working & restitution of the surface as to them shall seem expedient. Applts. having refused leave to resps. to take gravel from a common, the latter applied to justices, who made an order under Commons Act, 1876, s. 20, on the express ground that the sect. only gave them power to prescribe the conditions under which the right given by Highway Act, 1835, s. 35, was to be exercised, & that they had no discretion to refuse altogether to make an order:—*Held*: the decision of the justices was wrong, & they had absolute discretion, under Commons Act, 1876, s. 20, to make or refuse to make an order.—*HAYES COMMON CONSERVATORS v. BROMLEY RURAL DISTRICT COUNCIL*, [1897] 1 Q. B. 321; 66 L. J. Q. B. 155; 76 L. T. 51; 61 J. P. 104; 45 W. R. 207; 13 T. L. R. 136; 41 Sol. Jo. 160, D. C.

1062. — Right of conservators to sue for alleged encroachment.]—The conservators of a common regulated under the above Act, in whom the general management of the common was vested, brought an action to restrain the owner of inclosures abutting on the common from encroaching by means of fences erected on the common side of the hedges forming the boundary of the common as delineated upon a map annexed to the award. Deft. was a party to the application for regulation of the common, which was limited to improvement, & did not extend to the adjustment of rights. He contended that the award map was not conclusive & did not in fact show the real boundaries of the common. His inclosures were physically separated from the common by old quickset hedges, & the map showed as the boundary the

centre line of these hedges. There was evidence that the universal rule & practice on the common was & had been, where there was now no ditch or trace of one, to allow a ditch-width to the owners of the commonable animals & otherwise. Deft. contended that, either by presumption of law or by inference from the evidence, he was entitled to a ditch-width on the common side of the hedges, & that, allowing for this ditch-width, the fences complained of did not constitute any encroachment. He also contended that the conservators were not entitled to sue, & that the action was barred by the Stat. Limitations:—*Held*: the conservators had a right to sue.—*COLLIS v. AMPHLETT*, [1918] 1 Ch. 232; 87 L. J. Ch. 216; 118 L. T. 466; 16 L. G. R. 229, C. A.; *reversd.*, without affecting this point, [1920] A. C. 271, H. L.

SUB-SECT. 2.—BY BYE-LAWS.

1063. Who may make—Court leet—By custom.]—*JAMES v. TUTNEY* (1638), Cro. Car. 497; March, 28; 79 E. R. 1029; *sub nom.* *TINTENY v. JAMES*, 4 Vin. Abr. 306, pl. 10.
Annotation:—*Refd.* *Smith v. Barrett & Clifford* (1663), 1 Sid. 161.

1064. — — — — —.]—*EXCESTER (EARL) v. SMITH* (1668), 2 Keb. 367; 84 E. R. 230.

1065. — — — — — Composed entirely of commoners.]—The jury in a ct. leet of a manor made a bye-law regulating the rights of the commoners in respect of a fishery in the manor. The jury were not composed exclusively of commoners, though the majority were commoners:—*Held*: the bye-law was bad.—*PLATT v. JESSETT* (1900), 17 T. L. R. 105, D. C.

1066. Validity of bye-law—Must be for common benefit.]—*ANON.* (1588), Gouldsb. 79; 75 E. R. 1007.

1067. — — — — — Regulating period of common—Good.]—*ANON.*, No. 1066, *ante*.

1068. — — — — — That none shall carry hay upon the lord's lands—Bad.]—*ANON.*, No. 1066, *ante*.

1069. — — — — — That none shall break the hedges of a particular commoner—Bad.]—*ANON.*, No. 1066, *ante*.

1070. — — — — — Not to put on common a steer a year old—Bad.]—*ERBERY & LATTONS CASE* (1589), 1 Leon. 190; 74 E. R. 175; *sub nom.* *LATTON v. ERDBURY & BUTTON*, 1 And. 234.

1071. — — — — — Innocent strangers made liable to penalties—Bad.]—*R. v. BEVERLEY JJ.* (1861), 25

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J. P. 181; *subsequent proceedings, sub nom. R. v. LUNDIE* (1862), 31 L. J. M. C. 157.

1072. ———.]—*R. v. LUNDIE* (1862), 31 L. J. M. C. 157; 5 L. T. 830; 26 J. P. 646; 8 Jur. N. S. 640; 10 W. R. 267.

Annotation:—Mentd. R. v. Saddlers' Co. (1863), 10 H. L. Cas. 404.

1073. ——— **Prohibiting placing boat-vans without leave—Though not constituting a nuisance—Good.]—**A local improvement Act authorised conservators of a common to make bye-laws & regulations for the prevention of, & protection from, nuisances, & for keeping order. N. was charged for placing a boat-van for pleasure without licence & without payment of prescribed fee contrary to a bye-law made:—*Held*: the bye-law was not *ultra vires* merely because it prohibited vans without leave, & because it did not confine this to such as were nuisances.—*NASH v. MANNING* (1894), 58 J. P. 718, D. C.

1074. ——— **Customary bye-law for commoners to take rabbits or game on waste—Not necessarily void.]—***COOTE v. FORD*, No. 573, *ante*.

1075. **Construction of bye-law—Forbidding letting for hire on the common any pony—Not infringed by letting ponies for hire to be used on common.]—**M. had premises adjoining a common regulated under bye-laws made under Commons Act, 1876 (c. 56), where she let ponies for hire. M. at her premises let ponies to be used by two persons on the common, & they used them there:—*Held*: this was no offence within the meaning of the words "letting for hire on the common any pony," etc.—*MARCY v. MORRIS* (1888), 52 J. P. 168, D. C.

1076. **Enforcement of bye-law—Corporation common overstocked by freeman—Not cause for disfranchisement.]—***R. v. GREAT GRIMSBY CORPN.* (1832), 1 L. J. M. C. 23.

See, also, Nos. 1071, 1072, ante.

SECT. 2.—METROPOLITAN COMMONS.

SUB-SECT. 1.—BY BYE-LAWS AND REGULATIONS.

1077. **Validity of bye-law—Power to make bye-laws for prevention of nuisance & preservation of order—Bye-law forbidding public speeches without permission—Valid.]—**By a scheme under Metropolitan Commons Act, 1866 (c. 122), & confirmed by Metropolitan Commons Supplemental Act, 1877 (c. cci.), it was provided that a common should be dedicated to the use & recreation of the public as an open & uninclosed space for ever, & the Metropolitan Board of Works were empowered to frame bye-laws & regulations for the prevention of nuisances & the preservation of order on the common. The Metropolitan Board of Works made a bye-law prohibiting the delivery of any public speech, lecture, sermon or address of any kind, except with the written permission of the board first obtained, & upon such portions of the common & at such times as might be by such written permission directed & sanctioned by the board:—*Held*: such bye-law was valid.—*DE MORGAN v. METROPOLITAN BOARD OF WORKS* (1880), 5 Q. B. D. 155; 49 L. J. M. C. 51; 42 L. T. 238; 44 J. P. 296; 28 W. R. 489, D. C.

Annotations:—Consd. Brighton Corpn. v. Packham (1908), 72 J. P. 318; *Mitcham Common Conservators v. Cox*, *Mitcham Common Conservators v. Cole*, [1911] 2 K. B. 854.

1078. **Validity of regulations under bye-law—Player on golf course to be accompanied by licensed caddie—Valid.]—**By a scheme

made under the Metropolitan Commons Acts, 1866 (c. 122), & 1869 (c. 107), & confirmed by the Metropolitan Commons (Mitcham) Supplemental Act, 1891 (c. xxvi.), conservators were directed to set apart such portions of a common as they should consider expedient for games & to form grounds for cricket & other games, & to frame bye-laws & regulations for, among other purposes, the regulation of games to be played & other means of recreation on the common & generally for the prevention of any act tending to interfere with the use thereof by the public for the purposes of exercise & recreation. No bye-laws were to have effect unless & until confirmed by the Local Govt. Board. The scheme saved to the lords of certain manors their rights in the soil of the commons, but the conservators were empowered upon payment of compensation to restrict, diminish or extinguish those rights if they should interfere with the control, preservation or improvement of the common. With the consent of the conservators a golf club was formed which acquired the rights of the lords of the manors & laid out & maintained on the common two golf courses, the P. golf course and the P. ladies' golf course. The golf club conveyed to the conservators all their rights over the soil of the common, in return for which the conservators by deed granted to the golf club a licence to play golf upon both the golf courses. By this deed the conservators covenanted that they would not make any such bye-laws or regulations as would unreasonably interfere with the club playing golf on the courses & would not permit persons other than those authorised by the club or residents in the parish of M. to play golf or any other game on the courses. In pursuance of the scheme the conservators made a bye-law that no person should play cricket or any other game upon the parts of the common set apart or appropriated for cricket, football, golf, etc., except at such times & under such regulations as the conservators should prescribe, & that no person should obstruct or interfere with or annoy any persons playing at cricket or any other lawful game. They also made the following regulations:—(a) that golf should not be played upon any part of the common except the P. golf course and the P. ladies' golf course; (b) that for the safety of the public & the preservation of the turf, no one should play golf on either of the courses unless accompanied by a caddie duly authorised & licensed by the conservators or the golf club; (c) that no one who was not a member of the golf club should play on the P. golf course on Saturdays, but that persons holding permits might play on the P. ladies' golf course on Saturdays, but must be accompanied by caddies; (d) that no person should play golf on either of the courses unless he or she were a member of the golf club or an inhabitant of M. holding a permit from the conservators. The bye-law was confirmed by the Local Govt. Board, but the regulations were not submitted for confirmation:—*Held*: (1) regulation (b) was valid; (2) regulation (d) was unequal & void in excluding all but inhabitants of M. & members of the golf club from playing golf on the courses; (3) regulation (d) & *semble*, regulation (c) also were *ultra vires* & void in giving a permanent preference to the members of the golf club, for the conveyance of their rights in the soil was not a good consideration for such a preference; (4) whether or not the making & maintaining of the golf courses were a good consideration, the preference was not authorised by the bye-law & could not be given by mere regulation.—*MITCHAM COMMON CONSERVATORS v.*

COX, MITCHAM COMMON CONSERVATORS *v.* COLE, [1911] 2 K. B. 854; 80 L. J. K. B. 1188; 104 L. T. 824; 75 J. P. 471; 27 T. L. R. 492; 9 L. G. R. 843, D. C.

Annotation:—*As to* (3) *Consd.* Harris *v.* Harrison (1914), 111 L. T. 534.

1079. — Play on golf courses restricted to members of club or local inhabitants—Bad.]—MITCHAM COMMON CONSERVATORS *v.* COX, MITCHAM COMMON CONSERVATORS *v.* COLE, No. 1078, *ante*.

1080. — Non-members of club not to play before certain time on certain days—Valid.]—Under a scheme confirmed by statute the M. Common Conservators were required to set apart portions of the commons for games, & to make bye-laws & regulations for the playing of games on the commons. They made a bye-law that no person should play at any games on the parts so set apart except under such regulations as they might prescribe, & that no person should obstruct, interfere with or annoy any persons who were playing or who had made preparations to play at games on the parts so set apart; & penalties were imposed for breach of the bye-laws. Under this bye-law the conservators made regulations for playing golf on the commons; regulation 1, after reciting that the P. Golf Club had made & kept up two golf courses on the common, provided that a person who was not a member of the club should not on any Wednesday or Saturday commence to play golf on the courses between the hours of 9.30 & 11 in the morning or between 12.30 & 2.30 in the afternoon; & other regulations provided that no person should play golf unless accompanied by a caddie licensed by the conservators or by the club, & that caddies were to be obtained by all players through the caddie master of the club or a caddie master appointed by the conservators. The conservators had not appointed any caddie master or licensed any caddies. Resp., who was not a member of the club, but who had a permit from the conservators, went on a Saturday to the golf course to play golf, & had made preparations to play. He applied to applt., who was the caddie master of the club, for a caddie between 10 & 11 o'clock in the morning, but applt. by reason of regulation 1 refused to supply him with a caddie before 11 o'clock, & at 11 o'clock he supplied him with a caddie. Applt. having been summoned under the bye-law for obstructing & interfering with resp. by refusing to supply him with a caddie, & having been convicted because the justices found that regulation 1 was *ultra vires* as it showed preferential treatment to a class, namely, the members of the club:—*Held*: (1) as applt. was only the servant of the club & was merely obeying the orders of the club in enforcing the regulation, he could not be said to be obstructing resp. & the conviction was wrong upon that ground; (2) regulation 1 was not *ultra vires* but was a valid regulation.—HARRIS *v.* HARRISON (1914), 111 L. T. 534; 78 J. P. 398; 30 T. L. R. 532; 12 L. G. R. 1304, D. C.

1081. Construction of bye-law—Forbidding erection of posts—Replacement of posts in respect of which easement acquired—Not included.]—Metropolitan Commons Act, 1866 (c. 122), s. 15, enacted that no estate, interest or right of a profitable or beneficial nature in, over or affecting a common, should, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme under the Act without compensation being made or provided for the same. A common within the meaning of the Act was placed under the management of the Metropolitan Board of Works by a scheme confirmed

by the Metropolitan Commons Supplemental Act, 1871 (c. lvii). Paragraph 5 of the scheme gave the Board power to make bye-laws. Paragraph 13 of the scheme secured to all persons such estates, interest or right as they had before the confirmation of the scheme. The Board made a bye-law forbidding the erection on the common of any posts or poles, or any building of any kind. There was a public house adjoining the common, & near to it upon the common had stood for forty years a post bearing the sign of the public house. The signpost having been blown down, applt. the mtgee. of the public house, at the request of the occupier, erected a new one. Applt. was convicted under the bye-law of unlawfully erecting the new signpost:—*Held*: a signpost having stood for forty years, an easement had been gained in respect of the public house, & as an incident to the easement the right existed of repairing the signpost whenever it was broken, & the easement was a beneficial right preserved by Metropolitan Commons Act, 1866, s. 15, & paragraph 13 of the scheme relating to the common, & the conviction could not be upheld.—HOARE *v.* METROPOLITAN BOARD OF WORKS (1874), L. R. 9 Q. B. 296; 43 L. J. M. C. 65; 29 L. T. 804; 38 J. P. 535, D. C. *Annotation*:—*Refd.* Moody *v.* Steggles (1879), 12 Ch. D. 261.

1082. — Forbidding chasing game—Flying falcon after tame pigeon—Included.]—A bye-law relating to a common said, "No person shall shoot or chase game or other birds or animals on the common." M. carried a tame pigeon & a falcon, & let both off, & ran after them for half a mile watching the chase:—*Held*: this was an offence within the meaning of the bye-law.—HARPER *v.* MICHELL (1879), 44 J. P. 378, D. C.

1083. Enforcement of bye-law—Who may sue—Metropolitan Board of Works—Not Attorney-General—Construction of scheme.]—A.-G. *v.* AMHURST (1879), 23 Sol. Jo. 443.

Annotation:—*Refd.* Collis *v.* Amphlett (1917), 62 Sol. Jo. 37.

1084. — Jurisdiction of justices ousted—By bonâ fide claim of right.]—Applt. was summoned, under bye-laws made by the Conservators of B. Commons by virtue of Metropolitan Commons (Banstead) Supplemental Act, 1893, for cutting turf from & digging for loam upon B. Commons. It was proved upon behalf of applt. that he was authorised by the bailiff of the owners of the soil of the commons. In the year 1889, in the action of *Robertson v. Harlopp* (No. 580, *ante*), brought on behalf of all the tenants of the manor against the then lord of the manor & owner of the soil of the commons & his mtgees., judgment was given declaring that the cutting & digging by the defts. of the turf or loam in or upon the waste lands of the manor constituted an injury to the rights of common of pltfis. over the waste lands. The justices were of opinion that the claim of right of applt., though *bonâ fide*, was not reasonable, & they convicted applt.:—*Held*: (1) it was impossible, without inquiring into the circumstances as they existed at present, to say that the claim of the applt. was absurd & impossible in law, & the justices had no jurisdiction to hear such evidence; (2) as the claim was *bonâ fide*, the jurisdiction of the justices was ousted.—SCOTT *v.* BARING (1895), 64 L. J. M. C. 200; 72 L. T. 495; 11 T. L. R. 175; 18 Cox, C. C. 128; 15 R. 216, D. C.

1085. — By injunction.]—MITCHAM COMMON CONSERVATORS *v.* HARVEY (1910), 74 J. P. Jo. 137.

—OTHER CASES.

1086. Election of conservators—"Tenant or occupier"—Joint tenant—Though rates & taxes

Sect. 2.—Metropolitan commons: Sub-sect. 2. Sect. 3.]

paid by other joint tenant.]—By Wimbledon & Putney Commons Act, 1871, provisions were made for the election every three years of a body of conservators, themselves to be persons who were electors under the Act; & it was provided that any person who was tenant or occupier of a dwelling-house of the annual ratable value of £35 or upwards should be qualified as an elector. The Act empowered the conservators to make bye-laws. One of the bye-laws made by them provided that no person, not being an elector named & described in the list of voters, should vote at any election of conservators under the Act. A house within the limits of the Act was let to R. & his sister-in-law, as joint tenants, at an annual rent of £300. The house was occupied by both, but the rates & taxes were always paid by the lady, whose name alone appeared on the parish rate-books as ratepayer in respect of the house, R. contributing half the amount paid. The triennial meeting for the election of conservators was to be held, & in the list of electors, which was prepared by the overseers from the rate-books, the lady's name alone appeared in respect of the house in question. R. had been nominated as one of the candidates for election at the meeting, but the returning officer had refused to accept his nomination on the ground that his name was not upon the list of electors:—*Held*: (1) R. was a tenant or occupier of a dwelling-house within the meaning of the Act; (2) payment of rates was not required by the Act as a qualification as an elector, & R. was qualified as an elector, & eligible as a candidate for the office of conservator; (3) nothing done by the conservators could diminish R.'s right to vote as tenant or occupier unless a power to do so was conferred upon them by an Act of equal authority with the present Act; (4) if the bye-law had a contrary effect it was void & must be disregarded.—*PURVES v. WIMBLEDON & PUTNEY COMMONS CONSERVATORS* (1890), 62 L. T. 529.

1087. Power to inclose cricket ground temporarily—Permanent fence authorised—Subject to commoners' right of access at suitable times.]—*RATCLIFF v. JOWERS, BARNES COMMON CASE* (1891), 8 T. L. R. 6.

1088. Expenses of conservators—General district rate liable—Not poor rate.]—*R. v. BARNES, Ex p. RATCLIFF* (1896), 13 T. L. R. 25, D. C.

1089. Scheme—Conclusive as to extent of common—After confirmation.]—Where a scheme for the regulation of a common has been framed & confirmed under Metropolitan Commons Act, 1866 (c. 122), it is conclusive as to the limits & extent of the common. The owner of any land which is included in the plan embodied in the

scheme cannot, after the passing of the Act confirming the scheme, successfully assert his title thereto.—*COOK v. MITCHAM COMMON CONSERVATORS*, [1901] 1 Ch. 387; 70 L. J. Ch. 223; 83 L. T. 519; 49 W. R. 201; 17 T. L. R. 63.

Annotation:—*Distd. Collis v. Amphlett*, [1918] 1 Ch. 232.

1090. Common vested in London County Council—Expenses of paving new street abutting on common—London County Council not liable as "owners"—Metropolis Management Act, 1855 (c. 120), s. 250.]—By virtue of a scheme certified by the Inclosure Comrs. pursuant to Metropolitan Commons Act, 1886 (c. 122), & afterwards confirmed by Metropolitan Commons Supplemental Act, 1873 (c. 86), a common was vested in the Metropolitan Board of Works, whose successors are the London County Council, for the purpose of being dedicated to the public as a recreation ground. By the scheme it was provided that the common should be regulated & managed by the board, & that no house or other buildings should be erected on it, except such lodges or other buildings as might be necessary for the maintenance & management of the common or recreation ground. The county council derived small annual profits from the herbage on the common & from certain buildings erected thereon for purposes subsidiary to its use as a public recreation ground, but the expenses annually incurred by the county council in the management & regulation of the common far exceeded the amount of any profits so received by them. The W. Borough Council claimed from the London County Council as owners of the common, a sum of £319, as their proportion of the estimated expenses of paving a new street, on which the common abutted to the extent of 474 feet, under Act of 1855, s. 105, & the Act of 1862, s. 77:—*Held*: the London County Council were not owners of the common within the definition of the word "owner" contained in Metropolis Management Act, 1855, s. 250, & they were not liable to pay the amount claimed.—*LONDON COUNTY COUNCIL v. WANDSWORTH BOROUGH COUNCIL*, [1903] 1 K. B. 797; 72 L. J. K. B. 399; 88 L. T. 783; 67 J. P. 215; 51 W. R. 499; 19 T. L. R. 372; 47 Sol. Jo. 405; 1 L. G. R. 462, C. A.

Annotations:—*Refd.* Hackney Corpn. v. Leo Conservancy Board, [1904] 2 K. B. 541; Westminster Corpn. v. Johnson, Westminster Corpn. v. Fuller, [1904] 2 K. B. 737. *Mentd.* Herne Bay U. C. v. Payne & Wood, [1907] 2 K. B. 130.

SECT. 3.—PUBLIC RIGHTS OF RECREATION AND FOR OTHER PURPOSES.

See, generally, CUSTOM & USAGES; EASEMENTS & PROFITS À PRENDRE; OPEN SPACES & RECREATION GROUNDS.

COMMUTATION OF TITHES.

See ECCLESIASTICAL LAW.

COMPANIES.

Owing to its not being practicable to include cases relating to the above subject to any useful extent in this Volume, it has been arranged for the Title to commence in a separate Volume.

COMPENSATION.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION ; MASTER AND SERVANT.

COMPOSITION WITH CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

COMPOUNDING FELONY.

See CRIMINAL LAW AND PROCEDURE.

COMPROMISE.

See AGENCY ; BANKRUPTCY AND INSOLVENCY ; BARRISTERS ; CHARITIES ; COMPANIES ; HUSBAND AND WIFE ; INFANTS AND CHILDREN ; JUDGMENTS ; LUNATICS AND PERSONS OF UNSOUND MIND ; MISREPRESENTATION AND FRAUD ; MISTAKE ; PRACTICE AND PROCEDURE ; SOLICITORS.

COMPULSORY PILOTAGE.

See ADMIRALTY ; SHIPPING AND NAVIGATION.

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<i>Compensation under Public Health Acts</i>	FOOD AND DRUGS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.	<i>Land Purchase, generally</i>	„ SALE OF LAND.
		<i>Parliamentary Practice</i>	„ PARLIAMENT.
		<i>Tithes</i>	„ ECCLESIASTICAL LAW.

NOTE.—In this Title *Companies Clauses Consolidation Act, 1845 (c. 16), Land Clauses Consolidation Act, 1845 (c. 18), Lands Clauses Consolidation (Scotland) Act, 1845 (c. 19), Railway Clauses Consolidation Act, 1845 (c. 20), Railway Clauses Consolidation (Scotland) Act, 1845 (c. 38), Waterworks Clauses Act, 1847 (c. 17), Railway Companies Act, 1867 (c. 127), & Lands Clauses Consolidation Act, 1869 (c. 18), are referred to as Companies Act, 1845, Lands Act, 1845, Lands (Scotland) Act, 1845, Railways Act, 1845, Railways (Scotland) Act, 1845, Waterworks Act, 1847, Railways Act, 1867, & Lands Act, 1869, respectively.*

Part Compulsory Powers over Land.

SECT. 1.—GRANT OF POWERS BY PARLIAMENT.

See, generally, STATUTES.

1. **Permissive powers not obligatory.]**—(1) Acts of Parliament authorising cos. to make railways are now regarded as but enabling statutes, which give powers, but do not render compulsory or obligatory the exercise of those powers.

It was at one time supposed in England, as it seems to have been thought in Scotland, that permissive powers given by an Act of Parliament, to a co. were obligatory upon them. The cases, however, so deciding, have been reversed (LORD WENSLEYDALE).

(2) A co., after getting their Act, determined to abstain from executing the line which it sanctioned:—*Held*: they could not be compelled specifically to perform an agreement for the purchase of land which they had contracted to purchase for the purposes of the line, but which, as they had relinquished the undertaking, they no longer required.

Where the time limited for making the line had expired, & where consequently the powers of the co. under their Act had expired:—*Held*: (3) the co. could not be called upon to enter into an arbn. under a contract which had assumed them to be in full possession of their authority; (4) an action might lie for damages, though a bill could not be sustained for specific performance.—SCOTTISH NORTH-EASTERN RY. CO. v. STEWART (1859), 33 L. T. O. S. 307; 5 Jur. N. S. 607; 7 W. R. 458; 3 Macq. 382, II. L.

Annotations:—As to (1) *Reid*. R. v. G. W. Ry. (1893), 62 L. J. Q. B. 572; Darlaston L. B. v. L. & N. W. Ry., [1894] 2 Q. B. 694. *Generally, Consd.* Taylor v. Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356.

2. **Act of Parliament essential.—To confer compulsory powers.]**—DUNBALI v. WALTERS (1865), 35 Beav. 565; 12 L. T. 759; 55 E. R. 1016.

3. **On ground of general public good.]**—GRAY v. LIVERPOOL & BURY RY. CO. (1846), 9 Beav. 391; 4 Ry. & Can. Cas. 235; 7 L. T. O. S. 201; 10 Jur. 361; 50 E. R. 394, L. C.

4. — **Power of promoters to contract not to use powers.]**—Where the Legislature confers powers on any body, whether one which is seeking to make a profit for shareholders, or one acting solely for the public good, to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good; & a contract purporting to bind such a body & their successors not to use those powers is void.

Harbour trustees, constituted for the management & improvement of a public harbour by a special Act, which incorporated Lands (Scotland) Act, 1845, were empowered to take lands scheduled, which included that part of O.'s land having an unrestricted frontage to the harbour, for the undertaking. While the question of compensation to O. for his land was before the arbiter the trustees lodged a minute agreeing that the conveyance should restrict their use of the ground taken so as not to interfere with the access from the remaining property of O. to the harbour.

To this minute O. did not assent. The arbiter found £4,900 payable by the trustees as compensation for an unrestricted use, or £2,786 if it were competent for the trustees to bind themselves & their successors by the minute. O. raised an action for declarator of an absolute purchase & unrestricted right in the subject & for payment of the larger sum:—*Held*: (1) the trustees had power under their special Act, then or at any future time, to make erections on the piece of ground taken, which would effectually destroy the frontage of O.'s remaining property to the harbour; (2) it was not competent to the trustees to dispense with future exercise of their powers by themselves & their successors.

(3) If the trustees could bind themselves & their successors by the agreement, & that agreement would prevent O.'s land from being injuriously affected, O., by refusing his assent, could not get compensation for the injury he might have prevented (LORD BLACKBURN).—AYR HARBOUR TRUSTEES v. OSWALD (1883), 8 App. Cas. 623, II. L. *Annotations*:—As to (1) *Reid*. R. v. S. E. Ry. & Wiffin's Contract, [1907] 2 Ch. 366. As to (2) *Apld.* Croyke v. Hatfield Chase Corpn. (1896), 12 T. L. R. 383. *Distd.* West Derby Union Grdns. v. Metropolitan Life Assce. Soc., West Derby Union Grdns. v. Priestman (1896), 45 W. R. 90; Cale. Ry. v. Turcan, [1898] A. C. 256; Jordonson v. Sutton, Southcoates, & Drypool Gas Co. (1899), 68 L. J. Ch. 457. *Apld.* R. v. S. E. Ry. & Wiffin's Contract, [1907] 2 Ch. 366. *Distd.* Stourcliffe Estates Co. v. Bournemouth Corpn., [1910] 2 Ch. 12. *Reid*. Thames Conservators v. Southwark & Vauxhall Water Co. (1897), 13 T. L. R. 155; L. & N. W. Ry. v. Runcorn R. Co., [1898] 1 Ch. 34; G. W. Ry. v. Talbot, [1902] 2 Ch. 759. *Generally, Mentd.* Tiverton & North Devon Ry. v. Loosemore (1884), 9 App. Cas. 480.

5. — **Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf. Nor can any ct. remodel arrangements sanctioned, or relax conditions imposed, by Act of Parliament.**

It may be stated generally, that Parliament in passing a private Act looks to the public advantage & security, & also looks to the interference with private rights. Where a work of any kind has to be constructed, Parliament has made an elaborate set of provisions intended to secure to the public the advantages which the promoters propose as the reason for legislation, & as the consideration for the rights of the persons affected, or sought to be affected, by the intended legislation. In dealing with the latter class of questions it has been said that the particular provisions may rather be regarded as words of contract to which the Legislature has given its sanction than the words of the Legislature itself (LORD HALSBURY, C.).—HERRON v. RATHMINES & RATHGAR IMPROVEMENT COMRS., [1892] A. C. 498; 67 L. T. 658, H. L.

Annotations:—*Reid*. Fielden v. Morley Corpn. (1898), 14 T. L. R. 566; The Johannesburg, [1907] P. 65; A.-G. v. Frimley & Farnborough District Water Co., [1908] 1 Ch. 727; A.-G. v. Barnet District Gas & Water Co. (1909), 101 L. T. 651.

PART I. SECT. 1.

a. **Effect of expropriation.]**—Expropriation under statute is a compulsory sale, & the ordinary results of transfer of ownership follow as in the case of a voluntary sale.—GRIMBECK v. COLONIAL GOVERNMENT (1900), 17 S. C. 200.—S. AF.

b. **Rights of landowners — Whether**

payment of compensation essential.]—The Legislature has power to change the ownership of land with or without compensation.—*Re* McDOWELL & PALMERSTON TOWN CORPN. (1892), 22 O. R. 563.—CAN.

c. — **—.]**—Lands cannot be expropriated under statute without

payment of compensation.—SMART (PUBLIC WORKS COMR.) v. LOGAN (1903), 88 L. T. 779, P. C.—S. AF.

d. **Construction of Act granting powers—Whether retrospective—48 Vict. c. 23.]**—The above Act enabling the govt. to expropriate land for public purposes, is not retrospective.—

Sect. 1.—Grant of powers by Parliament. *Sects. 2 & 3. Part II. Sect. 1: Sub-sect. 1, A., B. & C.; sub-sect. 2.]*

6. Rights of landowners—In general.]—Acts of Parliament for making canals, railroads, etc., are powers given by Parliament over the land of the different proprietors through whose estates the works are to proceed. Each proprietor, therefore, has a right to have the power strictly & literally carried into effect as regards his own lands, & also a right to require that no variation shall be made to his prejudice. But where the Act of Parliament is faithfully carried into execution as regards his lands, he cannot, on the mere ground of a variation which is not injurious to himself, & which was made with the consent of others, obtain from a ct. of equity an injunction to stay the proceedings.—*LEE v. MILNER* (1837), 2 Y. & C. Ex. 611; 160 E. R. 540.

Annotations:—*Apprvd.* York & North Mid. Ry. v. R. (1853), 1 E. & B. 858. *Consd.* Ware v. Regent's Canal Co. (1858), 3 De G. & J. 212. *Refd.* Cohen v. Wilkinson (1849), 12 Beav. 138; Cardiff Corpn. v. Cardiff Waterworks Co. (1859), 33 L. T. O. S. 104.

—**Specific rights.]—***See* particular Parts, *passim*.

7. Jurisdiction of court—Over promoters—In general.]—Principles upon which the ct. will exercise its jurisdiction over bodies to whom Parliament has given powers of making compulsory purchases of land:—*Semble*: (1) the ct. will not allow such bodies to avail themselves of their Parliamentary powers by taking land which they do not require for a *bonâ fide* purpose sanctioned by their Act of Parliament; (2) although an attempt to obtain possession of land has been, in the first instance, made under colour of the powers of the Act of Parliament, when not really required for the *bonâ fide* purposes of the Act, yet if the land afterwards becomes really necessary or desirable for such *bonâ fide* purposes, the ct. will not interfere to prevent its being taken.

(3) Ambiguous words in an Act of Parliament, authorising a public co. to take land by compulsory process, are to be construed against the co. & in favour of private property.—*WEBB v. MANCHESTER & LEEDS RY. CO.* (1839), 4 My. & Cr. 116; 1 Ry. & Can. Cas. 576; 41 E. R. 46, L. C.

Annotations:—*As to* (1) *Consd.* Gray v. Liverpool & Bury Ry. (1846), 4 Ry. & Can. Cas. 235; *Dowling v. Pontypool Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714. *Refd.* Tawney v. Lynn & Ely Ry. (1847), 4 Ry. & Can. Cas. 615; *Bentlnck v. Norfolk Estuary Co.* (1856), 3 Jur. N. S. 204; *Simpson v. South Staffordshire Waterworks Co.* (1865), 6 New Rep. 184; *Lamb v. North London Ry.* (1869), 4 Ch. App. 522. *As to* (2) *Consd.* Stamps v. Birmingham, Wolverhampton, & Stour Valley Ry. (1848), 6 Ry. & Can. Cas. 123. *Refd.* Selby v. Colne Valley & Halstead Ry. (1862), 6 L. T. 709.

8. ———.]—The ct. in exercising its jurisdiction to prevent cos., entrusted by the Legislature with large powers, from acting in a manner prejudicial to the rights of individuals on the one hand, will, on the other, be careful not to assist persons in availing themselves of any omission in such powers, for the purpose of giving effect to exorbitant claims against the cos.—*BELL v. HULL & SELBY RY. CO.* (1840), 1 Ry. & Can. Cas. 616, L. C.; *subsequent proceedings*, 6 M. & W. 699.

Annotation:—*Consd.* Dowling v. Pontypool Caerleon & Newport Ry. (1874), L. R. 18 Eq. 714.

9. ——— Power of courts of equity to restrain exercise of compulsory powers.]—*KEMP v. LONDON & BRIGHTON RY. CO.* (1839), 1 Ry. & Can. Cas. 495; 3 Jur. 403.

KEARNEY v. DICKSON (1887), 20 N. S. R. 95 *reversd.* 14 S. C. R. 743.—**CAN.**

o. ——— When expropriation permissible—1 & 2 *Edw.* 7, c. 77.—Under the above Act arbitration proceedings to enforce the expropriation of land

cannot be taken unless the amount claimed by the landowner does not exceed \$1000, & then only in the manner provided by statute.—*DEVITT v. CITY OF WINNIPEG* (1906), 16 Man. L. R. 398.—**CAN.**

Annotation:—*Distd.* Northam Bridge & Roads Co. of Proprietors v. London & Southampton Ry. (1840), 1 Ry. & Can. Cas. 665.

—**Exercise of jurisdiction.]—***See* particular Parts, *passim*.

10. Duty of promoters—To prove existence of powers granted.]—*SIMPSON v. SOUTH STAFFORDSHIRE WATERWORKS CO.*, No. 26, *post*.

11. ——— To comply with letter of Act granting powers.]—*HERRON v. RATHMINES & RATHGAR IMPROVEMENT COMRS.*, No. 5, *ante*.

12. Construction of Act granting powers—Court cannot interfere so as to repeal part.]—*HARGREAVES v. LANCASTER & PRESTON JUNCTION RY. CO.* (1838), 1 Ry. & Can. Cas. 416.

13. ——— Ambiguous words—Construed against promoters—& in favour of private property.]—*WEBB v. MANCHESTER & LEEDS RY. CO.*, No. 7, *ante*.

14. ———.]—*SPARROW v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO.*, No. 561, *post*.

15. ——— Construction not strained in favour of promoters.]—*GRAY v. LIVERPOOL & BURY RY. CO.* (1846), 9 Beav. 391; 4 Ry. & Can. Cas. 235; 7 L. T. O. S. 201; 10 Jur. 364; 50 E. R. 394, L. C.

16. ——— Construed so as to protect landowners.]—*GROSVENOR (LORD) v. HAMPSTEAD JUNCTION RY. CO.*, No. 574, *post*.

17. ——— Words capable of two interpretations—Construed to make them consistent with general intent.]—*Re LONDON & BIRMINGHAM RAILWAY CO.'S ACT, 1833, Re LONDON & NORTH WESTERN RAILWAY CO.'S ACT, 1846, Ex p. ETON COLLEGE* (1850), 20 L. J. Ch. 1; 16 L. T. O. S. 121; 15 Jur. 45, L. C.

Annotations:—*Mentd.* L. & Y. Ry. v. Evans (1851), 15 Beav. 322; *Re Holden's Estate* (1855), 25 L. J. Ch. 382, n.; *Re Neachell's Trusts* (1855), 25 L. J. Ch. 382, n.; *Re Ellison's Estate* (1856), 3 De G. M. & G. 62.

18. ——— Construed strictly in reference to rights of promoters.]—*EVERSFIELD v. MID-SUSSEX RY. CO.*, No. 98, *post*.

—**As to conditions & restrictions attached to powers—In general.]—***See* Part II., *post*.

—**Incorporation of Lands Clauses Acts.]—***See* Part II., Sect. 1, sub-sect. 1, *post*.

Construction of Lands Clauses Acts.]—*See* Part II., Sect. 1, sub-sect. 2, *post*.

SECT. 2.—GRANT OF POWERS BY PROVISIONAL ORDER.

19. Order of Secretary of State—Invalid until confirmed—Certiorari.]—*R. v. HASTINGS LOCAL BOARD OF HEALTH* (1865), 6 B. & S. 401; 122 E. R. 1243; *sub nom.* *FREWEN v. HASTINGS LOCAL BOARD OF HEALTH*, 6 New Rep. 142; 34 L. J. Q. B. 159; 12 L. T. 346; 29 J. P. 711; 11 Jur. N. S. 670; 13 W. R. 678; *subsequent proceedings, sub nom.* *FREWEN v. HASTINGS LOCAL BOARD OF HEALTH* (1867), 16 L. T. 553.

20. Order of county council—Confirmed by Board of Agriculture & Fisheries—Under Small Holdings & Allotments Act, 1908 (c. 36), s. 39 (3)—Final.]—*Ex p. RINGER* (1909), 73 J. P. 436; 25 T. L. R. 718; 53 Sol. Jo. 745; 7 L. G. R. 1041.

Time of operation of.]—*See* Nos. 464, 477, *post*.

SECT. 3.—FOR PURPOSES OF DEFENCE OF THE REALM.

See CONSTITUTIONAL LAW.

PART I. SECT. 2.

191. Order of Governor in Council—Whether title of owner extinguished—New Zealand Settlement Act, 1863, s. 3.]—*KAPUA v. HAEMONA*, [1913] A. C. 761, P. C.—**N.Z.**

Part II.—Conditions attached to the Powers.

SECT. 1.—BY LANDS CLAUSES ACTS.

SUB-SECT. 1.—INCORPORATION OF ACTS.

A. Application to Special Acts before 1845 Act.

21. Application of incorporated Acts—Amendment of special Act by later Act.]—(1) In 1845 a landowner received, under an arbn., compensation for the land, & “in respect of damages which might be sustained by reason of making a railway” :—*Held*: he was not precluded from insisting on a further compensation for future unforeseen damages subsequently sustained.

(2) A railway Act was passed in 1844, under which certain lands were taken. Afterwards, in 1845, Lands Act, 1845, was passed, & in 1847 a second railway Act was passed extending the first :—*Held*: Lands Act, 1845, applied to the whole undertaking, became consolidated with the Acts of 1844 & 1847, & the owner of lands taken under the Act of 1844 became entitled to the benefit of its provisions.

(3) There is no equity arising from the provisions of Lands Act, 1845, s. 68, to restrain a party alleging himself to be injuriously affected from recovering compensation by an arbn. or a jury, in the manner thereby prescribed.

(4) In 1848 a landowner gave a railway co. notice for a jury to assess damages which he alleged he had suffered. In 1849 he made a claim for further subsequent damages, & in 1850 gave notice for an arbitrator to assess the whole damages :—*Held*: this was not irregular, & the first notice had not exhausted all the statutory powers.—*LANCASHIRE & YORKSHIRE RY. CO. v. EVANS* (1851), 15 Beav. 322; 51 E. R. 562; *subsequent proceedings, sub nom. EVANS v. LANCASHIRE & YORKSHIRE RY. CO.* (1853), 1 E. & B. 754. *Annotation* :—*As to* (3) *Consd. Todd v. Met. Dist. Ry.* (1871), 24 L. T. 435.

22. ———.]—*EVANS v. LANCASHIRE & YORKSHIRE RY. CO.* (1853), 1 E. & B. 754; 22 L. J. Q. B. 254; 21 L. T. O. S. 87; 17 Jur. 878; 1 C. L. R. 82; 118 E. R. 618.

Subsequent amalgamating Act—Effect on costs.]—*See* Part XII., Sect. 1, sub-sect. 1, B., *post*.

Terms of prior Act extended to later Act—Inconsistent with incorporated Act—Effect on costs.]—*See* Part XII., Sect. 1, sub-sect. 1, B., *post*.

B. Application to Special Acts after 1845 Act.

See Lands Act, 1845, ss. 1, 5.

No expressions of exclusion or variation in special Act—Effect on costs.]—*See* Part XII., Sect. 1, sub-sect. 1, B., *post*.

Saving as to express variation—Extent of exception—Right to have whole premises taken.]—*See* Part VI., Sect. 4, sub-sect. 1, *post*.

Persons entitled to compensation.]—*See* Part III., Sect. 1, sub-sect. 2, *post*.

Costs of arbitration.]—*See* Part VII., Sect. 5, sub-sect. 12, *post*.

Whether whole capital to be subscribed before compulsory powers put into force.]—*See* Part VI., Sect. 1, sub-sect. 1, *post*.

Where whole Act incorporated—Persons entitled to compensation.]—*See* Part III., Sect. 1, sub-sect. 2, *post*.

C. Application to Acts for Private Undertakings.

See Lands Act, 1845, ss. 1, 5.

23. Not implied—Private Act for erection of

hotel—Compensation for obstruction of ancient lights.]—*WALE v. WESTMINSTER PALACE HOTEL CO.* (1860), 8 C. B. N. S. 276; 2 L. T. 769; 7 Jur. N. S. 26; 9 W. R. 14; 141 E. R. 1172.

Annotation :—*Consd. Re Sion College, Ex p. London Corpn.* (1887), 57 L. T. 743.

24. ——— Taking land for private charity.]—A private charity incorporated by royal charter & having under a subsequent special Act power to take land compulsorily, is not an undertaking or work of a public nature within the meaning of Lands Act, 1845, s. 1, & therefore, in the absence of express provision, s. 80 of the latter Act, as to costs, is not incorporated with the charity's special Act.—*Re SION COLLEGE, Ex p. LONDON CORPN.* (1887), 57 L. T. 743; 3 T. L. R. 521, C. A.

SUB-SECT. 2.—CONSTRUCTION OF ACTS.

See Lands Act, 1845, ss. 2, 3.

25. General rule.]—Where the special Act of a railway co. incorporates Lands Act, 1845, but the general scope of the special Act shows the other to be clearly inapplicable to it, the public Act is to be considered as expressly varied by the special Act. It need not be varied in terms; but, if substantially inconsistent, it will be so regarded, & the provisions of the special Act will prevail.—*WELD v. SOUTH WESTERN RY. CO.* (1863), 32 Beav. 340; 1 New Rep. 415; 33 L. J. Ch. 142; 8 L. T. 13; 9 Jur. N. S. 510; 11 W. R. 448; 55 E. R. 133.

26. ———.]—(1) A waterworks co. were by their special Act, with which was incorporated Waterworks Act, 1847, authorised to make & maintain the reservoirs, aqueducts & other works therein described in the line & situation, & on the levels, & upon the lands delineated on the deposited plans & described in the books of reference & defined on the sections, & to enter upon, take, purchase & use such of the lands, etc. mentioned in the plans & books of reference as they might deem necessary for all or any of those purposes. The works authorised, so far as they related to a particular field which was situate within marked limits of deviation, were described as “an aqueduct, constructed in tunnel or otherwise, as shown on the original plans,” which plans indicated no surface works upon the field, but merely showed that it was intended to construct, at a depth of at least forty feet under same, an aqueduct in tunnel. After the special Act was passed, the co. served the owners of the field with a notice to treat for the purchase of it, with the view of sinking shafts in order to obtain an additional supply of water, & also of erecting thereon permanent pumping engines for raising water from beneath its surface. Upon a bill filed by the owners of the field against the co. for an injunction to restrain the co. from proceeding to summon a jury to assess the value of the field, & from using it for any other purpose than the construction of an aqueduct :—*Held*: the co. were not authorised to take or use the field permanently for any other purpose than that indicated upon the deposited plans.

(2) A public co. claiming statutory powers must prove clearly & distinctly from their Act of Parliament, the existence of those powers, & if there is any doubt as to their extent, that doubt must operate for the benefit of the landowner.—*SIMPSON*

Sect. 1.—By Lands Clauses Acts: Sub-sects. 2 & 3.]

v. SOUTH STAFFORDSHIRE WATERWORKS CO. (1865), 4 De G. J. & Sm. 679; 6 New Rep. 184; 34 L. J. Ch. 380; 12 L. T. 360; 11 Jur. N. S. 453; 13 W. R. 729; 46 E. R. 1082, L. C.

Annotations:—As to (1) Consd. Re Huddersfield Corp'n. & Jacomb (1874), L. R. 17 Eq. 476. As to (2) Refd. Morris v. Tottenham & Forest Gate Ry., [1892] 2 Ch. 47.

27. —.]—METROPOLITAN DISTRICT RY. CO. *v.* SHARPE, No. 817, *post*.

28. — Division into "headings."—(1) The headings of different portions of a statute are to be referred to, to determine the sense of any doubtful expression in a sect. ranged under any particular heading.

(2) Lands Act, 1845, & Railways Act, 1845, do not contain any provisions under which a person whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway co. in respect of damage or annoyance arising from vibration occasioned, without negligence, by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby.—HAMMERSMITH & CITY RY. CO. *v.* BRAND (1869), L. R. 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. 238; 34 J. P. 36; 18 W. R. 12, H. L.; *reusq.* S. C. *sub nom.* BRAND *v.* HAMMERSMITH & CITY RY. CO. (1867), L. R. 2 Q. B. 223, Ex. Ch.

Annotations:—As to (1) Consd. Fletcher v. Birkenhead Corp'n., [1907] 1 K. B. 205. Refd. Toronto Corp'n. v. Toronto Ry., Toronto Ry. v. Toronto Corp'n., [1907] A. C. 315. As to (2) Consd. Glasgow City Union Ry. v. Hunter (1870), L. R. 2 Sc. & Div. 78. Distd. R. v. Cambrian Ry. (1871), L. R. 6 Q. B. 422. Consd. Buccleuch v. Metropolitan Board of Works (1872), L. R. 5 H. L. 418. Distd. G. W. Ry. v. Smith (1876), 2 Ch. D. 235. Apld. Hopkins v. G. N. Ry. (1877), 2 Q. B. D. 224. Consd. Smith v. Mid. Ry. & L. & Y. Ry. (1877), 37 L. T. 224; Metropolitan Asylum District v. Hill (1881), 6 App. Cas. 193; Cale. Ry. v. Walker's Trustees (1882), 7 App. Cas. 259; Cowper Essex v. Acton L. B. (1889), 14 App. Cas. 153. Apld. A.-G. v. Met. Ry., [1894] 1 Q. B. 384. Distd. Long Eaton Recreation Grounds Co. v. Mid. Ry. (1901), 71 L. J. K. B. 74. Consd. Fletcher v. Birkenhead Corp'n., [1907] 1 K. B. 205. Refd. Smith v. L. & S. W. Ry. (1870), L. R. 6 C. P. 14; Clowes v. Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 129, n.; Jones v. Stanstead, Shefford & Chamblay Ry. (1872), L. R. 4 P. C. 98; Lea Conservancy Board v. Hertford Corp'n. (1884), 48 J. P. 628; North Shore Ry. v. Pion (1889), 14 App. Cas. 612; Dixon v. Metropolitan Board of Works, [1891] 7 Q. B. D. 418; Emsley v. N. E. Ry., [1896] 1 Ch. 418; Kirby v. Harrogate School Board, [1896] 1 Ch. 437; Jorleson v. Sutton, Southcoates & Drypool Gas Co., [1898] 2 Ch. 614; Canadian Pacific Ry. v. Parke, [1899] A. C. 535; Canadian Pacific Ry. v. Roy, [1902] A. C. 220; Dawson v. G. N. & City Ry., [1905] 1 K. B. 260; Horton v. Colwyn Bay & Colwyn U. C., [1908] 1 K. B. 327; West v. Bristol Tram. Co. (1908), 77 L. J. Q. B. 684; Board of Agriculture for Scotland v. Plummer, [1916] 1 A. C. 675. Generally, Mentd. R. v. L. G. Board & Taylor (1882), 52 L. J. M. C. 4; R. v. Sheward (1882), 9 Q. B. D. 741; L. & B. Ry. v. Truman (1885), 11 App. Cas. 45; Parkdale Corp'n. v. West (1887), 12 App. Cas. 602; Holliday v. Wakefield Corp'n., [1891] A. C. 81; Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co. (1894), 64 L. J. Ch. 216; Southwark & Vauxhall Water Co. v. Wandsworth Board of Works, [1898] 2 Ch. 603; Edinburgh Water Trustees v. Somerville (1906), 95 L. T. 217; Dibden v. Skirrow, [1907] 1 Ch. 437; Price's Patent Candle Co. v. L. C. C., [1908] 2 Ch. 526; R. v. Fulham Grdns. (1909), 7 L. G. R. 881; Grand Trunk Pacific Ry. v. Fort William Land Investment Co., [1912] A. C. 224; Coldman v. Hill, [1919] 1 K. B. 443; Quebec Ry., Light, Heat & Power Co. v. Vandry, [1920] A. C. 662.

29. (1) Lands Act, 1845, was divided into different subjects by headings, which were accompanied by corresponding words in the margin. Thus there was a division marked by the words "intersected lands" in the margin. In the body of the statute was a line containing these words as a heading, "With respect to small portions of intersected land, be it enacted, as follows." Then came two sects., the first of which, s. 93, began thus, "If any lands not being situate in a town, etc." The second sect., s. 94, began,

"If any such land shall be so cut through & divided":—*Held*: the word "such" in s. 94 was not confined to "lands not being situate in a town," as described in s. 93, but applied to the words in the general heading, "small portions of intersected land."

(2) An action was brought against a railway co. for not making a communication between small portions of intersected lands as required by s. 93. The co. pleaded & claimed the benefit of s. 94 & in the course of the plea averred that the lands were not situate in a town. This averment was found against the co.:—*Held*: it was an immaterial averment, & notwithstanding this finding, the co. was entitled to the benefit of s. 94.—EASTERN COUNTIES & LONDON & BLACKWALL RY. COS. *v.* MARRIAGE (1860), 9 H. L. Cas. 32; 31 L. J. Ex. 73; 3 L. T. 60; 7 Jur. N. S. 53; 8 W. R. 748; 11 E. R. 639, H. L.; *reusq.* S. C. *sub nom.* MARRIAGE *v.* EASTERN COUNTIES RY. CO. & LONDON & BLACKWALL RY. CO. (1857), 2 H. & N. 625, Ex. Ch.

Annotations:—As to (1) Refd. Hammersmith, etc. Ry. v. Brand (1869), L. R. 4 H. L. 171. Generally, Mentd. Shiel v. Sunderland Corp'n. (1861), 6 H. & N. 796; Tetley v. Wanless (1866), L. R. 2 Exch. 21; Latham v. Lafone (1867), L. R. 2 Exch. 115; Wilson v. Halifax Corp'n. (1868), L. R. 3 Exch. 114; Union S.S. Co. of New Zealand v. Melbourne Harbour Trust Comrs. (1884), 9 App. Cas. 365; Arrow Shipping Co. v. Tyne Improvement Comrs., The Crystal, [1894] A. C. 508.

30. "Lands"—Easement—Right to tunnel—No justification for entering on land before compensation paid.]—RAMSDEN *v.* MANCHESTER, SOUTH JUNCTION & ALTRINCHAM RY. CO. (1848), 1 Exch. 723; 5 Ry. & Can. Cas. 552; 10 L. T. O. S. 464; 12 Jur. 293; 154 E. R. 307.

Annotations:—Apld. South v. East London Ry. (1874), 22 W. R. 568. Refd. Pinchin v. London & Blackwall Ry. (1854), 1 K. & J. 34; Re Met. Dist. Ry. & Cosh (1880), 13 Ch. D. 607. Mentd. Reddie v. N. W. Ry., Hobbit v. N. W. Ry. (1849), 13 Jur. 659; Abraham v. G. N. Ry. (1851), 20 L. J. Q. B. 322.

—.]—FALKNER *v.* SOMERSET & DORSET RY. CO., No. 586, *post*.

32. ——— Justification for entering on land upon deposit of value of easement.]—HILL *v.* MIDLAND RY. CO. (1882), 21 Ch. D. 143; 51 L. J. Ch. 774; 47 L. T. 225; 30 W. R. 774.

Annotation:—Consd. G. W. Ry. v. Swindon & Cheltenham Ry. (1884), 9 App. Cas. 787.

33. ——— Right to erect railway bridge.]—PINCHIN *v.* LONDON & BLACKWALL RY. CO., No. 601, *post*.

34. ——— Right of access from river to wharf—Thames Embankment Act, 1862 (c. 93).]—MACEY *v.* METROPOLITAN BOARD OF WORKS, No. 273, *post*.

35. ——— Interference with ancient lights.]—CLARK *v.* LONDON SCHOOL BOARD, No. 233, *post*.

36. ———.]—By a special Act the S. Co. were authorised to make a railway & to carry it across the railway of the G. Co., at one point by a bridge over & at another by an archway under that railway, the archway to remain the property of the G. Co. S. 8 of the Act, which was inserted at the instance of the G. Co. for their protection, provided that the S. Co. should not purchase & take any land of the G. Co. which the S. Co. were authorised to use, enter upon or interfere with, but that the S. Co. might purchase & take, & the G. Co. should sell & grant accordingly, an easement or right of using same in perpetuity for the purposes of the Act; & s. 9 of the Act provided that if any dispute should arise respecting the matters aforesaid it should be settled by an arbitrator to be appointed under the Act. Lands Act, 1845, except where expressly varied by the special Act, was incorporated therewith, & it was enacted that the words & expressions to which

meanings were assigned by Lands Act should have the same respective meanings unless there was something in the subject or context repugnant to such construction. The S. Co. gave the G. Co. a notice to treat for the purchase of an easement or right in or over lands of the G. Co. for the purposes of the crossings, & shortly afterwards a notice of their desire to enter upon & use the lands for those purposes, & of their intention to apply to the Board of Trade to appoint a surveyor to determine the value of such easement or right. The valuation was made, & the S. Co. deposited the amount & entered into a bond under Lands Act, 1845, s. 85. The G. Co. having brought an action for an injunction to restrain the S. Co. from entering or continuing upon the lands mentioned in the notice to treat, or from putting in force any of the powers of the special Act or of Lands Act in relation to the compulsory purchase of land, on the ground that the capital of the S. Co. had not been duly subscribed as required by Lands Act, 1845, s. 16:—*Held*: (1) the S. Co. could not be restrained on that ground.

(2) The assertion of the rights conferred by s. 8 of the special Act was not a "putting in force of the powers of Lands Act, 1845, or of the special Act in relation to the compulsory taking of land"; (3) even if the perpetual easements created by s. 8 of the special Act would constitute "land" within Lands Act, 1845, s. 16, yet the case had been taken out of the compulsory powers of Lands Act by s. 8 of the special Act (*LORD FITZGERALD*).—*GREAT WESTERN RY. CO. v. SWINDON & CHELTENHAM RY. CO.* (1884), 9 App. Cas. 787; 53 L. J. Ch. 1075; 51 L. T. 798; 48 J. P. 821; 32 W. R. 957, H. L.

Annotations:—*As to* (1) *Reid. M. S. & L. Ry. v. Sheffield & South Yorkshire Navigation Co.* (1890), 6 T. L. R. 414. *As to* (3) *Consd. Re C. & S. L. Ry. & St. Mary Woolnoth & St. Mary Woolchurch Haw*, [1903] 2 K. B. 728. *Reid. Re Gerard & Beecham's Contract*, [1894] 3 Ch. 295. *Generally, Consd. Charlton v. Rolleston* (1884), 28 Ch. D. 237. *Reid. Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299.

37. — "Lands situate in a town"—*Intersected lands*.]—*EASTERN COUNTIES & LONDON & BLACKWALL RY. COS. v. MARRIAGE*, No. 29, *ante*.

38. — *Ferry*.]—*R. v. CAMBRIAN RY. CO.*, No. 310, *post*.

39. — *Mines and Minerals*.]—(1) A railway co., having the usual power to purchase lands under its special Act, has, by virtue of Lands Act, 1845, s. 6, power also to purchase the minerals under those lands compulsorily at any time before the expiration of the time limited for the exercise of its compulsory powers, if it should deem it advisable. That power is not taken away by Railways Act, 1845, ss. 77 *et seq.*, which are for the benefit not of the mine owner but of the co., & only exempt the co. from the obligation of buying the minerals at once together with the surface lands.

(2) The words "expressly purchased" in s. 77 are not to be confined to "purchased by agreement."

(3) There is no distinction between the severance of ownership vertically, that is, of the surface lands from the mines beneath, & the severance of ownership laterally by the taking by successive purchases of surface lands from the same landowner. So a railway co. having already acquired surface lands may subsequently purchase compulsorily the minerals under those lands.

(4) The opinion of the co.'s engineer, if *bonded*, is the only evidence required by the ct. as to the necessity or propriety of any purchase, & the burden of proving want of *bona fides* rests upon the

party opposing the purchase.—*ERRINGTON v. METROPOLITAN DISTRICT RY. CO.* (1882), 19 Ch. D. 559; 51 L. J. Ch. 305; 46 L. T. 443; 30 W. R. 663, C. A.

Annotations:—*As to* (1) *Consd. Mid. Ry. & Kettering, Thrapston & Huntingdon Ry. v. Robinson* (1889), 15 App. Cas. 19. *Reid. G. N. Ry. v. L. R. Comrs.*, [1901] 1 K. B. 416; *G. W. Ry. v. Blades*, [1901] 2 Ch. 624; *N. E. Ry. v. Reckitt* (1913), 109 L. T. 327. *As to* (4) *Reid. Wilkinson v. Hull, Barnsley & West Riding Junction Ry. & Dock Co.* (1882), 46 L. T. 455; *Lewis v. Weston-super-Mare L. B. of Health* (1888), 59 L. T. 769. *Generally, Consd. Ruabon Brick & Terra Cotta Co. v. G. W. Ry.*, [1893] 1 Ch. 427. *Reid. Mid. Ry. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552; *Pountney v. Clayton* (1883), 11 Q. B. D. 820.

—]—*See, also*, Part IV., Sect. 1, subsect. 1, *post*.

Particular interests in land.]—*See* Part XIII., *post*.

"Taken"—*Lands Act, 1845, s. 68*.]—*See* Part IX., Sect. 1, *post*.

"Street."—*See* HIGHWAYS, STREETS & BRIDGES.

Construction of specific sections of Lands Clauses Acts.]—*See* particular Parts, *passim*.

SUB-SECT. 3.—LIABILITY FOR POOR RATE.

See Lands Act, 1845, s. 133.

40. *Includes liability for borough & county rates*.]—*FARMER v. LONDON & NORTH WESTERN RY. CO.* (1888), 20 Q. B. D. 788; 59 L. T. 542; 36 W. R. 590, D. C.

Annotations:—*Distd. Islington B. C. v. London School Board*, [1903] 2 K. B. 354. *Reid. London Corp'n. v. Associated Newspapers*, [1915] A. C. 674. *Mentd. Jonas v. St. Dunstan Overseers* (1906), 95 L. T. 787.

41. —]—*PALMER v. LONDON & NORTH WESTERN RY. CO.* (1888), 4 T. L. R. 447, D. C.

42. — *London Government Act, 1899* (c. 14).]—By Lands Act, 1845, s. 133, promoters of undertakings to whom the Act applies, who become possessed of lands liable to be assessed to the poor rate, are to make good the deficiency in that rate caused by their taking or using the lands for the purposes of their works until their works are completed & assessed to the poor rate. By London Government Act, 1899, s. 10 (2), the general rate & the poor rate are to be assessed, made & levied together by the borough council as one rate, termed the general rate, which is to be assessed, made, collected & levied as if it were the poor rate & all enactments referring to the poor rate are, subject to the provisions of the Act as to audit, to be construed as referring also to the general rate:—*Held*: promoters who in the exercise of their statutory powers had compulsorily taken land in London since the coming into operation of the Act of 1899, were only liable to make good the deficiency in so much of the general rate as represented the poor rate or any thing chargeable on that rate, & were not liable to make good the whole of the deficiency in the general rate.—*ISLINGTON BOROUGH COUNCIL v. LONDON SCHOOL BOARD*, [1903] 2 K. B. 354; 72 L. J. K. B. 677; 89 L. T. 53; 68 J. P. 35; 52 W. R. 115; 19 T. L. R. 589; 47 Sol. Jo. 749; 1 L. G. R. 704; *Ryde & K. Rat. App.* 293, C. A.

Annotations:—*Reid. London Corp'n. v. Associated Newspapers*, [1915] A. C. 674. *Mentd. Jonas v. St. Dunstan Overseers* (1906), 95 L. T. 787.

43. *Promoters not to be rated as occupiers—No liability for other rates which follow poor rate*.]—*LONDON CORPN. v. ST. ANDREW, HOLBORN* (1867), L. R. 2 C. P. 574; 36 L. J. M. C. 95; 16 L. T. 665; 15 W. R. 928.

Annotations:—*Apld. Wheeler v. Metropolitan Board of Works* (1869), L. R. 4 Exch. 303. *Folld. L. B. & S. C. Ry.*

Sect. 1.—By Lands Clauses Acts: Sub-sect. 3. Sect. 2: Sub-sect. 1.]

& East London Ry. v. Stepney Union (1871), Ryde, Rat. App. (1871-85) 48. **Consd.** Bristol Grdns. v. Bristol Corpn. (1887), 18 Q. B. D. 549.

44. Meaning of "promoters"—Metropolitan Board of Works—Lands Act, 1845, s. 133 applies—When beneficial occupation of completed works possible.]—WHEELER v. METROPOLITAN BOARD OF WORKS (1869), L. R. 4 Exch. 303; 38 L. J. Ex. 165; 20 L. T. 984.

Annotations:—Distd. Stratton v. Metropolitan Board of Works (1874), L. R. 10 C. P. 76. **Refd.** Bristol Grdns. v. Bristol Corpn. (1887), 18 Q. B. D. 549.

45. Deficiency in poor rate until completion of works.]—LONDON, BRIGHTON & SOUTH COAST RY. CO. & EAST LONDON RY. CO. v. STEPNEY UNION (1871), Ryde, Rat. App. (1871-85), 48.

46. —.]—EAST LONDON WATERWORKS CO. v. EDMONTON UNION (1904), Ryde & K. Rat. App. 120.

47. —.]—R. v. METROPOLITAN DISTRICT RY. CO. (1871), L. R. 6 Q. B. 698; 40 L. J. M. C. 113; 35 J. P. 613.

Annotation:—Overd. East London Ry. v. Whitechurch (1874), L. R. 7 H. L. 81.

48. — Completion of part of works.]—East London Ry. Act, 1865, authorised the making of several small railways, & the taking possession of lands for that purpose. Each of these railways passed through more than one parish. By s. 128 it was provided that "if & while the co. are possessed under this Act of any lands assessed or liable to be assessed, to any sewers rate, consolidated rate, poor rate, police rate, main drainage rate, church rate or other parochial or ward rate, they shall, from time to time, until the railway or the works thereof are completed & assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates, by reason of those lands being taken or used for the purposes of the railway or works; & the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated." A portion of one of these railways was completely constructed in one parish, & was worked there. Till its completion there, the directors had paid in that parish the deficiency rate as provided in this clause. On its completion there, they claimed that they should be relieved from the deficiency rate:—**Held:** the rate was properly a parochial rate, & on the completion of that portion of the railway in that parish, the title of the parish officers to claim the deficiency rate there had ceased.—EAST LONDON RY. CO. v. WHITECHURCH (1874), L. R. 7 H. L. 81; 43 L. J. M. C. 159; 30 L. T. 412; 38 J. P. 484; 22 W. R. 665; Ryde, Rat. App. (1871-85) 98; H. L.; *reusg.* S. C. *sub nom.* WHITECHURCH v. EAST LONDON RY. CO. (1872), L. R. 7 Exch. 424, Ex. Ch.

Annotations:—Mentd. A.-G. v. Barnet District Gas & Water Co. (1909), 101 L. T. 651; A.-G. v. Leicester Corpn. (1910), 80 L. J. Ch. 21.

49. — — — Arrears of deficiency.]—STRATTON v. METROPOLITAN BOARD OF WORKS

(1874), L. R. 10 C. P. 76; 44 L. J. M. C. 33; 31 L. T. 689; 39 J. P. 167; 23 W. R. 447.

Annotations:—Consd. Bristol Grdns. v. Bristol Corpn. (1887), 18 Q. B. D. 549; Putney Overseers v. L. & S. W. Ry., [1891] 1 Q. B. 440.

50. — Separate undertakings.] —(1) By Lands Act, 1845, s. 133, the promoters of undertakings who become possessed under statutory authority of lands liable to be assessed to the poor rate, are liable to make good the deficiency caused thereby "until the works shall be completed & assessed to the poor rate." An urban sanitary authority, acting under statutory authority, took for the purposes of improvements lands situate in a number of parishes & liable to be assessed to the poor rate. In some cases all the land so taken was used in the construction of the roadways of new streets, but in some cases more land was taken than was required for that purpose, so that the sanitary authority became possessed of surplus land which was vacant, unoccupied & unassessed. Such land was to be disposed of either by sale in fee simple or by the creation of rent-charges which were to be sold within a specified time, which had not expired when the rating authority brought an action to recover from the sanitary authority the amount of the deficiency in the assessment to the poor rate caused by the lands having been taken:—**Held:** (1) the works were completed within the above Act, s. 133, so as to relieve the undertakers from the liability to make good the deficiency so caused, when the streets were fully made, & such of the lands taken as might be liable to assessment had become assessable; (2) the deficiency was to be computed from time to time by comparing the assessed value at the time of the special Act of the lands taken with the assessed value at the time of computation of such of the lands taken as might have again become assessable.

(2) The authority to put in force the compulsory powers of Lands Clauses Consolidation Acts was conferred by a provisional order confirmed by a statute which described in one schedule, but under headings separately numbered, the several improvement schemes promoted by the sanitary authority:—**Held:** each scheme described in the schedule constituted a separate undertaking, & the deficiency in the assessment ought to be calculated on each separate undertaking within the rating area affected by it.—BRISTOL GUARDIANS v. BRISTOL CORPN. (1887), 18 Q. B. D. 549; 56 L. J. Q. B. 320; 56 L. T. 641; 51 J. P. 676; 35 W. R. 619; 3 T. L. R. 446, C. A.

Annotation:—Refd. Putney Overseers v. L. & S. W. Ry. (1890), 60 L. J. Q. B. 18.

51. When deficiency ascertained—Part of land unoccupied.]—The promoters of a railway co. purchased houses beyond the limits of deviation from the line of the railway, in order to obtain the withdrawal of the opposition of the owners of such houses to the passing of the special Act. Some of the houses were unoccupied when acquired by the promoters:—**Held:** (1) as the promoters could only hold land under the powers given them by

PART II. SECT. 1, SUB-SECT. 3.

45 i. Deficiency in poor rate—Until completion of work—How deficiency computed.]—In regard to lands taken by a ry. co. under powers in a special Act subsequent to that by which they were incorporated, the works are not completed until the lands by conversion have become part of the undertaking, & as such liable to assessment; & the deficiency in assessment for poor-rates is to be computed according to the rental at which such lands & buildings

thereon were valued at the time of passing of the special Act, under deduction of the value of those portions converted to the purposes of the undertaking, & also of those on which the buildings were still standing.—HALL (COLLECTOR OF POOR RATES FOR CITY PARISH OF GLASGOW) v. NORTH BRITISH RY. CO. (1883), 10 R. (Ct. of Sess.) 857; 20 Sc. L. R. 545.—SCOT.

45 ii. — Over portion of land taken but not over whole.]—In a claim for deficiency in assessments for poor-

rates against a ry. co. by reason of lands having been taken for the ry.'s undertaking:—**Held:** (1) all lands taken must be considered in order to ascertain whether or not any deficiency actually existed; (2) where the assessment for all lands showed no deficiency no claim could be made against the co. although portions of the land were deficient.—HALL v. CITY OF GLASGOW UNION RY. CO. (1881), 8 R. (Ct. of Sess.) 687; 18 Sc. L. R. 433.—SCOT.

statute, they could not be heard to say that they had become possessed of the houses otherwise than by virtue of their Acts, & they were liable to make good the deficiency in the assessments for poor rate; (2) as Lands Act, 1845, s. 133, directed that the deficiency should be computed according to the rental at which the houses were valued or rated at the time of the passing of the special Act, the fact that some of them were then unoccupied was immaterial in estimating the amount of the deficiency.—**PUTNEY OVERSEERS v. LONDON & SOUTH WESTERN RY. CO.**, [1891] 1 Q. B. 440; 60 L. J. Q. B. 438; 64 L. T. 280; 55 J. P. 422; 39 W. R. 291; 7 T. L. R. 271, C. A.

Annotations:—**Consd.** *St. Leonard, Shoreditch Vestry v. L. C. C.*, [1895] 2 Q. B. 104. **Mentd.** *Winstanley v. North Manchester Overseers* (1909), 74 J. P. 49; *Roberts v. Poplar Asmt. Com.* (1921), 85 J. P. 239.

52. — Rates compounded under Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 3.—The owners of houses on land taken by the promoters of an undertaking for the purpose of their works had made agreements under s. 3 of the above Act with the rating authority of the district to pay the rates instead of the occupiers, subject to being allowed a deduction of 25 per cent. from the amount of such rates, & those agreements were in force when the promoters took the land:—**Held**: on the true construction of Lands Act, 1845, s. 133, the deficiency which the promoters were liable to make good must be computed having regard to the ratable value at the time the special Act was passed, & they were not entitled to claim the deduction of 25 per cent. from the amount of the rates levied according to that value.—**ST. LEONARD, SHOREDITCH VESTRY v. LONDON COUNTY COUNCIL**, [1895] 2 Q. B. 104; 64 L. J. Q. B. 615; 72 L. T. 802; 59 J. P. 423; 43 W. R. 598; 11 T. L. R. 420; 39 Sol. Jo. 539; 15 R. 516, D. C.

SECT. 2.—BY ACTS OTHER THAN LANDS CLAUSES ACTS.

SUB-SECT. 1.—CONSTRUCTION AND APPLICATION OF ACTS.

Application of clauses in former Act to later Act—Effect on reinvestment of purchase-money & costs thereof.—*See* Parts XI., XII., *post*.

53. Powers not to be implied when not expressly given in special Acts—Sale & purchase of land by

railway companies.—**R. v. SOUTH WALES RY. CO.** (1850), 14 Q. B. 902; 6 Ry. & Can. Cas. 489; 19 L. J. Q. B. 272; 14 L. T. O. S. 546; 14 Jur. 828; 117 E. R. 346.

54. “Any proprietor” empowered to make “any railways or roads”—Persons becoming proprietors subsequent to passing of Act or making of railroad included.—**BISHOP v. NORTH** (1843), 11 M. & W. 418; 3 Ry. & Can. Cas. 459; 12 L. J. Ex. 362; 1 L. T. O. S. 110; 8 J. P. 171; 152 E. R. 867.

Annotations:—**Mentd.** *Sidebottom v. Bostock* (1853), 16 Jur. 1013; *A.-G. v. Cambridge Consumers Gas Co.* (1868), L. R. 6 Eq. 282.

55. “Land abutting on”—South Eastern Railway Act, 1899.—Powers having been granted to a railway co. by a special Act to acquire for the purpose of extending their station, siding & other accommodation, & for other purposes connected with their undertaking, the lands in the Act mentioned, it was provided by s. 20 of the above Act, that if the co. should acquire any land which should abut upon any part of a certain road they should forthwith widen the road. Pursuant to the powers contained in the Act the railway co. acquired land separated from the road by a small stream, & certain bridges had been thrown across the stream connecting the land acquired by the railway co. with the road:—**Held**: the ct. was bound to attach to the word “abut” the only meaning which could give real effect to the intention of the parties, & the existence of the bridges connecting the railway co.’s land with ptfs.’ road was sufficient to satisfy the use of the word “abut.”—**R. (ON PROSECUTION OF LEWISHAM BOROUGH COUNCIL) v. SOUTH EASTERN RY. CO.** (1910), 74 J. P. 137; 54 Sol. Jo. 233; 8 L. G. R. 401, C. A.

56. Provisions as to land acquired under compulsory powers—Not applicable to land acquired by agreement.—**GREAT CENTRAL RY. CO. v. BALBY-WITH-HEXTHORPE URBAN COUNCIL, A.-G. v. GREAT CENTRAL RY. CO.**, [1912] 2 Ch. 110; 81 L. J. Ch. 596; 106 L. T. 413; 76 J. P. 205; 28 T. L. R. 268; 56 Sol. Jo. 343; 10 L. G. R. 687. *Annotation*:—**Mentd.** *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

57. Power to take same land given to separate parties — Restraint of exercise of powers.—**LANCASTER & CARLISLE RY. CO. v. MARYPORT & CARLISLE RY. CO.** (1846), 4 Ry. & Can. Cas. 504.

58. — — — — ——**MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. GREAT NORTHERN RY. CO.** (1851), 9 Hare, 284; 68 E. R. 511.

PART II. SECT. 2, SUB-SECT. 1.

i. Application of clauses in later Act to former Act—Whether claim for compensation extinguished.—A claim for compensation arising prior to Public Works Act, 1876, is not extinguished by Public Works Act Amendment Act, 1880, sect. 13; at all events, when the action has been begun before the passing of the latter Act.—**WILKIN’S CLAIM** (1881), 1 N. Z. L. R. 4.—**N.Z.**

g. Application of clauses in particular Acts to a general law providing for arbitration—Power to waive.—It is not competent for govt. in the interests of the general public to waive the provisions of statutes specially applicable, & to agree to arbitration, under the general law when the terms are less favourable to the proprietors.—**REYNOLDS BROTHERS v. NATAL GOVERNMENT** (1910), 31 N. L. R. 359.—**S. AF.**

53 i. Whether powers to be implied when not expressly given.—Statutes which encroach upon the rights of the subject in respect of his private property, or which enable public corpora-

tions to take his property without his consent, must be construed with the greatest strictness.—**SMITH v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE** (1905), 15 Man. L. R. 249; 1 W. L. R. 237.—**CAN.**

h. — — — — — Power to take land formerly expropriated by another company.—Mere general words enabling a co. compulsorily to acquire will not enable it to take property formerly acquired in the same way by another co., if its use would seriously interfere with user by the earlier co.—**DOMINION LUMBER CO. v. HALIFAX POWER CO.** (1915), 48 N. S. R. 364.—**CAN.**

j. — — — — ——A ry. co. in the absence of express terms by their special Act, cannot acquire compulsorily lands vested in, & in use by, an earlier ry. co. though the land lie within the “limits of deviation” shown by their plans.—**DUBLIN & DROGHEDA RY. CO. v. NAVAN & KINGSCOURT RY. CO.** (1871), 5 I. R. Eq. 393.

k. — — — — — Sale & purchase of land by railway companies—Cape of Good

Hope Act IX. 1858, s. 11.—An intention to take away property without compensation should not be imputed to a Legislature unless it be expressed in unequivocal terms.—**PUBLIC WORKS COMR. (CAPE COLONY) v. LOGAN**, [1903] A. C. 355, P. C.—**S. AF.**

l. — — — — — Effect of Transvaal Mines & Works Regulation No. 2 of 1909.—A resolution of the Volksraad expropriating land for the benefit of a railway co. must be construed strictly; & in the absence of express words, will not affect the mining rights under such land.—**SOUTH AFRICAN RAILWAYS & HARBOURS MINISTER v. SIMMER & JACK PROPRIETARY MINES, LTD.** (1918), 87 L. J. P. C. 117.—**S. AF.**

m. Provisions as to land acquired under compulsory powers—Public Works Act, 1882, s. 20.—Above sect., so far as it authorises the taking of land, will receive as wide a construction as is consistent with the language used.—**KITCHENER v. WAIHEMO COUNTY COUNCIL** (1884), 3 N. Z. L. R. 116.—**N.Z.**

Sect. 2.—By Acts other than Lands Clauses Acts: Sub-sects. 1 & 2. Sect. 3: Sub-sect. 1.]

59. — Effect given to later Act.]—REGENT'S CANAL CITY & DOCKS CO. v. LONDON SCHOOL BOARD, [1885] W. N. 4.

SUB-SECT. 2.—LIABILITY FOR RATES.

See Lands Act, 1845, s. 133.

60. Until works completed—"General purposes rate"—London & South Western Railway Act, 1883—All rates made for general purposes.]—BURRUP v. LONDON & SOUTH WESTERN RY. CO. (1890), 64 L. T. 112, D. C.

61. — "Whether lands & buildings occupied or vacant"—"Sewer & other rates & contributions"—Buildings pulled down before land acquired—Great Northern & City Railway Act, 1892.]—By s. 69 of the above Act it was enacted: "The co. shall in respect of all lands & buildings acquired by them under the powers of this Act be liable to & pay all the consolidated sewer & other rates & contributions leviable in respect of such lands & buildings as if the co. were assessed in respect of such lands & buildings in the valuation list in force for the parish or place within which such lands & buildings are situate at the time the co. acquire such lands & buildings, whether such lands & buildings be occupied or vacant, & shall continue liable to & pay all such consolidated sewer & other rates & contributions until the undertaking shall be completed & assessed or liable to be assessed to the before-mentioned rates & contributions, or until such of the lands & buildings as may not be required for the purposes of the undertaking shall have been otherwise duly assessed or liable to be assessed & become liable to the before-mentioned rates & contributions." The railway co. acquired certain land under the above Act upon which buildings formerly existed but had been pulled down before the railway co. had acquired any interest in the land:—*Held*: the railway co. were not liable to be rated in respect of these buildings under the above sect.—ST. STEPHEN (CHURCHWARDENS) v. GREAT NORTHERN & CITY RY. CO. (1902), 86 L. T. 390; 66 J. P. 373; 50 W. R. 395; 18 T. L. R. 350, D. C.

PART II. SECT. 3, SUB-SECT. 1.

n. Adherence to plans—Compensation limited to filed plans.]—Defts. complained that possession of lands not covered by the plan & description filed had been taken & claimed compensation:—*Held*: the right to compensation must be limited to lands mentioned in the plan & description filed, & to the injurious affection of other lands held therewith.—R. v. HARRIS (1901), 7 Exch. C. R. 277; 22 C. L. T. 83.—CAN.

o. — Whether necessary if purposes of special Act observed.]—Prior to a Provisional Orders' Confirmation Act, empowering defts. to acquire compulsorily lands, for the purposes of their special Act, plans were deposited; the Act did not contain any provision requiring defts. to carry out the work according to the plans:—*Held*: whilst observing such purposes, defts. were not bound to adhere to the deposited plans.—BRADSHAW & FALCONER v. BRAY URBAN DISTRICT COUNCIL, [1907] 1 I. R. 152; 41 I. L. T. 1.—IR.

p. —.]—The bed of a river is not included in a Proclamation taking the land on both sides of it for a public work where the plan & the evidence unmistakably show that it was not intended to be included.—TUA HOTENE

v. MORRINSVILLE TOWN BOARD, [1917] 36 N. Z. L. R. 936.—N.Z.

q. What plans must contain.]—The plans filed must show exactly what portion of the land of each separate owner the ry. co. requires: mere indication of the centre line of the proposed ry. is not sufficient.—MARSAN v. GRAND TRUNK PACIFIC RY. CO. (1909), 2 Alta. L. R. 43; 10 W. L. R. 465; 9 Can. Ry. Cas. 341.—CAN.

r. — Absence of boundary line.]—A plot was marked on the deposited plan as bounded only on 3 sides, the lines marked on 2 of the sides ending abruptly, leaving the 4th side open:—*Held*: the plot was not delineated.—COATS v. CALEDONIAN RY. CO. (1905), 6 F. (Ct. of Sess.) 1042.—SCOT.

s. — Compliance with Railways (Ireland) Act, 1851, s. 4.]—A corpn. was empowered by an Act, which incorporated the above Act, to acquire compulsorily lands. They made out, & deposited as prescribed by the Act a schedule in which a single sum representing the aggregate annual value of several units was set out, also a single sum representing the aggregate value of the fee of such units:—*Held*: the schedule sufficiently complied with the provisions of the Act.—R. (MONTGOMERY) v. BELFAST CORPN., [1915] 2 I. R. 45.—IR.

SECT. 3.—RESTRICTIONS AS TO LAND TO BE TAKEN AND WORKS TO BE EXECUTED.

SUB-SECT. 1.—SHOWN BY DEPOSITED PLANS.

See, generally, RAILWAYS & CANALS.

62. Adherence to plans—Presumption.]—(1) By an Act obtained by the R. Co. they were empowered to make & maintain an enlargement of a certain reservoir in the lines & upon the lands delineated in the plans of such enlargement, deposited with the clerk of the peace, showing the lines, with a section showing the levels thereof:—*Held*: the sections, as well as the plans, were incorporated in the Act, & prescribed a vertical as well as a lateral limit within which the works were to be kept.

(2) By Act of Parliament a canal co. were empowered to construct a reservoir, raising the water to a certain height. If by exercising their powers to the extreme limit, the effect would have been to cover with water other lands than those the co. had taken:—*Semble*: the landowner might have compelled the co. to purchase these lands, if the co.'s compulsory powers had not expired, but if the compulsory powers had expired, the co. would be restrained by injunction.

(3) Where a co. having power by Act of Parliament to raise an embankment to a certain height exceeds that height, a neighbouring landowner is not, on account of the possibility of injury to his lands, entitled to an injunction against the co., but the right to such injunction is in the A.-G. on behalf of the public.—WARE v. REGENT'S CANAL CO. (1858), 3 De G. & J. 212; 28 L. J. Ch. 153; 32 L. T. O. S. 136; 23 J. P. 3; 5 Jur. N. S. 25; 7 W. R. 67; 44 E. R. 1250, L. C.

Annotations:—As to (1) *Refd.* A.-G. v. Frimley & Farnborough District Water Co., [1908] 1 Ch. 727; A.-G. v. Barnet District Gas & Water Co. (1909), 101 L. T. 651. As to (3) *Expld.* A.-G. v. G. E. Ry. (1879), 11 Ch. D. 449. *Refd.* McCormac v. Queen's University (1867), 15 W. R. 733; Lawrence v. West Somerset Mineral Ry., [1918] 2 Ch. 250.

63. Plans binding only if incorporated in special Act.]—Pltf. was the owner of a house near a public road, & connected therewith by an avenue & a lodge. A railway co. deposited plans, etc., whereby it was shown that they intended to cross pltf.'s avenue 520 feet from the lodge, under a bridge raising the level of the roadway of the avenue only two feet & by means of a cutting fifteen feet

t. Filing plans—Condition precedent to expropriation.]—*Re VONDA & MANTYKA* (1909), 12 W. L. R. 222.—CAN.

u. — Whether reference to plan sufficient—17 Vict. c. 1.]—By above Act comrs. expropriating land were required "to lay off the same by metes & bounds & record a description & plan thereof." The dedication filed did not contain such description:—*Held*: identification by metes & bounds by reference to a plan was sufficient.—R. v. LEE (1919), 59 S. C. R. 652; 52 D. L. R. 689.—CAN.

63 i. Plans binding only if incorporated in special Act.]—Plans exhibited prior to the passing of the local Act are to be disregarded, except when incorporated or made part of the Act.—TOD v. NORTH BRITISH RY. CO. (1846), 5 Bell. Sc. App. 184; 18 Sc. Jur. 608.—SCOT.

w. Works shown on plans—Aids to construction of Act.]—Plans of projected works referred to & adopted by the Act authorising their construction, are to be looked at in order to construe the general powers given by the Statute, in regard to the nature, extent & position of the works.—MONCRIFFE v. PERTH HARBOUR COMRS. (1846), 5 Bell. Sc. App. 333; 18 Sc. Jur. 631.—SCOT.

in depth. Pltf., relying on the plans & sections, did not oppose the bill in Parliament, which passed into an Act. The railway co. afterwards gave notice of their intention to deviate from the original plans, & to make their cutting sixty-one feet nearer pltf.'s house, & to make a bridge over his avenue seventeen feet high :—*Held* : (1) parties are bound by what is represented on the deposited plans & sections, so far only as such plans & sections are incorporated in or specially referred to by the Act ; (2) the ct. will not regard what is done under the Standing Orders of Parliament, but will only look at the Act itself ; (3) the plans are binding to determine the level of the railway with reference to the datum line, but not to the surface level of the land over or through which the railway passes ; (4) a vertical deviation of the level of a railway, not exceeding five feet, calculated with reference to the datum line shown on the plans & sections deposited in pursuance of the Standing Orders of Parliament, was within the powers of deviation conferred by Railways (Scotland) Act, 1845, s. 11, although the deviation might exceed five feet, calculated with reference to the surface line shown on the plans & sections.

(5) If a contract, or an Act of Parliament, refers to a plan, to the extent that the Act refers to the plan & for the purpose for which the Act or contract refers to the plan, it is part of the contract or part of the Act.

(6) An Act of Parliament of this sort has, by all the judges who have considered the subject, been considered as a contract. The Act of Parliament must be considered as overruling & doing away with everything that had taken place prior to the time when the Act of Parliament was passed, & renders the representation or proposal of the co., pending the Act of Parliament, of no avail (LORD CAMPBELL).—*NORTH BRITISH RY. CO. v. TOD* (1846), 12 Cl. & Fin. 722 ; 4 Ry. & Can. Cas. 449 ; 10 Jur. 975 ; 8 E. R. 1595, H. L.

Annotations :—*As to* (1) & (5) *Consd.* *Beardmer v. L. & N. W. Ry.* (1849), 1 H. & Tw. 161 ; *R. v. Cale. Ry.* (1850), 16 Q. B. 19 ; *Ware v. Regent's Canal Co.* (1858), 3 De G. & J. 212 ; *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299. *Refd.* *Breynton v. L. & N. W. Ry.* (1846), 2 Coop. temp. Cott. 108 ; *A.-G. v. Tewkesbury & Malvern Ry.* (1863), 1 De G. J. & Sm. 423 ; *A.-G. v. G. E. Ry.* (1872), 7 Ch. App. 475 ; *Edinburgh Street Tram. Co. v. Black* (1873), L. R. 2 Sc. & Div. 336 ; *Mackett v. Herne Bay Comrs.* (1876), 35 L. T. 202. *As to* (4) *Refd.* *Braynton v. L. & N. W. Ry.* (1846), 4 Ry. & Can. Cas. 553 ; *Ware v. Regent's Canal Co.* (1858), 3 De G. & J. 212. *Generally, Mentd.* *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221.

64. —.]—A railway co., at the instance of the Comrs. of Paving, raised the height of a bridge over the railway, & made the gradient of the ascent 1 in 105, instead of 1 in 40, as shown by the deposited plans & sections. Pltf.'s premises would not have been reached by the incline, as exhibited in the deposited plans ; but, by the alteration, an embankment five feet in height passed by two sides of that part of pltf.'s premises which faced the street, partially obstructing the access & the supply of light & air :—*Held* : (1) except where the plans & sections form part of the Act, they are referred to for the purposes of determining the datum line only ; (2) the plans & sections, although referred to, were not so incorporated into the special Act, & did not so form part of it, as to preclude the co. from availing themselves of the powers conferred by Railways Act, 1845, s. 16.—*BEARDMER v. LONDON & NORTH WESTERN RY. CO.* (1849), 1 H. & Tw. 161 ; 1 Mac. & G. 112 ; 5 Ry. & Can. Cas. 728 ; 18 L. J. Ch. 432 ; 13 Jur. 327 ; 47 E. R. 1367, L. C.

Annotation :—*As to* (1) *Refd.* *A.-G. v. Tewkesbury & Malvern Ry.* (1863), 1 De G. J. & Sm. 423.

65. —.]—Where plans & sections are shown

& referred to before the passing of an Act of Parliament authorising certain works, such as the construction of a railway, nothing will render such plans, etc. binding upon the co. unless they are so mentioned or referred to as to be incorporated therewith.—*WOOD v. NORTH STAFFORDSHIRE RY. CO.* (1849), 1 Mac. & G. 278 ; 1 H. & Tw. 611 ; 14 L. T. O. S. 123 ; 41 E. R. 1272, L. C.

Annotation :—*Consd.* *Selby v. Colne Valley & Halstead Ry.* (1862), 6 L. T. 709.

66. —.]—*R. v. CALEDONIAN RY. CO.* (1850), 16 Q. B. 19 ; 20 L. J. Q. B. 147 ; 16 L. T. O. S. 280 ; 15 Jur. 396 ; 117 E. R. 782.

Annotations :—*Distd.* *Ware v. Regent's Canal Co.* (1858), 3 De G. & J. 212. *Consd.* *A.-G. v. Tewkesbury & Malvern Ry.* (1863), 1 De G. J. & Sm. 423. *Refd.* *R. v. East & West India Docks & Birmingham Junction Ry.* (1853), 23 L. J. Q. B. 380 ; *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299. *Mentd.* *R. v. L. & N. W. Ry.* (1851), 6 Ry. & Can. Cas. 634.

67. — What amounts to incorporation.]—

A railway co. deposited with the clerk of the peace plans & sections of a railway & station which they intended to obtain power to make, showing that they proposed to stop up certain streets, but proposed to cross S. street on an arch. The Act which the co. obtained referred to the plans & sections, but gave the co. power to stop up all the streets within a certain defined area, which included S. street :—*Held* : (1) the co. had power to stop up S. street ; (2) Railways Act, 1845, ss. 13, 14, were controlled by the sect. in the special Act which gave power to stop up the streets within the defined area.—*A.-G. v. GREAT EASTERN RY. CO.* (1873), L. R. 6 H. L. 367 ; 22 W. R. 281, H. L.

Annotations :—*As to* (1) *Refd.* *Edinburgh Street Tram. Co. v. Black* (1873), L. R. 2 Sc. & Div. 336 ; *Mackett v. Herne Bay Comrs.* (1876), 35 L. T. 202. *As to* (2) *Consd.* *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299. *Refd.* *Yarmouth Corp'n. v. Simmons* (1878), 10 Ch. D. 518 ; *Rhondda U. D. C. v. Taff Vale Ry.* (1907), 24 T. L. R. 165.

68. — Extent of incorporation.]—By Cardiff Railway Act, 1906, which incorporated Railways Clauses Acts, so far as they were applicable to & not varied by or inconsistent therewith, the C. Co. was empowered to make a short line joining its railway with that of the T. Co. "in the line & according to the levels shown on the deposited plans." The deposited plans indicated that the junction line would be carried on an embankment in order to bring it up to the level of the two railways which were to be connected. Alongside the T. railway was a narrow strip of land which that co. had acquired for the purpose of sidings not yet constructed. The C. co. originally proposed to purchase so much of this strip as was necessary to enable them to carry their embankment over it, but the special Act as passed provided that the C. co. should not purchase any portion of the strip, but should acquire an easement or right of using same for the purpose of the junction authorised. The C. co. served upon the T. co. a notice to treat for the purchase of an easement or right over the portion of the strip in question for the purpose of making a solid embankment across it in order to effect the junction. The T. co. brought an action to restrain the C. co. from proceeding upon their notice to treat on the ground that they were not authorised by their Act to construct a solid embankment & that the notice was consequently invalid. The T. co. contended that an embankment would prevent their using the strip for the purpose of sidings & that the junction line ought to be carried over the strip upon a bridge. The C. co. contended that the deposited plans indicated an embankment, & that under Railways Act, 1845, s. 14, & Railways Act, 1863, ss. 9, 10, 11, they were bound to make the connection in that way :—(1) the deposited plans were obligatory on

Sect. 3.—Restrictions as to land to be taken and works to be executed: Sub-sects. 1 & 2.]

the co. only so far as they were expressly or by implication made so by the special Act, whereas in that Act the only matters expressly referred to were the "line" & "levels." The plans dealt with land which the co. proposed to purchase & indicated what should be done on that land when purchased. The conditions were changed when purchase was prohibited, & the qualified incorporation of the general Acts applied to land which the C. co. could not acquire; (2) there being two practicable modes whereby the co. might cross the strip, namely, an embankment & a bridge, & Parliament not having prescribed the mode by which the crossing was to be effected, the C. co. were not entitled to select that mode which was the more burdensome to the T. co., & that co. ought not to be required to grant an easement more extensive than the purposes of the junction demanded.—*TAFF VALE RY. CO. v. CARDIFF RY. CO.*, [1917] 1 Ch. 299; 86 L. J. Ch. 129; 115 L. T. 800, C. A.

69. Wider powers given by Railways Act, 1845 —Not limited by agreement to purchase land for construction of railway according to deposited plan.]—*BREYNTON v. LONDON & NORTH WESTERN RY. CO.* (1846), 10 Beav. 238; 2 Coop. temp. Cott. 108; 11 Jur. 28; 50 E. R. 574; *sub nom.* *BRAYNTON v. LONDON & NORTH WESTERN RY. CO.*, 4 Ry. & Can. Cas. 553; 8 L. T. O. S. 270, L. C.

70. Works shown on plans—One of two roads stopped up—Other road not sufficient substitution within Railways Act, 1845.]—*A.-G. v. GREAT NORTHERN RY. CO.* (1850), 4 De G. & Sm. 75; 15 L. T. O. S. 362; 17 L. T. O. S. 23; 14 Jur. 684; 15 Jur. 387; 64 E. R. 741.

Annotations:—*Consd. R. v. Wycombe Ry.* (1867), L. R. 2 Q. B. 310; *A.-G. v. Barry Docks & Ry.* (1887), 35 Ch. D. 573.

71. — Works confined to those authorised by special Act.]—Defts. constructed, under an Act of Parliament, a railway which crossed a carriage highway on a level at two places, thereby cutting off on the west a bend in the highway thirty chains in length from the rest of the highway, & made a new road on the east side of the line parallel to it, connecting the two ends of the highway from which the bend was cut off. Under their Act they had no special authority to cross this highway on a level, nor to divert it, but on the deposited plan "Proposed diversion of road" was shown in the direction in which the new road was made, & they had power by their Act to make the railway on the line delineated upon the plan:—*Held*: neither the delineation on the plan, without special power in their Act, nor Railways Act, 1845, s. 16, authorised defts. to divert permanently the road, & they were bound by s. 46 to carry the road over the railway, or the railway over the road, by means of a bridge, in order to connect the bend with the rest of the highway.—*R. v.*

PART II. SECT. 3, SUB-SECT. 2.

y. Meaning of "deviation."]—"Deviation" is a term not to be restricted to a lateral variance on either side of the line, but may mean a change *de viâ* in any direction within the prescribed limits.—*MURPHY v. KINGSTON & PEMBROKE RY. CO.* (1886), 11 O. R. 302, 582; 17 S. C. R. 582.—*CAN.*

z. What deviations permissible —Filing alterations from original plan—*R. S. Ont.* 1887, c. 170, s. 10.]—*A ry. co.*, having filed an original plan under

the Act must file, under above sect. a plan of a proposed deviation.—*BROOKE v. TORONTO BELT LINE RY. CO.* (1891), 21 O. R. 401.—*CAN.*

a. — Railways (Scot.) Act, 1845.]—Deviation within five feet of the datum line in the plans will be within the deviation allowed by above Act even should it exceed five feet from the surface-level shown upon the plans.—*Top v. NORTH BRITISH RY. CO* App.

Right once exercised

WYCOMBE RY. CO. (1867), L. R. 2 Q. B. 310; 8 B. & S. 259; 36 L. J. Q. B. 121; 15 L. T. 610; 31 J. P. 197; 15 W. R. 489.

Annotations:—*Consd. Dowling v. Pontypool Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714; *Fenwick v. East London Ry.* (1875), L. R. 20 Eq. 544. **Apprvd. & Foll.** *Pugh v. Golden Valley Ry.* (1880), 15 Ch. D. 330. **Refd.** *Beauchamp v. G. W. Ry.* (1868), 3 Ch. App. 745; *Lamb v. North London Ry.* (1869), 4 Ch. App. 522; *Wilkinson v. Hull, Barnsley & West Riding Junction Ry. & Dock Co.* (1882), 46 L. T. 455; *Glasgow Corp'n. v. Farie* (1888), 13 App. Cas. 657; *Emsley v. N. E. Ry.*, [1896] 1 Ch. 418; *L. & N. W. Ry. v. Ogwen District Council* (1899), 80 L. T. 401. **Mentd.** *Pearson v. Pearson* (1884), 51 L. T. 311; *C. & S. L. Ry. v. L. C. C.*, [1891] 2 Q. B. 513; *A.-G. v. Met. Ry.*, [1894] 1 Q. B. 384.

72. Mistake in — Omission of lessee's name — Promoters not prevented from taking land.]—*KEMP v. WEST END OF LONDON & CRYSTAL PALACE RY. CO.* (1855), 1 K. & J. 681; 3 Eq. Rep. 940; 26 L. T. O. S. 70; 1 Jur. N. S. 1012; 3 W. R. 607; 69 E. R. 633.

SUB-SECT. 2.—LIMITS OF DEVIATION.

See, generally, RAILWAYS & CANALS.

73. What deviations permissible — Complainant not substantially injured.]—*LEE v. MILNER*, No. 6, *ante*.

74. — — —.]—A railway co. purchased a part of pltf.'s land, the value being settled by arbn. The co. entered, & were proceeding to make their line in a manner which clearly exceeded their powers of vertical deviation. Pltf. filed his bill, alleging injury, & praying an injunction:—*Held*: Pltf. must satisfy the ct. that he had sustained substantial damage from the violation of a legal right, in order to entitle himself to an injunction.—*HOLYOAKE v. SHREWSBURY & BIRMINGHAM RY. CO.* (1848), 5 Ry. & Can. Cas. 421; 11 L. T. O. S. 489, L. C.

Annotations:—*Refd. Wintle v. Bristol & South Wales Union Ry.* (1862), 6 L. T. 20; *Grand Junction Canal Co. v. Shugar* (1871), 6 Ch. App. 483.

75. — Powers of special Act apply also to deviated line.]—*DOE d. PAYNE v. BRISTOL & EXETER RY. CO.* (1840), 6 M. & W. 320; 2 Ry. & Can. Cas. 75; 9 L. J. Ex. 232; 151 E. R. 432.

Annotations:—*Refd. Taylor v. Clemson* (1844), 11 Cl. & Fin. 610; *Doe d. Armitstead v. North Staffordshire Ry.* (1851), 16 Q. B. 526; *Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714. **Mentd.** *R. v. Stainforth* (1847), 11 Q. B. 66; *R. v. L. & Y. Ry.* (1852), 1 E. & B. 228; *R. v. Ambergate, etc. Ry.* (1853), 1 E. & B. 372.

76. — Vertical deviation.] —*NORTH BRITISH RY. CO. v. TOD*, No. 63, *ante*.

77. — — —.]—*HOLYOAKE v. SHREWSBURY & BIRMINGHAM RY. CO.*, No. 74, *ante*.

78. — Deviation consistent with general plans—Unless prohibited by special Act or agreement.]—*BREYNTON v. LONDON & NORTH WESTERN RY. CO.* (1846), 10 Beav. 238; 2 Coop. temp. Cott. 108; 11 Jur. 28; 50 E. R. 574; *sub nom.* *BRAYNTON v. LONDON & NORTH WESTERN RY. CO.*, 4 Ry. & Can. Cas. 553; 8 L. T. O. S. 270, L. C.

—Power exhausted.]—Parliamentary powers were given for the construction of works, in a particular locality with a power of deviation. The power was once exercised, though not to the extent of the limits allowed:—*Held*: the power of deviation was exhausted.—*MONCREIFFE v. PERTH HARBOUR COMRS.* (1846), 5 Bell. Sc. App. 333; 18 Sc. Jur. 631.—*SCOT.*

c. — Deviation from deviation —Exhaustion of Powers.]—*NORTH v. RAILWAYS & HARBOURS MINISTER.* (1913), 34 N. L. R. 461.—*S. AF.*

79. Land beyond limits of deviation—Company authorised by special Act to take lands for stations—Can take.]—CRAWFORD v. CHESTER & HOLY-HEAD RY. CO. (1847), 10 L. T. O. S. 105; 11 Jur. 917.

Annotation:—*Refd.* Doe d. Armitstead v. North Staffordshire Ry. (1851), 16 Q. B. 526.

80. — For collateral purposes—Land included in plan & books of reference can be taken.]—DOE d. ARMITSTEAD v. NORTH STAFFORDSHIRE RY. CO. (1851), 16 Q. B. 526; 20 L. J. Q. B. 249; 17 L. T. O. S. 59; 15 Jur. 944; 117 E. R. 980; *subsequent proceedings* (1852), 19 L. T. O. S. 374.

Annotations:—*Expld.* R. v. York, Newcastle & Berwick Ry. (1851), 6 Ry. & Can. Cas. 648. *Consd.* Worsley v. South Devon Ry. (1851), 16 Q. B. 539. *Folld.* Salisbury v. G. N. Ry. (1852), 17 Q. B. 840; *Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714. *Consd.* Tiverton & North Devon Ry. v. Loosomore (1884), 9 App. Cas. 480. *Refd.* Sparrow v. Oxford, Worcester & Wolverhampton Ry. (1852), 7 Ry. & Can. Cas. 92; *Finch v. L. & S. W. Ry.* (1889), 60 L. T. 350; *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101. *Mentd.* Doe d. Hudson v. Leeds & Bradford Ry. (1851), 16 Q. B. 796; *May v. G. W. Ry.* (1872), L. R. 7 Q. B. 364; *Donaldson v. South Shields Corpn.* (1899), 79 L. T. 685.

81. — Boundary of land undefined on plans—Company restrained from taking land beyond limits shown.]—WRIGLEY v. LANCASHIRE & YORKSHIRE RY. CO. (1863), 4 Giff. 352; 8 L. T. 267; 9 Jur. N. S. 710; 66 E. R. 742.

Annotations:—*Distd.* *Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714. *Consd.* *Finck v. L. & S. W. Ry.* (1890), 44 Ch. D. 330. *N.F.* *Protheroe v. Tottenham & Forest Gate Ry.*, [1891] 3 Ch. 278.

82. — Meaning of “delineated.”]—A railway Act empowered the co. to take lands delineated on the deposited plans & described in the book of reference:—*Held*: (1) where the boundary of a plot was left unclosed outside the limits of deviation, the co. might at any rate take up to the limits of deviation; (2) the word “delineated” could not be limited to mean surrounded on every side by lines, but it meant sketched, or represented, or so shown that landowners would have notice that the land might be taken.

Evidence, not before the Committee of Parliament, was admitted to prove boundaries beyond those shown on the deposited plans, & was used in determining the extent of the “lands delineated.” Evidence of engineers, as experts, on the construction of the plans & of the Act was not admitted.

The co. in order to avoid the necessity of completely blocking up pltf.’s entrance, took land of theirs to divert a road so as to diminish the obstruction:—*Held*: such land was necessary for the purposes of the Act, though the pltf. did not desire the diversion of the road, & objected to their land being taken for the purpose.

The deposited plans & book of reference showed a small plot, No. 38, nearly surrounded by a large plot, No. 37. The schedule to the notice to treat mentioned 37 but not 38, & the accompanying plan omitted both the number & the boundary of 38. The painted area on the notice plan in fact covered the site of No. 38, & this fact was known to the pltf. long before they pointed out the

objection:—*Held*: the notice was sufficient under the circumstances to entitle the co. to take 38.

Where a railway co. was bound by its Act to make a good & sufficient siding on a specified field of an owner who had opposed the bill:—*Held*: the obligation was not broken, though the co. took for other purposes so much of the specified field as not to leave any to furnish access from the siding to an adjoining road without passing over the land taken, or out of the specified field.

Where a railway co. took land in excess of its powers:—*Semble*: the ct. would not grant relief by injunction if the quantity & value of the land were extremely small.—*DOWLING v. PONTYPOOL, CAERLEON & NEWPORT RY. CO.* (1874), L. R. 18 Eq. 714; 43 L. J. Ch. 761.

Annotations:—*Folld.* *Finck v. L. & S. W. Ry.* (1890), 44 Ch. D. 330. *Consd.* *Protheroe v. Tottenham & Forest Gate Ry.*, [1891] 3 Ch. 278.

83. — — — — —.]—Pltf. were tenants of a nursery ground, through the S.W. part of which ran the central line of an intended railway, as shown on the deposited plans. Only the S.W. boundary & part of the S.E. boundary of the nursery ground were delineated on the plans, the latter being carried to a point a little to the N.E. of the N.E. limit of deviation, & the paths in the ground were carefully delineated & carried on to short unequal distances beyond the same limit. The co. gave pltf. notice to treat for a strip of land bounded on the N.E. by an imaginary line beyond, & distant about a chain & a half from, the N.E. limit of deviation. If this line had been traced on the plan, the tracings of the outer boundary of the nursery ground, & those of nearly all the paths, would have stopped short of it. Pltf. applied for an injunction to restrain the co. from taking any ground to the N.E. of the N.E. limit of deviation, as not being delineated on the plans:—*Held*: nothing to the N.E. of the limit of deviation could be considered to be “delineated” on the plan, & the co. could not take compulsorily anything beyond that limit.

When a co. seek to obtain power to acquire a limited portion only of a piece of land of great extent which is not broken up into closes, they must frame their deposited plans in such a way as to show how much of it they mean to acquire power to take.—*PROTHEROE v. TOTTENHAM & FOREST GATE RY. CO.*, [1891] 3 Ch. 278; 65 L. T. 323; 7 T. L. R. 724, C. A.

84. — Land reasonably required for construction of line—Houses partly within and partly without limits.]—By a special Act a railway co. were authorised to widen their existing railway, & on the parliamentary plans the existing line of railway was delineated, & there were dotted lines on either side indicating the limits of the deviation. The co. constructed a portion of their widening outside the limits shown by one of the dotted lines & upon land taken by them from pltf., who brought this action against them for an injunction, but did not show that he had sustained any special damage by reason of their acts. The land of the pltf.

d. Land within limits of deviation—Company authorised by special Act to take land for stations—Railways (Scot.) Act, 1845.]—Ground lying between a ry. & the lands of a neighbouring proprietor was within the limits of deviation, & was scheduled in the special Act:—*Held*: under above Act, the Co. were entitled to take the ground against the will of the proprietor, to form a depot, although their special Act did not authorise the formation of a branch line at that point.—*BOSWELL v. GLASGOW & SOUTH WESTERN RY. CO.* (1851), 13 Dunl. (Ct. of Sess.)

1157; 23 Sc. Jur. 554.—*SCOT.*

e. Land beyond limits of deviation—Deviation from original plan—Company restrained from taking land beyond limits shown.]—A co. built their line to the terminal mentioned in the charter & then wished to extend it less than a mile in the same direction. To effect the desired extension it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute:—*Held*: (1) the statutory provision that land required for a railway should be

indicated on a map or plan filed in the department of railways, before it could be expropriated, applied as well to a deviation from the original line as to the line itself; (2) the co. having failed to show any statutory authority therefor, would be restrained from taking the land against the owners’ consent.—*KINGSTON & PEMBROKE RY. CO. v. MURPHY* (1889), 17 S. C. R. 582.—*CAN.*

f. — — — — —.]—*BREADALBANE (MARQUESS) v. WEST HIGHLAND RY. CO.* (1895), 22 R. (Ct. of Sess.) 307; 32 Sc. L. R. 226.—*SCOT.*

3.—*Restrictions as to land to be taken and works*

taken by the co. was comprised in the parliamentary plans & books of reference. It consisted of two dwelling-houses & their curtilages. The co. first gave notice to take such parts of them as were within the limits of deviation, but after receiving a notice from the tenants under Lands Act, 1845, s. 92, requiring them to take the whole of the tenements, & also a letter from the landlord refusing to give up any part which he was not compelled to sell, they gave a fresh notice to take the remainder of the two tenements:—*Held*: (1) as the land taken was included in the parliamentary plans & no special damage to pltf. had been proved, the action could not be maintained; (2) as the two houses & curtilages were included in the parliamentary plans, & were reasonably necessary to be taken for the completion of the co.'s works, the co. had the power to take them, although they were outside the limits of deviation, & the notices were valid, notwithstanding the refusal of consent on the part of the landlord.—*FINCK v. LONDON & SOUTH WESTERN RY. CO.* (1890), 44 Ch. D. 330; 59 L. J. Ch. 458; 62 L. T. 881; 38 W. R. 513; 6 T. L. R. 223, C. A.

Annotations:—As to (1) *Folld. Cardiff Ry. v. Taff Vale Ry.*, [1905] 2 Ch. 289. As to (2) *Reid. Protheroe v. Tottenham & Forest Gate Ry.*, [1891] 3 Ch. 278.

Liability of promoters to take whole premises generally.—See Part VI., Sect. 4, *post*.

85. — Powers in schedule of property differing from powers given by special Act—Effect of addition of “or thereabouts.”—A corp'n. previously to an application to Parliament for an Act, served the usual parliamentary notice of their intention to apply for power to take certain land. In the margin of the schedule the property proposed to be taken was referred to as “Property in the line of the proposed work as at present laid out, including property any part of which is within eleven yards or thereabouts of the centre line of such proposed work as delineated upon the plan:—*Held*: (1) the corp'n. were not by this statement restricted from taking a greater total breadth than twenty-two yards, provided that what they took was within the limits of deviation prescribed by their Act; (2) if necessary, the words “or thereabouts” might be considered to extend the limit to an entire breadth of one-third more than the specified quantity of twice eleven yards; (3) after a reference to arbn. the landowner was bound to sell all that was comprised in the notice to treat, whether it was or was not within the compulsory powers of the corp'n.

(4) Where a corp'n. were under an Act empowered to make a conduit for water through a field at some distance below the surface:—*Held*: it was not necessary for them to make compensation for damage by severance of minerals where they were not required by Waterworks Act, 1847, to purchase them.—*Re HUDDERSFIELD CORPN. & JACOMB* (1874), 10 Ch. App. 92; *sub nom. JACOMB v. HUDDERSFIELD CORPN.*, 31 L. T. 466, L. J.

Annotations:—*Generally, Mentd. Smith v. Parkside Mining*

PART II. SECT. 3, SUB-SECT. 3.—A.

g. Power to expropriate land beyond prescribed limits—Will not be implied.]—By a local Act pltf. had full power to construct a bridge within certain limits as they might deem advisable. There was no express power to expropriate land:—*Held*: pltf. had no implied authority to expropriate lands outside the prescribed limits even if necessary for their purposes.—*WINNIPEG CORPN. v. CAUCHON* (1881), Man. R. *temp.* Wood,

350.—CAN.

89 i. Consent of owners condition precedent.]—A ry. Act empowered a co. “to hold & own land in any municipality through or in which the main line or any branch was carried for the erection & maintenance thereon of stations, etc. as might be necessary”:—*Held*: not to authorise expropriation against the will of the owner.—*MURPHY v. KINGSTON & PEMBROKE RY. CO.* (1886), 11 O. R. 582; 17 S. C. R. 582.—CAN.

Co. (1880), 6 Q. B. D. 67; *Re Gallop & Central Queensland Meat Export Co.* (1890), 25 Q. B. D. 230.

Plans binding if incorporated in special Act.]—See Sub-sect. 1, *ante*.

SUB-SECT. 3.—LAND REQUIRED FOR PURPOSES OF UNDERTAKING.

A. Must be within Terms of Special Act.

86. General rule.] — *SIMPSON v. SOUTH STAFFORDSHIRE WATERWORKS CO.*, No. 26, *ante*.

87. Land described in plan—Likely to be wanted.]—A market co. obtained a special Act, which, after reciting that a convenient site might be obtained, between certain streets on the east & certain other streets on the west, enacted that Market & Fairs Clauses Act, 1847 (c. 14) was incorporated therewith. By s. 24 the erection of a market-house on land described in the deposited plans was authorised, & by s. 25 the co. were enabled to alter & widen streets in the way pointed out on the deposited plans, & by s. 30, to buy additional lands, not exceeding two acres. A. was the owner of land on the west side of one of the streets on the western boundary of the area spoken of in the preamble, & his land was described in the deposited plans, but it did not thereby appear that more was intended to be taken than enough to widen one of the streets named in s. 25. The co. proceeded to take the whole land of A. compulsorily, & to build upon it a covered building, in addition to the market-house authorised by s. 24, whereupon A. filed his bill for an injunction, which was granted. The co. appealed:—*Held*: (1) as the land of pltf. was described in the plan, & as it might be wanted, the co. were authorised to take it; (2) as by the general Act the singular might mean the plural, the co. were not restricted by the word market-house; (3) the enactments of the special Act did not require a reference to the preamble to explain them, & the injunction must be dissolved, the co. being the proper judges of what lands were necessary for the works.—*RICHARDS v. SCARBOROUGH PUBLIC MARKET CO.* (1853), 23 L. J. Ch. 110, L. J.

88. Power to break up “footways,” etc., & “public places”—Public footpath over private field not included.]—*SCALES v. PICKERING* (1828), 4 Bing. 448; 1 Moo. & P. 195; 6 L. J. O. S. C. P. 53; 130 E. R. 840.

89. Consent of owners condition precedent—Promoters required to obtain consent—Construction of special clause.]—*GRAY v. LIVERPOOL & BURY RY. CO.* (1846), 9 Beav. 391; 4 Ry. & Can. Cas. 235; 7 L. T. O. S. 201; 10 Jur. 364; 50 E. R. 394, L. C.

B. Must be required for Purposes of Special Act.

(a) Railway Companies.

See, generally, RAILWAYS & CANALS.

90. Purpose must be bonâ fide—Attempt to take land under colour of powers—Land subsequently becoming necessary for bonâ fide purposes—Inter-

PART II. SECT. 3, SUB-SECT. 3.—B. (a).

90 i. Purpose must be bonâ fide—Attempt to take land under colour of powers—Interference by court.]—Where there were grounds for supposing that powers of expropriation were to be exercised by a ry. co. for other than those purposes ry. laws permit:—*Held*: the co. should be restrained.—*NIHAN v. ST. CATHARINES & NIAGARA CENTRAL RY. CO.* (1888), 16 O. R. 459.—CAN.

ference by court.]—WEBB v. MANCHESTER & LEEDS Ry. Co., No. 7, *ante*.

—Promoters to decide what land necessary.]—When the Legislature authorises railway directors to take, for the purposes of their undertaking, any lands specially described in their Acts, it constitutes them the judges whether they will or will not take these lands, provided that they act with the *bona fide* object of using the lands for the purposes authorised by the Act, & not for any collateral purpose. Having provided for affording compensation to the owners of the lands, the Legislature leaves it to the co. to determine what lands are necessary to be taken.—STOCKTON & DARLINGTON Ry. Co. v. BROWN (1860), 9 H. L. Cas. 246; 3 L. T. 131; 24 J. P. 803; 6 Jur. N. S. 1168; 8 W. R. 708; 11 E. R. 724, H. L.

Annotations:—*Distd.* Flower v. L. R. & S. C. Ry. (1865), 2 Drew. & Sm. 330. *Consd.* Kemp v. S. E. Ry. (1872), 7 Ch. App. 364; Errington v. Met. Dist. Ry. (1882), 19 Ch. D. 559. *Apld.* Wilkinson v. Hull, etc., Ry. & Dock Co. (1882), 20 Ch. D. 323. *Consd.* Stroud v. Wandsworth District Board of Works, [1894] 1 Q. B. 64. *Apld.* Goldberg v. Liverpool Corpn. (1900), 82 L. T. 362. *Consd.* L. & N. W. Ry. v. Westminster Corpn., [1904] 1 Ch. 759. *Refd.* Simpson v. South Staffordshire Waterworks Co (1865), 4 De G. J. & Sm. 679; City of Glasgow Union Ry. v. Cale. Ry. (1871), L. R. 2 Sc. & Div. 160; Temple v. Flower (1872), 41 L. J. Ch. 604; Betts v. G. E. Ry. (1879), 28 W. R. 50; L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562; L. B. & S. C. Ry. v. Truman (1885), 11 App. Cas. 45; Lewis v. Weston-Super-Mare L. B. (1888), 40 Ch. D. 55; C. & S. L. Ry. v. L. C. C. (1891), 65 L. T. 362. *Mentd.* Hooper v. Bourne (1877), 2 Q. B. D. 339; James v. Lovel (1887), 56 L. T. 739.

92. — Evidence of necessity for land — Evidence of engineer—Power to take land as promoters might think necessary.]—FLOWER v. LONDON, BRIGHTON & SOUTH COAST Ry. Co. (1865), 2 Drew. & Sm. 330; 5 New Rep. 424; 34 L. J. Ch. 540; 12 L. T. 10; 11 Jur. N. S. 406; 13 W. R. 518; 62 E. R. 647.

Annotations:—*Distd.* Galloway v. London Corpn. (1866), L. R. 1 H. L. 34. *Consd.* Lewis v. Weston-Super-Mare L. B. (1888), 40 Ch. D. 55. *Refd.* Flower v. Muspratt, Flower v. Frowd, Flower v. L. B. & S. C. Ry. (1865), 6 New Rep. 200; Kemp v. S. E. Ry. (1872), 7 Ch. App. 364; Temple v. Flower (1872), 41 L. J. Ch. 604; Wilkinson v. Hull, Barnsley & West Riding Ry. & Dock Co. (1882), 30 W. R. 617; James v. Lovel (1887), 56 L. T. 739. *Mentd.* Butt v. Imperial Gas Co. (1866), 2 Ch. App. 158.

93. — — — As to quantity of land required.]—A landowner agreed with a railway co. to sell them ten acres of land & one acre for a station, at a certain price, & that if the co. should require more land for the station, or for any purpose, they should pay for the same at the rate of £100 per acre, & the agreement was to be supplemental to the Lands Act, 1845. The ten acres were paid for & conveyed. Before the compulsory powers of the co. had expired they gave, apparently by mistake, notice to treat for three acres more, & before the time for completion had expired they took possession of these three acres, alleging that they required the land. They also took possession of some small pieces of land which were covered by earth slipped from the railway:—*Held*: the agreement was not waived, but the co. had power, until the expiration of the time limited for the completion of the railway, to

take such land as they required for the purpose of a station or for slips of earth at £100 an acre.

The ct. will accept as conclusive the evidence of the engineer in the service of the co. as to the quantity of land required for the purposes of the railway, if the statement has a reasonable appearance of accuracy.—KEMP v. SOUTH EASTERN Ry. Co. (1872), 7 Ch. App. 364; 41 L. J. Ch. 404; 26 L. T. 110; 20 W. R. 306, L. C.

Annotations:—*Consd.* Errington v. Met. Dist. Ry. (1882), 19 Ch. D. 559; L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562; Loosemore v. Tiverton & North Devon Ry. (1882), 22 Ch. D. 25. *Refd.* Wilkinson v. Hull, etc., Ry. & Dock Co. (1882), 20 Ch. D. 323; James v. Lovel (1887), 56 L. T. 739; Goldberg v. Liverpool Corpn. (1900), 82 L. T. 362.

94. — Purpose also attainable without acquisition of land.]—A railway co. obtained an Act of Parliament in 1864 for extending their operations, containing compulsory powers to take additional lands in connection with their undertaking. Pltf.'s land was included in the deposited plans referred to in the Act. It was provided by the Act that a street called A. street should not be stopped up by the co. without the consent of the vestry of the parish of I. In 1865, the co., having been unable to obtain the consent of the I. vestry to the stopping up of A. street, obtained another Act for the improvement of their H. station & for other purposes, by which it was recited that it was expedient that the co. should be empowered to stop up A. street, & also to acquire, by compulsion or otherwise, additional lands in connection with their undertaking, & the co. was empowered to take the lands included in the deposited plans; & it was also enacted that they might stop up A. street, provided that they made another street in a prescribed direction. None of pltf.'s land was included in the plans referred to in this Act. The co., before the expiration of the compulsory powers of the Act of 1864, gave notice to pltf. to take some of his land included in the plans referred to in that Act; although it was admitted that the land was wanted to form the new street under the provisions of the Act of 1865. Pltf. filed his bill for an injunction:—*Held*: pltf. was entitled to an injunction, the stopping up of A. street not being one of the purposes of the Act of 1864.

The ct. will not construe the compulsory powers of a railway co. so as to extend them beyond the express words or absolutely necessary implication of the Act; it being the duty of the co. to take care that the public understand, before the Act is passed, the extent of the compulsory powers which they require.

Where a railway co. has given notice to take land for some object which is clearly within their compulsory powers, the ct. will not interfere to restrain them merely on the ground that they might obtain same object in some other way without taking the land.—LAMB v. NORTH LONDON Ry. Co. (1869), 4 Ch. App. 522; 21 L. T. 98; 17 W. R. 746, L. JJ.

Annotation:—*Refd.* Dowling v. Pontypool, Caerleon & Newport Ry. (1874), L. R. 18 Eq. 714.

90 ii. — Additional land taken.]—By Dominion Ry. Act, s. 178, C. P. Ry. co. were allowed to take additional land for terminals, ry. shops, etc.:—*Held*: it was better that too much land should be taken, so long as it was taken honestly for the purpose of affording public facilities, than that the area should be too much curtailed.—CANADIAN PACIFIC Ry. Co. v. QUILLIAM LAND-OWNERS (1911), 20 L. R. 632.—CAN.

to be kept within their statutory powers, but where the legislature empowers persons to take land compulsorily they are the proper judges of what land they need.—BODEN v. SHEA (1881), 6 Nfld. L. R. 328.—NFLD.

h. What purposes included within —Extension of line beyond terminus—Branch lines authorised.]—EDMONDS v. CANADIAN PACIFIC Ry. Co. (1886), 1 B. C. R. 272.—CAN.

i. Promoters proper judges of land needed.]—Corporations are

j. — "Necessary for construction."—*Held*: the C. P. Ry. Act authorises the right of expropriation

of land, necessary for construction of the ry., in the mode provided for by Ry. Act, 1879.—CANADIAN PACIFIC Ry. Co. v. MAJOR (1886), 1 B. C. R. 287; 13 S. C. R. 233.—CAN.

k. — "Railway purposes"—Retail shop for employees.]—Under N. R. Concession, s. 6, power was granted a co. to expropriate land "for ry. purposes":—*Held*: a general retail shop necessary for supplying employees of the co. was "for ry. purposes."—SCALLAN v. GNODDE (1894), 1 O. R. 287.—S. AF.

Sect. 3.—Restrictions as to land to be taken and works to be executed: Sub-sect. 3, B

95. What purposes included within—Railway & works—Station.]—Held: under the words "railway & works" a railway co. had a right, by the compulsory powers of their Act, to take a piece of land for the purpose of building a station.—(*OTHER v. MIDLAND RY. CO.* (1848), 2 Ph. 469; 5 Ry. & Can. Cas. 187; 17 L. J. Ch. 235; 10 L. T. O. S. 437; 41 E. R. 1025, L. C.)

Annotations:—Distd. Sadd v. Maldon, Witham & Braintree Ry. (1851), 6 Exch. 143. *Mentd. Mid. Ry. v. Ambergate, Nottingham & Boston & Eastern Junction Ry.* (1853), 10 Hare, 359; *Powell Duffryn Steam Coal Co. v. Taff Vale Ry.* (1873), 29 L. T. 575.

96. ——— Works convenient but not necessary.]—SADD v. MALDON, WITHAM & BRAINTREE RY. CO. (1851), 6 Exch. 143; 6 Ry. & Can. Cas. 779; 20 L. J. Ex. 102; 16 L. T. O. S. 370; 155 E. R. 489.

Annotations:—Refd. A.-G. v. Met. Ry., [1894] 1 Q. B. 384; *Emsley v. N. E. Ry.*, [1896] 1 Ch. 418.

97. ——— Prolonging line from point of junction to station.]—WOOD v. EPSOM & LEATHERHEAD RY. CO. (1860), 8 C. B. N. S. 731; 30 L. J. C. P. 82; 2 L. T. 487; 141 E. R. 1353.

98. ——— "Necessary for making & maintaining railway"—Taking soil for embankment.]—A railway co. had compulsory powers to purchase soil for their works, & to purchase such of the lands delineated in the plans, & within the limits of deviation indicated in the plans & books of reference, & to enter upon, take & use such of the lands as should be necessary for such purposes. They entered upon a small piece of land belonging to A. situate within the limits of deviation, & made a contract with him for the purchase of the soil found thereon for the purpose of making an embankment, forming part of the railway works situate at some distance from the other lands of A. After this the co. determined on the purchase of this small piece of land in fee simple, & gave the required notices for the assessment of its value. It appeared that the co. did not want this small piece of land for any other purpose than that of taking the soil for the embankment:—*Held:* the fee simple of the land was not necessary for the making & maintaining the railway within the meaning of the parliamentary powers of the co., but the soil alone being wanted, which they might purchase elsewhere under their powers, a perpetual injunction must be granted.

Acts of Parliament authorising the construction of public undertakings are to be construed strictly with reference to the rights of those who are empowered to make them.—*EVERSFIELD v. MID-SUSSEX RY. CO.* (1858), 3 De G. & J. 286; 28 L. J. Ch. 107; 32 L. T. O. S. 202; 5 Jur. N. S. 776; 7 W. R. 102; 44 E. R. 1278, L. J.J.

Annotations:—Folld. Dodd v. Salisbury & Yeovil Ry. (1859), 1 Giff. 158. *Distd. Quinton v. Bristol Corpn.* (1874), L. R. 17 Eq. 524. *Consd. Wilkinson v. Hull, etc., Ry. & Dock Co.* (1882), 20 Ch. D. 323.

99. ——— "Undertaking" — Accommodation works.]—Lands required by a railway co. for accommodation works are lands required for the purposes of "the undertaking" or "of the railway"; every work which a railway co. is empowered to do, not merely what it is compelled to do, is a purpose of the undertaking.—*WILKINSON v. HULL, ETC. RY. & DOCK CO.* (1882), 20 Ch. D. 323; 51 L. J. Ch. 788; 46 L. T. 455; 30 W. R. 617, C. A.

Annotations:—Refd. Goldberg v. Liverpool Corpn. (1900),

82 L. T. 362. *Mentd. Re East & West India Dock Co.* (1888), 38 Ch. D. 576; *Clyde Navigation Trustees v. Blantyre*, [1893] A. C. 703.

See, further, RAILWAYS & CANALS.

100. Land taken for collateral purposes—Land beyond limits of deviation—But included in plan & books of reference—Can be taken.]—DOE d. ARMITSTEAD v. NORTH STAFFORDSHIRE RY. CO. (1851), 16 Q. B. 526; 20 L. J. Q. B. 249; 17 L. T. O. S. 59; 15 Jur. 944; 117 E. R. 980; *subsequent proceedings* (1852), 19 L. T. O. S. 374.

Annotations:—Apld. Salisbury v. G. N. Ry. (1852), 17 Q. B. 840. *Consd. Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714; *Tiverton & North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480. *Refd. May v. G. W. Ry.* (1872), L. R. 7 Q. B. 364; *Finch v. L. & S. W. Ry.* (1889), 60 L. T. 350; *Donaldson v. South Shields Corpn.* (1899), 79 L. T. 685. *Mentd. Doe d. Hudson v. Leeds & Bradford Ry.* (1851), 16 Q. B. 796; *R. v. York, Newcastle & Berwick Ry., R. v. L. & Y. Ry.* (1851), 6 Ry. & Can. Cas. 648; *Worsley v. South Devon Ry.* (1851), 16 Q. B. 539; *Sparrow v. Oxford, Worcester & Wolverhampton Ry.* (1852), 7 Ry. & Can. Cas. 92.

101. ——— Whether restrained by injunction.]—Compulsory powers to take land are given to railway cos., & must be exercised for the sole purpose of constructing the railway & works; therefore, where a railway co. endeavoured, by means of their compulsory powers, to construct a road so as to accomplish a subsidiary object, they were restrained by the ct. at the instance of the landowner whose property would be affected, though the proposed works were within the scope of their Act.—*DODD v. SALISBURY & YEOVIL RY. CO.* (1859), 1 Giff. 158; 33 L. T. O. S. 254, 311; 23 J. P. 581; 5 Jur. N. S. 782; 65 E. R. 867.

Annotations:—Distd. Quinton v. Bristol Corpn. (1874), L. R. 17 Eq. 524. *Mentd. L. & N. W. Ry. v. Westminster Corpn.*, [1904] 1 Ch. 759.

102. ——— Land cannot be taken to compensate third party.]—VANE v. COCKERMOUTH, KESWICK, & PENRITH RY. CO. (1865), 12 L. T. 821; 13 W. R. 1015.

Compare No. 114, post.

103. ——— Purpose expressly authorised—Land can be taken to deposit spoil & materials during construction.]—LUND v. MIDLAND RY. CO. (1865), 34 L. J. Ch. 276, L. J.J.

Annotation:—Expld. May v. G. W. Ry. (1872), L. R. 7 Q. B. 364.

104. Land taken for purposes of later Act—Under power of earlier Act—Injunction.]—LAMB v. NORTH LONDON RY. CO., No. 94, *ante*.

105. Under Railways Act, 1845—Temporary possession for "forming road"—Land cannot be taken for forming tramway.]—MORRIS v. TOTTENHAM & FOREST GATE RY. CO., [1892] 2 Ch. 47; 61 L. J. Ch. 215; 66 L. T. 585; 40 W. R. 310; 8 T. L. R. 286; 36 Sol. Jo. 232.

(b) *Water Companies.*

See, generally, WATER SUPPLY.

106. Land taken for collateral purposes—Restrained by injunction—Power to make cuts & works—Land taken to supply materials for works on other lands.]—An estuary co. were by their Act, with which the Lands Act, 1845, was incorporated, empowered to make & maintain certain cuts & works, & to enter upon, take & use such of the lands delineated in the deposited plans as might be necessary for that purpose:—*Held:* the co. were not entitled to take compulsorily land which was required not for the site of the cuts or works, but to supply materials for the execution of works on other land.—*BENTINCK v. NORFOLK ESTUARY CO.* (1857), 8 De G. M. & G. 714; 26

101 l. Land taken for collateral purposes—Whether restrained by injunction.]—JENKINS v. CENTRAL ONTARIO RY. CO. (1883), 4 O. R. 593.—CAN.

PART II. SECT. 3, SUB-SECT. 3.—
B. (b).

1. Land acquired for "extension

"improvement" of water system—Sale for other purposes—Restrained by injunction.]—*HUBLEY v. HALIFAX CITY* (1909), 7 E. L. R. 360.—CAN.

L. J. Ch. 404; 29 L. T. O. S. 32; 3 Jur. N. S. 345; 5 W. R. 327; 44 E. R. 565, L. JJ.

107. ——— Power to make aqueduct in tunnel—Land taken for obtaining additional water supply.]—SIMPSON v. SOUTH STAFFORDSHIRE WATERWORKS CO., No. 26, *ante*.

108. ——— Power to carry on business of waterworks company—Land taken to sink well & erect pumping station.]—A water co., incorporated by a special Act for the purposes of making & maintaining the waterworks thereby limited & defined, & for supplying water within the limits of the Act & for carrying on the business usually carried on by water cos., was empowered, in addition to the lands authorised to be taken compulsorily, to acquire by agreement & hold for the general purposes of its undertaking any lands within its limits of supply not exceeding a certain acreage, provided that no buildings should be erected thereon except such as were required for the purposes of the co.'s waterworks. Under this power the co. purchased land some distance away from its waterworks & proposed to sink a well & erect a pumping station thereon for the purpose of tapping a new water supply & pumping the water into an existing reservoir constructed under the powers of the Act:—*Held*: the power to purchase additional land was only for purposes ancillary to the main purpose of the co., which was to supply water within its limits of supply by its statutory waterworks, & the proposed works were *ultra vires*.—A.-G. v. FRIMLEY & FARNBOROUGH DISTRICT WATER CO., [1908] 1 Ch. 727; 77 L. J. Ch. 442; 98 L. T. 905; 24 T. L. R. 473; 6 L. G. R. 689; 72 J. P. Jo. 159, C. A.

Annotations:—*Distd.* A.-G. v. Barnet District Gas & Water Co. (1909), 101 L. T. 651. *Appld.* Marriott v. East Grinstead Gas & Water Co., [1909] 1 Ch. 70.

(c) Other Companies.

See Particular Parts, passim.

(d) Local Authorities.

109. General rule.]—(1) Where persons have special powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a co. authorised, on making due compensation, to take compulsorily the lands of any person for a definite object, may be restrained by injunction from any attempt to take them for another object.

(2) The Mayor & Commonalty of the City of London had been entrusted with powers to make certain public improvements in the city, & for that purpose had been authorised compulsorily to take land, to raise money on the credit of it, & to sell superfluous land to pay off the debts:—*Held*: the Act which gave them those powers, though only thus impliedly authorising them to take more land than might be absolutely necessary to effect the desired improvements, might be construed favourably to them, & lands so taken might be treated as lands taken "for the purposes of the Act."

(3) Before the royal assent was given to an Act of this description the mayor & commonalty entered into a contract with a railway co. to sell to the co. certain lands which the mayor & commonalty expected to be authorised by the Act to take. When the Act had been passed, notice to take the land was given, & the taking was resisted by the landowner. A subsequent Act recited the contract, & declared the co. entitled to the benefit of it. Notice to take the land under this later Act was given by the mayor & commonalty to the landowner, but the notice expressly reserved to

them all their rights under the former Act:—*Held*: the original contract was valid, & this later Act was a parliamentary recognition of it.

(4) Acts giving to a corp'n. compulsory powers for the purpose of effecting public improvements are not to be construed in the same strict manner as Acts giving like powers to any body of adventurers, such for example as a railway co.—GALLOWAY v. LONDON CORPN. (1866), L. R. 1 H. L. 34; 35 L. J. Ch. 477; 14 L. T. 865; 30 J. P. 580; 12 Jur. N. S. 747, H. L.

Annotations:—*As to* (1) *Consd.* Bristol Grdns. v. Bristol Corp'n. (1887), 18 Q. B. D. 549. *Refd.* Carington v. Wycombe Ry. (1868), 3 Ch. App. 377; East Fremantle Corp'n. v. Annois, [1902] A. C. 213; Roberts v. Charing Cross, Euston & Hampstead Ry. (1903), 87 L. T. 732; L. & N. W. Ry. v. Westminster Corp'n., [1904] 1 Ch. 759. *As to* (2) *Distd.* L. C. & D. Ry. v. London Corp'n. (1868), 19 L. T. 250. *Consd.* Quinton v. Bristol Corp'n. (1874), 43 L. J. Ch. 783. *Distd.* Gard v. City of London Sewers Comrs. (1885), 28 Ch. D. 486; Donaldson v. South Shields Corp'n. (1899), 68 L. J. Ch. 162. *Refd.* James v. Lovel (1887), 35 W. R. 626; Lewis v. Weston-Super-Mare L. B. (1888), 40 Ch. D. 55; Goldberg v. Liverpool Corp'n. (1900), 82 L. T. 362. *As to* (3) *Consd.* Kent Coast Ry. v. L. C. & D. Ry. (1868), 3 Ch. App. 656. *Generally, Mentd.* Baker v. Portsmouth Corp'n. (1878), 3 Ex. D. 157; L. B. & S. C. Ry. v. St. Giles, Camberwell Vestry (1879), 4 Ex. D. 239; Robinson v. Barton-Eccles L. B. (1883), 8 App. Cas. 798.

110. For street widening—Power to take all land in schedule—Local authority not limited to land actually required.]—QUINTON v. BRISTOL CORPN. (1874), L. R. 17 Eq. 524; 43 L. J. Ch. 783; 30 L. T. 112; 38 J. P. 516; 22 W. R. 434.

Annotations:—*Consd.* Bristol Grdns. v. Bristol Corp'n. (1887), 18 Q. B. D. 549; Donaldson v. South Shields Corp'n. (1899), 79 L. T. 685.

111. ——— Power to take whole—Part only required.]—(1) Two houses adjoining W. street, in L., having been destroyed by fire, the outer walls only being left standing, the Comrs. of Sewers adjudicated that it was desirable to widen W. street, & that the two houses, & the land on which they stood, projected into & prevented them from widening the street, & that the possession & purchase of those houses was necessary for that purpose, & they directed their solr. to treat for the purchase. Notice to treat was accordingly given for the whole of the houses. The owners brought their action for an injunction to restrain the comrs. from proceeding on this notice. It was admitted by the comrs. that they only meant to use a strip of 5½ feet in breadth for widening the street, & intended to sell the rest without giving ptfs. any option of pre-emption:—*Held*: ptfs. were entitled to an injunction, for that the adjudication was *ultra vires*, the comrs. having no power to adjudicate that the possession of the whole of a piece of land is necessary for the purpose of improvements when they only intend to use a small part of it for that purpose, though if they made such an adjudication in the belief that they should require the whole for the improvements, the correctness of the adjudication could not be questioned.

(2) If part of a piece of land prevents an improvement, the comrs. have power to take part compulsorily, their power of proceeding compulsorily not being limited to taking the whole.

(3) *Qu.*: whether the comrs., if they only want a part of the site of an existing house for the purpose of an improvement, can adjudicate that the possession & purchase of the whole house are necessary.—GARD v. CITY OF LONDON SEWERS COMRS. (1885), 28 Ch. D. 486; 54 L. J. Ch. 698; 52 L. T. 827; 1 T. L. R. 208, C. A.

Annotations:—*As to* (1) *Consd.* Lynch v. City of London Sewers Comrs. (1886), 32 Ch. D. 72; Clanciarde v. Congested Districts Board for Ireland (1914), 79 J. P. 481. *Refd.* Denman v. Westminster Corp'n., Cording v. Westminster Corp'n., [1906] 1 Ch. 464. *As to* (2) *Refd.* Teuliere

Sect. 3.—Restrictions as to land to be taken and works to be executed: *Sub-sect. 3, B. (d); sub-sects. 4, 5*

v. St. Mary Abbots, Kensington Vestry (1885), 30 Ch. D. 642; Gordon v. St. Mary Abbots, Kensington Vestry, [1894] 2 Q. B. 742; Fernley v. Limehouse Board of Works (1900), 82 L. T. 524. As to (3) Distd. Fernley v. Limehouse Board of Works (1899), 68 L. J. Ch. 344. Refd. Aldis v. London City Corpn. (1899), 47 W. R. 514; Fernley v. Limehouse Board of Works (1900), 82 L. T. 524; Davies v. London City Corpn., [1913] 1 Ch. 415. Generally, Refd. A.-G. v. London Parochial Charities Trustees, [1896] 1 Ch. 541.

Liability of promoters to take whole premises generally.]—See Part VI., Sect. 4, post.

See, further, HIGHWAYS, STREETS & BRIDGES.

112. — Land taken to alter level of street—Injunction.]—LYNCH v. SEWERS COMRS. OF LONDON, No. 2252, post.

113. Under Public Health Act, 1875 (c. 55)—For laying water main—Surveyor to determine necessity for land.]—LEWIS v. WESTON-SUPER-MARE LOCAL BOARD (1888), 40 Ch. D. 55; 58 L. J. Ch. 39; 59 L. T. 769; 37 W. R. 121; 5 T. L. R. 1.

Annotations:—Refd. Jones v. Conway & Colwyn Bay Joint Water Supply Board, [1893] 2 Ch. 603; Stroud v. Wandsworth District Board of Works, [1894] 1 Q. B. 64. Mentd. Robinson v. Sunderland Corpn., [1899] 1 Q. B. 751; Kendal v. Lewisham B. C. (1903), 67 J. P. 236.

See, further, HIGHWAYS, STREETS & BRIDGES; SEWERS & DRAINS.

114. Under Education Acts—For provision of school accommodation—Land can be taken for exchange with third party—For construction of road beneficial to school.]—ROLLS v. LONDON SCHOOL BOARD (1884), 27 Ch. D. 639; 51 L. T. 567; 33 W. R. 129.

Compare No. 102, ante.

115. — Cannot be taken for illegal purpose—Erection of pupil teachers' centre.]—BATSON v. LONDON SCHOOL BOARD (1903), 67 J. P. 457; 20 T. L. R. 22; 2 L. G. R. 116; subsequent proceedings (1904), 69 J. P. 9.

116. Whether land taken for statutory purpose—Land bona fide intended to be taken & suitable for such purpose—Interference by court.]—The Congested Districts Board for Ireland were empowered by the Irish Land Act, 1909 (c. 42), with the aid of the Estate Comrs., to purchase lands compulsorily in any congested districts county for the amalgamation or enlargement of small holdings. In purported exercise of their statutory powers, the Board took steps to acquire compulsorily from pltf. several large estates situated in a congested districts county. Pltf. claimed to set aside the proceedings as *ultra vires* on the grounds that the Board proposed to take the lands not for their statutory purposes but for the reinstatement of evicted tenants & that the lands were incapable of being used for such statutory purposes:—*Held*: the claim failed, as it had not been proved either that the Board were taking the land for some purpose which their statutory powers did not authorise, or that they were acting without inquiry as to the suitability of the land for their statutory purposes.—CLANRICARDE (MARQUESS) v. CONGESTED DISTRICTS BOARD FOR IRELAND (1914), 79 J. P. 481; 31 T. L. R. 120; 13 L. G. R. 415, H. L.

Annotation:—Mentd. Marron v. Cootchill R. C. (1915), 84 L. J. P. C. 125.

Restrictions as to user of land.]—See Sect. 4, post.

PART II. SECT. 3, SUB-SECT. 4.

119 i. Whether easement acquired—Under statutory powers—To lay pipes—Land need not be compulsorily acquired.]—By 5 Edw. 7, c. 59, the city of J.

were authorised to take by expropriation or purchase any land that might be needed for extending their water supply:—*Held*: the city might expropriate either the land or an easement to lay & maintain their pipes, but could

SUB-SECT. 4.—EASEMENTS.

117. To effect junction with existing railway—Land need not be compulsorily acquired.]—OXFORD, WORCESTER & WOLVERHAMPTON RY. CO. v. SOUTH STAFFORDSHIRE RY. CO. (1852), 1 Drew. 255; 1 W. R. 75; 61 E. R. 449.

118. To lay sewers—Land need not be compulsorily purchased.]—A surveyor of a local board reported that it was necessary to make a sewer of a certain size through N.'s land, whereon the necessary steps were taken & authority to the surveyor given, but N. obstructed the surveyor, & on summons before justices contended that proceedings ought first to have been instituted for the compulsory taking of the lands under the Lands Act, 1845, & Local Government Act, 1858, c. 98, s. 75:—*Held*: the justices were wrong in dismissing the summons on the above objection, for it was not necessary to take the land if nothing more was wanted than merely to make a sewer through it, which was an easement only.—THORNTON v. NUTTER (1867), 31 J. P. 419.

119. Whether easement or interest in land acquired—Under statutory power—To set out tow-paths.]—Where a local Act gave to the navigation co. of a river, among other powers, a power to appoint & set out towing-paths alongside the river, but the language left it in equal doubt whether the soil of the towing-paths was to vest in the co. or only the easement of the right of way for towing; though it was necessary for other purposes of the co., that the co. should have the fee of certain parts of the land adjoining the river:—*Held*: the co. did not acquire the fee in the towing-paths, but only such a use of the soil, or easement as was necessary for the purposes of the navigation.—BADGER v. SOUTH YORKSHIRE RY. & RIVER DUN CO. (1858), 1 E. & E. 359; 28 L. J. Q. B. 118; 32 L. T. O. S. 207; 5 Jur. N. S. 459; 7 W. R. 130; 120 E. R. 945, Ex. Ch.

Annotations:—Consd. Doncaster Union Assmt. Com. v. M. S. & L. Ry., [1895] A. C. 133, n. Refd. Winch v. Thames Conservators (1872), L. R. 7 C. P. 458. Mentd. Medway Co. v. Romney (1861), 9 C. B. N. S. 575; Hinde v. Chorlton (1866), Hop. & Ph. 383; Wadmore v. Dear, Wadmore v. Putney Overseers (1871), 1 Hop. & Colt. 687.

120. — — — — —.]—Where river conservancy comrs. have statutory powers to set out towing-paths, etc., paying compensation to the owners of the soil for the damage caused thereby, & have also powers to purchase lands required for their undertaking, the burden of proof lies upon them to show that they have purchased the soil of a towing-path used by them. It will be presumed, in the absence of evidence to the contrary that they have acquired an easement merely, under the first-mentioned power, the owner remaining at liberty to use the path in any way which does not interfere with its use for the purposes of the navigation.—LEE RIVER NAVIGATION CONSERVATORS v. BUTTON (1881), 6 App. Cas. 685; *sub nom.* LEA CONSERVANCY BOARD v. BUTTON, 51 L. J. Ch. 17; 45 L. T. 385; 46 J. P. 164; 30 W. R. 233, H. L.; *affg.* S. C. *sub nom.* LEE CONSERVANCY BOARD v. BUTTON (1879), 12 Ch. D. 383, C. A.

Annotations:—Consd. Northam Bridge, etc., Proprietors v. South Stoneham R. D. C. (1906), 71 J. P. 345. Refd. Collis v. Amphlett, [1918] 1 Ch. 232. Mentd. Re Auto-threptic Steam Boiler Co. & Townsend, Hook (1888), 59 L. T. 632; Thames Conservators v. Kent, [1918] 2 K. B. 272.

not expropriate an easement to erect & maintain telegraph & telephone lines upon the land.—CHITTIK v. ST. JOHN CITY (1907), 3 E. L. R. 475; 38 N. B. R. 249.—CAN.

121. To construct underground railway—Interest in land acquired.]—A special Act authorised the M. Ry. Co. to construct an underground railway, & provided that with respect to lands under a highway the co. should not be required wholly to take such lands, but might appropriate & use the subsoil & under-surface. Under this Act the co. constructed a tunnel under a highway for the purposes of the railway:—*Held*: the co. had with respect to the tunnel an interest in land & not merely an easement, & the tunnel was a hereditament within Land Tax Act, 1797 (c. 5), s. 4, & the co. was in respect thereof chargeable with the land tax imposed by that statute.—**METROPOLITAN RY. CO. v. FOWLER**, [1893] A. C. 416; 62 L. J. Q. B. 553; 69 L. T. 390; 57 J. P. 756; 42 W. R. 270; 9 T. L. R. 610; 1 R. 264, H. L.

Annotations:—**Consd.** Westminster Corpn. v. Johnson, Westminster Corpn. v. Fuller, [1904] 2 K. B. 737; Newton Chambers v. Hall, [1907] 2 K. B. 446; C. L. Ry. v. City of London Land Tax Comrs., [1911] 1 Ch. 467; Taff Vale Ry. v. Cardiff Ry., [1917] 1 Ch. 299. **Refd.** Halkyn District Mines Drainage Co. v. Holywell Union (1893), 9 R. 779; Toronto Corpn. v. Consumers' Gas Co., [1916] 2 A. C. 618. **Mentd.** Southport Corpn. v. Ormskirk Union Assmt. Com., [1894] 1 Q. B. 196; Farmer v. Waterloo & City Ry., [1895] 1 Ch. 527; Liverpool Corpn. v. West Derby Union Assmt. Com. (1908), 72 J. P. 397; C. L. Ry. v. City of London Land Tax Comrs., [1911] 2 Ch. 467; Derry v. Sanders, [1919] 1 K. B. 223.

122. ————.]—FARMER v. WATERLOO & CITY RY. CO., [1895] 1 Ch. 527; 64 L. J. Ch. 338; 72 L. T. 225; 59 J. P. 295; 43 W. R. 363; 11 T. L. R. 210; 13 R. 306.

123. Whether easement acquired over adjacent land—Proposed road mentioned in schedule to notice to treat.]—Where a proposed road is mentioned in the particulars scheduled to a notice to treat for the compulsory purchase of land, *e.g.* as the site for a board-school, as one of the boundaries of such land, same must be regarded as descriptive merely, & not as passing any right to have the road constructed, or any right over land adjacent to the land so compulsorily acquired.—*Re* LONDON SCHOOL BOARD & FOSTER (1903), 87 L. T. 700; 47 Sol. Jo. 204, C. A.

Annotation:—**Mentd.** Whitehouse v. Hugh, [1906] 1 Ch. 253.

Whether easement included in "lands."]—*See* Sect. 1, sub-sect. 2, *ante*.

Right to use land to prevent acquisition of prescriptive rights.]—*See* Sect. 4, *post*.

Right to grant easements over land acquired.]—*See* Sect. 4, *post*.

Interference with easement—Remedies for.]—*See* Part III., Sect. 3, sub-sect. 4, B. (e), *post*.

Destruction of easement—Whether notice to treat necessary.]—*See* Part VI., Sect. 2, sub-sect. 1, *post*.

SUB-SECT. 5.—LAND TAKEN FOR RECOUPMENT AND EXCHANGE.

124. Recoupment—Whether lands authorised to be taken for such purpose.]—GALLOWAY v. LONDON CORPN., No. 109, *ante*.

125. ———— Not under authority to make street works.]—By a private Act of Parliament a corpn. were authorised, *inter alia*, to make certain street works within the limits of lateral deviation shown on their deposited plans & to take "for the purpose of the street works the lands shown on the deposited plans in connection therewith & which they may require for the purposes thereof respectively":—*Held*: it did not authorise the corpn. to take land shown on the plans but not actually required for street works, for the purpose of reselling same at a profit.—**DONALDSON v.**

SOUTH SHIELDS CORPN. (1899), 68 L. J. Ch. 162; 79 L. T. 685, C. A.

126. ———— Not under authority to widen streets.]—DENMAN (J. L.) & Co., LTD. v. WESTMINSTER CORPN., CORDING (J. C.) & Co., LTD. v. WESTMINSTER CORPN., [1906] 1 Ch. 464; 75 L. J. Ch. 272; 94 L. T. 370; 70 J. P. 185; 54 W. R. 345; 22 T. L. R. 270; 4 L. G. R. 442.

Annotations:—**Expld.** R. v. Brighton Corpn., *Ex p.* Shoosmith (1907), 96 L. T. 762. **Refd.** Davies v. London City Corpn., [1913] 1 Ch. 415.

Liability of promoters to take whole premises.]—*See* Part VI., Sect. 4, *post*.

Exchange of lands—Whether acquisition of land allowed for such purpose.]—*See* Nos. 102, 114, *ante*.

SUB-SECT. 6.—LAND FOR EXTRAORDINARY PURPOSES.

See Lands Act, 1845, s. 12.

127. Not subject to provisions relating to superfluous lands.]—Lands taken compulsorily by the promoters of a railway, unless used or disposed of within the statutory period, are deemed "superfluous lands," & as such vest in the adjoining owners. But this statutory rule has no application to lands acquired by voluntary agreement for "extraordinary purposes" arising incidentally.—**CITY OF GLASGOW UNION RY. CO. v. CALEDONIAN RY. CO.** (1871), L. R. 2 Sc. & Div. 160; 35 J. P. 628, H. L.

Annotations:—**Distd.** May v. G. W. Ry. (1872), L. R. 8 Q. B. 26. **Consd.** Horne v. Lymington Ry. (1874), 31 L. T. 167. **Expld.** Hooper v. Bourne (1877), 3 Q. B. D. 258. **Consd.** *Re* Chelsea Waterworks Co. (1887), 56 L. J. Ch. 640. **Mentd.** Schweder v. Worthing Gas Light & Coke Co. (1911), 105 L. T. 670.

128. ———— Land acquired by purchase outside limits of deviation.]—HORNE v. LYMINGTON RY. CO. (1874), 31 L. T. 167; 38 J. P. 788.

Superfluous lands.]—*See, generally*, Part XIV., *post*.

129. Acquisition of land for authorised purpose amounting to nuisance—No negligence—Cattle station.]—A railway co. were by their Act authorised among other things to carry cattle, & also to purchase by agreement, in addition to the lands which they were empowered to purchase compulsorily, any lands not exceeding in the whole fifty acres, in such places as should be deemed eligible, for the purpose of providing additional stations, yards & other conveniences for receiving, loading or keeping any cattle, goods or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the co. should judge requisite. The co. were also empowered to sell such additional lands & to purchase in lieu thereof other lands which they should deem more eligible for the said purposes, & so on from time to time. The Act contained no provision for compensation in respect of lands so purchased by agreement. Under this power the co. some years after the expiration of the compulsory powers bought land adjoining one of their stations & used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station the noise of the cattle & drovers was a nuisance which, but for the Act, would have been actionable. There was no negligence in the mode in which the co. conducted the business:—*Held*: the purpose for which the land was acquired being expressly authorised by the Act & being incidental & necessary to the authorised use of the railway for the cattle traffic, the co. were authorised to do what they did, &

Sect. 3.—Restrictions as to land to be taken and works to be executed: Sub-sects. 6 & 7. Sect. 4.]

were not bound to choose a site more convenient to other persons, & the adjoining occupiers were not entitled to an injunction to restrain the co.—**LONDON, BRIGHTON & SOUTH COAST RY. CO. v. TRUMAN** (1885), 11 App. Cas. 45; 55 L. J. Ch. 354; 54 L. T. 250; 50 J. P. 388; 34 W. R. 657, H. L.; *reversg.* S. C. *sub nom.* **TRUMAN v. LONDON, BRIGHTON & SOUTH COAST RY. CO.**, 29 Ch. D. 80, C. A.

Annotations:—**Consd.** National Telephone Co. v. Baker, [1893] 2 Ch. 186. **Distd.** Rapier v. London Tram. Co., [1893] 2 Ch. 588. **Consd.** Canadian Pacific Ry. v. Parke, [1899] A. C. 535. **Distd.** Jordonson v. Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217. **Consd.** Batcheller v. Tunbridge Wells Gas Co. (1901), 65 J. P. 680; Rattee v. Norwich Electric Tram. Co. (1902), 18 T. L. R. 562; A.-G. v. Dorchester Corp'n. (1905), 93 L. T. 290. **Distd.** English v. Metropolitan Water Board, [1907] 1 K. B. 588. **Expld.** R. v. Brighton Corp'n., *Ex p.* Shoosmith (1907), 96 L. T. 762. **Refd.** Evans v. M. S. & L. Ry. (1887), 36 Ch. D. 626; Goldberg v. Liverpool Corp'n. (1900), 82 L. T. 362; East Fremantle Corp'n. v. Annals, [1902] A. C. 213; Westminster Corp'n. v. L. & N. W. Ry., [1905] A. C. 426; Demerara Electric Co. v. White, [1907] A. C. 330; McClelland v. Manchester Corp'n., [1912] 1 K. B. 118. **Mentd.** A.-G. v. Met. Ry., [1894] 1 Q. B. 384; West v. Bristol Tram. Co. (1908), 99 L. T. 264.

See, generally, NUISANCE.

130. Power of company to enter into restrictive covenants—On purchase by agreement of land for extraordinary purpose—Release of covenant on resale—Covenant ultra vires.]—*Re* **SOUTH EASTERN RY. CO. & WIFFIN'S CONTRACT**, [1907] 2 Ch. 366; 76 L. J. Ch. 481; 97 L. T. 576.

Annotations:—**Consd.** Stourcliffe Estates Co. v. Bournemouth Corp'n., [1910] 2 Ch. 12. **Refd.** County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

131. ——— Restrictions not preventing user of land for purpose for which acquired.]—When a corp'n. purchases land by agreement for any of the purposes for which it is authorised to acquire land by Public Health Act, 1875 (c. 55), or other public Acts, or by its special local Acts, it is not *ultra vires* for the corp'n. to enter into covenants with the vendor restricting the erection of buildings upon the land purchased which it might erect under other powers given to it for the benefit of the public, provided that such restrictions do not prevent the user of the land for the particular purposes for which it was acquired.—**STOURCLIFFE ESTATES CO., LTD. v. BOURNEMOUTH CORPN.**, [1910] 2 Ch. 12; 79 L. J. Ch. 455; 102 L. T. 629; 74 J. P. 289; 26 T. L. R. 450; 8 L. G. R. 595, C. A.

SUB-SECT. 7.—SALE OF SUPERFLUOUS LAND.

See Part XIV., Sect. 4, *post*.

SECT. 4.—RESTRICTIONS AS TO USER OF LAND.

132. Land acquired for reservoir—Letting out pleasure boats on reservoir—Restrained by injunction.]—**BOSTOCK v. NORTH STAFFORDSHIRE RY. CO.** (1856), 3 Sm. & G. 283; 25 L. J. Ch. 325; 27 L. T. O. S. 33; 20 J. P. 390; 2 Jur. N. S. 248; 4 W. R. 336; 65 E. R. 661.

Annotations:—**Expld.** Grand Junction Canal Co. of Proprietors v. Petty (1888), 57 L. J. Q. B. 413. **Refd.** Norton v. L. & N. W. Ry. (1878), 9 Ch. D. 623. **Mentd.** Astley v. M. S. & L. Ry. (1858), 27 L. J. Ch. 299.

133. Land acquired under Public Health Acts—For public park—Part used for erection of museum, free library, & conservatory.]—In 1864, a municipal corp'n., as local board of health, purchased

under Public Health Act, 1848 (c. 63), s. 74, a piece of land of about ten acres to be added to a public garden of fifteen acres. In 1875 the corp'n. determined to appropriate about a quarter of an acre at one extremity of this piece of land as a site for the erection of town buildings & of a museum, public library, & school of art & conservatory:—**Held:** the erection of a free library was also allowable, as being conducive to the better enjoyment of the public walks & grounds as such.—**A.-G. v. SUNDERLAND CORPN.** (1876), 2 Ch. D. 634; 45 L. J. Ch. 839; 34 L. T. 921; 40 J. P. 564; 24 W. R. 991, C. A.

Annotations:—**Expld.** Herne Bay U. C. v. Payne & Wood, [1907] 2 K. B. 130. **Refd.** Williamson v. Sunderland Corp'n. (1892), 9 T. L. R. 143; A.-G. v. Hanwell U. C., [1900] 1 Ch. 51; Stourcliffe Estate Co. v. Bournemouth Corp'n. (1910), 79 L. J. Ch. 455.

134. ——— For disposal of sewage—Part not immediately required for purpose for which acquired—May be used temporarily as recreation ground.]—**A.-G. v. TEDDINGTON URBAN COUNCIL**, [1898] 1 Ch. 66; 67 L. J. Ch. 23; 77 L. T. 426; 61 J. P. 825; 46 W. R. 88; 14 T. L. R. 32; 42 Sol. Jo. 46.

Annotations:—**Consd.** A.-G. v. Hanwell U. C., [1900] 1 Ch. 51; A.-G. v. Pontypridd U. C., [1905] 2 Ch. 441.

135. ——— Used for erection of isolation hospital.]—(1) Public Health Act, 1875 (c. 55), s. 175, which empowers the Local Government Board to direct that any lands acquired by a local authority in pursuance of any powers contained in the Act, *e.g.* for disposal of sewage, & not required for the purpose for which they were acquired, shall not be sold, does not enable the Board to direct that those lands shall be applied permanently to any purpose inconsistent with the original purpose, *e.g.* erection of isolation hospital.

(2) A local authority have no power to apply permanently land which they have acquired for one purpose to another purpose inconsistent with the original purpose, even though the land cannot possibly be required for that original purpose, & they will be restrained from so doing at the suit of the A.-G. & the landowner from whom the land not required was purchased.—**A.-G. v. HANWELL URBAN COUNCIL**, [1900] 2 Ch. 377; 69 L. J. Ch. 626; 82 L. T. 778; 48 W. R. 690; 16 T. L. R. 452; 44 Sol. Jo. 572, C. A.

Annotations:—*As to* (1) **Appld.** A.-G. v. Pontypridd U. C., [1905] 2 Ch. 441. **Expld.** Herne Bay U. C. v. Payne & Wood, [1907] 2 K. B. 130.

136. Land acquired for erection of electricity generating station—Part not immediately required for purpose for which acquired—Used for erection of refuse destructor.]—The principles which govern the provisions of Public Health Act, 1875 (c. 55), s. 175, also apply to similar provisions in clause 8 of the schedule to Electric Lighting (Clauses) Act, 1899 (c. 19). Where therefore a local authority, under the powers of Electric Lighting Acts & a provisional order confirmed by a special Act, acquire land for the purpose of erecting thereon a generating station for the supply of electricity to their district, they cannot use any part of the land, for the time being not required for those purposes, for any purpose, *e.g.* the erection of a refuse destructor, not authorised by the order or inconsistent with the purposes for which the land was acquired.—**A.-G. v. PONTYPRIDD URBAN COUNCIL**, [1906] 2 Ch. 257; 75 L. J. Ch. 578; 95 L. T. 224; 70 J. P. 394; 22 T. L. R. 576; 50 Sol. Jo. 525; 4 L. G. R. 791, C. A.

PART II. SECT. 4.

133 i. Land acquired for railway purposes—Used for trading purposes.]—

Where land has been *bona fide* expropriated by govt. for railway purposes, the former owner of such land cannot prevent its use for trading purposes

by persons to whom permission has been given by govt. so to use it.—**LANDMARK v. VAN DER WALT** (1885), 3 S. C. 300.—S. AF.

Annotations:—*Refd.* Lambeth B. C. v. South London Electric Supply Corpn. (1907), 96 L. T. 440. *Mentd.* Stourcliffe Estate Co. v. Bournemouth Corpn. (1910), 79 L. J. Ch. 455.

See, further, ELECTRIC LIGHTING & POWER; OPEN SPACES & RECREATION GROUNDS; PUBLIC HEALTH & LOCAL ADMINISTRATION; SEWERS & DRAINS.

137. Prevention of acquisition of prescriptive rights—By railway company—Hoarding to prevent right of light.]—A railway co. purchasing land for the railway acquires an absolute fee simple, but such fee simple is acquired solely for the purposes of constructing & using the railway. A railway co. has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway.—*NORTON v. LONDON & NORTH WESTERN RY. CO.* (1878), 9 Ch. D. 623; 47 L. J. Ch. 859; 39 L. T. 25; 27 W. R. 352; *affd.* on another ground (1879), 13 Ch. D. 268, C. A.

Annotations:—*Consd.* Bonner v. G. W. Ry. (1883), 24 Ch. D. 1. *Dtd.* Foster v. L. C. & D. Ry., [1895] 1 Q. B. 711. *Refd.* Bayley v. G. W. Ry. (1884), 26 Ch. D. 434. *Mentd.* Bobbett v. S. E. Ry. (1882), 9 Q. B. D. 424; Bird v. Eggleton (1885), 29 Ch. D. 1012; Marshall v. Taylor, [1895] 1 Ch. 641; Littledale v. Liverpool College, [1900] 1 Ch. 19; Mid. Ry. v. Wright, [1901] 1 Ch. 738; Kynoch v. Rowlands, [1912] 1 Ch. 527.

138. ———.]—Pltf. was owner of a house some of the windows of which overlooked a piece of land belonging to a railway co. & used as a goods yard of a station. When the house had been built sixteen years the co. put up a screen opposite pltf.'s windows to prevent his acquiring an easement of light & air. Pltf. brought an action for injunction to restrain the co. from interfering with his light & air:—*Held:* pltf. had no equity to restrain the co. from taking measures to prevent prescriptive rights from being acquired for windows looking upon their land.—*BONNER v. GREAT WESTERN RY. CO.* (1883), 24 Ch. D. 1; 48 L. T. 619; 47 J. P. 580; 32 W. R. 190, C. A.

Annotations:—*Refd.* Foster v. L. C. & D. Ry., [1895] 1 Q. B. 711. *Mentd.* Greenhalgh v. Brindley, [1901] 2 Ch. 324; Boyce v. Paddington B. C., [1903] 2 Ch. 556.

139. Alienation of land—Or easement over same—For purposes outside special Act—Sale of right of way under railway arch.]—(1) A railway co. having the usual powers under their special Act to take & use land for the purpose of the railway & works, cannot, whether for valuable consideration or otherwise, alienate for any purpose except the purposes of the Act any portion of its land, not being superfluous land within Lands Act, 1845, s. 127, & not being land taken for extraordinary purposes within Railways Act, 1845, s. 45, nor any easement over same.

(2) Where a railway station is erected on arches on land thus taken, the part of the land under the arches is not superfluous land within Lands Act, 1845, s. 127.—*MULLINER v. MIDLAND RY. CO.* (1879), 11 Ch. D. 611; 48 L. J. Ch. 258; 40 L. T. 121; 43 J. P. 573; 27 W. R. 330.

Annotations:—*As to* (1) *Distd.* *Re* Higgins & Hitchman's Contract (1882), 21 Ch. D. 95. *Consd.* Ware v. L. B. & S. C. Ry. (1882), 52 L. J. Ch. 198; Ayr Harbour Trustees v. Oswald (1883), 8 App. Cas. 623; Bayley v. G. W. Ry. (1884), 26 Ch. D. 434. *Distd.* Grand Junction Canal Co. v. Pottly (1888), 21 Q. B. D. 273. *Consd.* Foster v. L. C. & D. Ry. (1894), 71 L. T. 855; *Re* Gonty & M. S. & L. Ry., [1896] 2 Q. B. 439. *Folld.* G. W. Ry. v. Solihull R. D. C. (1902), 86 L. T. 852. *Distd.* Stretford U. D. C. v. Manchester South Junction & Altrincham Ry. (1903), 68 J. P. 59. *Consd.* Taff Vale Ry. v. Pontypridd U. D. C. (1905), 93 L. T. 126; Stourcliffe Estates Co. v. Bournemouth Corpn., [1910] 2 Ch. 12. *Refd.* Stevens v. Met. Dist. Ry. (1885), 29 Ch. D. 60; Thames River Conservators v. Southwark & Vauxhall Water Co. (1897), 13 T. L. R. 155; Jordonson v. Sutton, Southcoates & Drypool Gas Co., [1898] 2 Ch. 614; L. & N. W. Ry. v. Runcorn R. C., [1898] 1 Ch. 34; G. W. Ry. v. Talbot, [1902] 2 Ch. 759; S. E. Ry. v. Associated Portland Cement Manufacturers, [1910] 1 Ch. 12; G. C. Ry. v. Balby-with-Hexthorpe U. C., A.-G. v. G. C. Ry., [1912] 2 Ch. 110; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251; *Re*

Plymouth Corpn. & Walter, [1918] 2 Ch. 354; Thames Conservators v. Kent, [1918] 2 K. B. 272. *As to* (2) *Consd.* *Re* Met. Dist. Ry. & Cosh (1880), 13 Ch. D. 607. *Generally,* *Mentd.* Sevenoaks, Maidstone & Tunbridge Ry. v. L. C. & D. Ry. (1879), 11 Ch. D. 625; Davis v. Leicester Corpn., [1894] 2 Ch. 208; M. S. & L. Ry. v. Anderson, [1898] 2 Ch. 394; Hackney Corpn. v. Lee Conservancy Board, [1904] 2 K. B. 541.

140. Premises used as stable—Until required for authorised purposes—Right to claim right of way—From highway to stables.]—A railway co. purchased under the powers of their Act, a piece of land on which was a stable. By the conveyance to the co. the premises were granted together with all rights, members & appurtenances to the hereditaments belonging or occupied or enjoyed as part parcel or member thereof. The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience & had used it ever since. The soil of this road was not conveyed to the co. & no express mention of it was made in the conveyance. Pltf. refused to allow the co. to use the road:—*Held:* (1) notwithstanding the unity of possession of the stables & the private road at the date of the conveyance to the co., a right of way passed to the co. under the general words in the conveyance; (2) the fact of the stable having been purchased by a railway co. for the purposes of their undertaking did not preclude them from claiming the right of way so long as they used the premises as a stable, which they might lawfully do till such time as they were required for the special purposes of the railway, or were sold as superfluous land.

(3) *Qu.*: whether the railway co. would be entitled to claim the right of way after they had ceased to use the premises as a stable & had converted them to some purpose connected with the railway.—*BAYLEY v. GREAT WESTERN RY. CO.* (1884), 26 Ch. D. 434; 51 L. T. 337, C. A.

Annotations:—*As to* (1) *Consd.* Brown v. Alabaster (1887), 37 Ch. D. 490. *Apld.* Schwann v. Cotton & Hayles (1910), 85 L. J. Ch. 689. *Refd.* *Re* Peck & London School Board, [1893] 2 Ch. 315; Broomfield v. Williams, [1897] 1 Ch. 602; Allhusen v. Ealing & South Harrow Ry. (1898), 78 L. T. 285. *As to* (2) *Distd.* Titchmarsh v. Royston Water Co. (1899), 81 L. T. 873. *Refd.* Foster v. L. C. & D. Ry. (1894), 71 L. T. 855; May v. Belleville, [1905] 2 Ch. 605; *Re* Walmsley & Shaw's Contract, [1917] 1 Ch. 93. *As to* (3) *Refd.* A.-G. v. Teddington U. C., [1898] 1 Ch. 66; Milner's Safe Co. v. G. N. & City Ry., [1907] 1 Ch. 208.

141. Temporary letting of part for erection of chapel—Not inconsistent with authorised purposes.]—*ONSLOW v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1895), 64 L. J. Ch. 355; 72 L. T. 256.

142. Dedication of right of way—Whether incompatible with authorised powers—By canal company.]—Land acquired by a co. under an Act of Parliament for the purposes of their undertaking as specified by such Act may be dedicated by them as a public highway, if such use by the public be not incompatible with the objects prescribed by the Act.—*GRAND JUNCTION CANAL CO. v. PERTY* (1888), 21 Q. B. D. 273; 57 L. J. Q. B. 572; 59 L. T. 767; 52 J. P. 692; 36 W. R. 795, C. A.

Annotations:—*Expld.* Foster v. L. C. & D. Ry. (1894), 71 L. T. 855; *Re* Gonty & M. S. & L. Ry., [1896] 2 Q. B. 439. *Consd.* Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs. (1899), 81 L. T. 174. *Expld.* G. W. Ry. v. Solihull R. D. C. (1902), 86 L. T. 852. *Consd.* A.-G. v. L. & S. W. Ry. (1905), 69 J. P. 110. *Expld.* Taff Vale Ry. v. Pontypridd U. D. C. (1905), 93 L. T. 126. *Consd.* Arnott v. Whitby U. D. C. (1909), 101 L. T. 14. *Apld.* Arnold v. Morgan, [1911] 2 K. B. 314. *Consd.* County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251. *Refd.* Stretford U. D. C. v. Manchester South Junction & Altrincham Ry. (1903), 1 L. G. R. 683; L. & Y. Ry. v. Davenport (1906), 70 J. P. 129; Thames Conservators v. Kent, [1918] 2 K. B. 272. *Mentd.* A.-G. v. Horner (1913), 82 L. J. Ch. 339.

Sect. 4.—Restrictions as to user of land. Part III.
Sect. 1: Sub-sects. 1 & 2, A., B. & C.]

143. —.—.—.—.—.]—A statutory body cannot dedicate to the public a right of way which would be incompatible with the special purpose for which it was incorporated.—**GREAT WESTERN RY. CO. v. SOLIHULL RURAL DISTRICT COUNCIL** (1902), 86 L. T. 852; 66 J. P. 772; 18 T. L. R. 707, C. A.

Annotations:—Consd. A.-G. v. L. & S. W. Ry. (1905), 3 L. G. R. 1327; **County Hotel & Wine Co. v. L. & N. W. Ry.**, [1918] 2 K. B. 251. **Refd. G. W. Ry. v. Talbot**, [1902] 2 Ch. 759; **Taff Vale Ry. v. Pontypridd U. D. C.** (1905), 93 L. T. 126; **L. & Y. Ry. v. Davenport** (1906), 4 L. G. R. 425; **G. C. Ry. v. Balby-with-Hexthorpe U. C., A.-G. v. G. C. Ry.**, [1912] 2 Ch. 110; **Thames Conservators v. Kent**, [1918] 2 K. B. 272.

144. —.—.—.—.—.]—A statutory body has no power to dedicate to the public a right of way over its property if such dedication would be incompatible with the special purposes for which the statutory powers were conferred upon it, but such a body has power to dedicate a right of way along the embankment of a reservoir where such dedication need not result in the cost of the upkeep & maintenance of the undertaking being materially increased.—**LANCASHIRE & YORKSHIRE RY. CO. v. DAVENPORT** (1906), 70 J. P. 129; 4 L. G. R. 425, C. A.

Annotation:—Refd. Thames Conservators v. Kent, [1918] 2 K. B. 272.

145. Temporary letting of arches for profit—By railway company—Authorised.]—A railway co. authorised by their special Act to acquire land for the purposes of the railway & works have also the implied power of using land so acquired in any manner which is not an infringement of the rights of other persons & which is not inconsistent with the purposes for which the co. was constituted.—**FOSTER v. LONDON, CHATHAM & DOVER RY. CO.**, [1895] 1 Q. B. 711; 64 L. J. Q. B. 65; 71 L. T. 855; 43 W. R. 116; 11 T. L. R. 89; 39 Sol. Jo. 95; 14 R. 27, C. A.

Annotations:—Appld. Onslow v. M. S. & L. Ry. (1895), 64 L. J. Ch. 355. **Consd. Re Gonty & M. S. & L. Ry.**, [1896]

2 Q. B. 439; **Dundee Harbour Trustees v. Nicol**, [1915] A. C. 550. **Refd. Taff Vale Ry. v. Pontypridd U. D. C.** (1905), 93 L. T. 126; **A.-G. v. Mersey Ry.**, [1907] 1 Ch. 81; **County Hotel & Wine Co. v. L. & N. W. Ry.**, [1918] 2 K. B. 251. **Mentd. Mid. Ry. v. Wright** (1901), 70 L. J. Ch. 411; **Rochdale Canal Co. v. Manchester Ship Canal Co.** (1901), 85 L. T. 585; **Young v. Liverpool Assmt. Com.** (1911), 9 L. G. R. 366.

146. Regrant of easement of tunnelling—By railway company.]—By an accommodation works agreement a ry. co., who were purchasing a strip of land for their line, agreed that the landowner, his heirs, appointees, or assigns, might at any time thereafter make a tunnel thereunder to join the lands severed thereby. The co. also agreed to make a certain defined level crossing; the landowner subsequently conveyed the strip to the ry. co., reserving to himself the defined level crossing & the right to make a tunnel at his own expense, the level crossing & the privilege of making a tunnel being accepted in lieu of all other accommodation works. The site of the tunnel was in no way defined:—**Held:** (1) the provision in the agreement as to the tunnel was a personal contract & was not obnoxious to the rule against perpetuities; (2) the benefit of the contract could be specially assigned to a lessee of part of the severed lands during the continuance of the lease; (3) as the agreement & reservation amounted to a regrant of an easement by the ry. co. to the landowner, & not to an exception out of the land granted by him to the co., the right to select the site of the tunnel was vested in the landowner, his heirs, appointees, & assigns, & the agreement & reservation were not void for uncertainty; (4) the grant of the easement was not *ultra vires*; (5) the agreement was also valid as an agreement for a further accommodation work under Railways Act, 1845, s. 71.—**SOUTH EASTERN RY. CO. v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS** (1900), LTD., [1910] 1 Ch. 12; 79 L. J. Ch. 150; 101 L. T. 865; 73 J. P. 482; 74 J. P. 21; 25 T. L. R. 811; 26 T. L. R. 61; 54 Sol. Jo. 80, C. A.

Annotation:—Consd. County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

Part III.—Principles of the Law of Compensation.

SECT. 1.—WHERE LAND PURCHASED OR TAKEN.

See Lands Act, 1845, ss. 16–68.

SUB-SECT. 1.—IN GENERAL.

See Lands Act, 1845, s. 68.

147. “Lands taken for the execution of works” —Not applicable when compensation is sought in respect of whole interest in land—Nor when taking wrongful.]—The compensation provided for lands “taken for the execution of works,” under Lands Act, 1845, s. 68, does not apply where compensation is sought in respect of the whole interest in the land; nor to a case where there has been a wrongful taking, i.e. a taking without lawful authority, though by mistake.

A railway co. agreed for the purchase of lands for £300 with C., the supposed agent of H., who was tenant for life of the property only, though believed by both contracting parties to be the absolute owner. The co. afterwards received notice that

H. was tenant for life only. Shares to the amount of £300 were forwarded to H. with his consent, & the co. shortly afterwards entered upon the lands without the leave of H., & not having made any payment or compensation other than the above, or deposited any sum in the bank. Some disagreement arose as to boundaries & a right of way, & H. five months afterwards having been informed of the alleged agreement, wrote to the co. repudiating it & denying the agency of C. It afterwards appeared that the lands were in mtge. It was also alleged that £300 was a grossly inadequate value for the fee simple in the land. A bill was filed by the mtgees. & the second tenant for life for an injunction to restrain continuation of possession until compensation had been made to every person having any interest in the lands. The co. alleged that plffs.’ remedy was at law, under the above sect., & not in equity:—**Held:** plffs. were entitled to an injunction.—**PERKS v. WYCOMBE RY. CO.** (1862), 3 Giff. 662; 7 L. T. 150; 8 Jur. N. S. 1051; 10 W. R. 788; 66 E. R. 574; *subsequent proceedings*, 1 New Rep. 1, L. C.

SUB-SECT. 2.—PERSONS ENTITLED TO COMPENSATION.

See Lands Act, 1845, s. 18.

A. Owners.

148. Owner not ascertained at date of entry—Purchase-money retained by promoters for twenty-five years—Immediate claim by owner when ascertained—Valid.]—By an Act of Parliament establishing a canal co., the committee of the co. had power, in case any person who should agree with the co. for sale of any commons or waste lands should not be able to make a good title to the satisfaction of the committee, or in case any person entitled to commons or waste lands to be purchased by the co. could not be known, to order the purchase-money to be paid into ct. In 1812, a contract for the purchase of certain lands on P. Common was entered into by the co. with S., a party whose title to sell was then doubtful. The co., however, took possession of the lands & never paid the purchase-money into ct. In 1827, an Act passed for the inclosure of P. Common, & in 1837, an award was made pursuant to that Act by which the arbitrator found that S. was the true owner of the lands:—*Held*: the co. were trustees of the purchase-money for S., & those claiming under him, & as the legislature had permitted a bargain with an unascertained person, S. & those claiming under him were guilty of no laches in not filing a bill against the co. for the recovery of the purchase-money before 1837, the period when the true ownership was ascertained. —*CATOR v. CROYDON CANAL CO.* (1843), 4 Y. & C. Ex. 593; 13 L. J. Ch. 89; 2 L. T. O. S. 225; 8 Jur. 277; 160 E. R. 1149, L. C.

149. Owner when land taken.]—*Ex p. SUNDERLAND (FREEMEN & STALLINGERS)* (1852), 1 Drew. 184; 22 L. J. Ch. 145; 18 L. T. O. S. 329; 16 Jur. 370; 61 E. R. 422.

150. Executors of owner—Lands devised to infant before sale—Death of owner before completion.]—*Re MANCHESTER & SOUTHPORT RY. CO.* (1854), 19 Beav. 365; 52 E. R. 391.

Annotation:—*Reid. Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

151. Conservators as owners of bed and fore-shore of river—Notwithstanding consent to building of bridge.]—*THAMES CONSERVATORS v. PIMLICO RY. CO.* (1868), L. R. 4 C. P. 59; 38 L. J. C. P. 4; 19 L. T. 734.

Annotation:—*Consd. Thames Conservators v. Port of London Port Sanitary Authority*, [1894] 1 Q. B. 647.

B. Owners of Chattels.

152. Not entitled—Disused water pipes.]—(1) Defts. under their Act of Parliament took land under which pltfs.' water pipes were laid. The pipes were buried beneath defts.' embankment, & ceased to be used. Afterwards, in making a tunnel, defts. took up the pipes. Pltfs. claimed compensation for the value of the pipes under Lands Act 1845, s. 68:—*Held*: pltfs. had no interest in land, & were not entitled to compensation under that sect.

(2) In an issue stated under the Regulation of Railways Act, 1868 (c. 119), s. 41, to try a question of compensation, the time for appealing is not limited to twenty-one days by R. S. C. (1875), O. 58, rr. 9, 15.—*NEW RIVER CO. v. MIDLAND RY. CO.* (1877), 36 L. T. 539; 25 W. R. 502, C. A.

C. Licensees.

153. Not entitled—Shooting rights.]—A party who has a right of shooting over land by an agreement, not under seal, with the owner, has not such an interest as to entitle him to compensation from a railway co., under Lands Act, 1845, s. 68, in respect of the shooting being diminished in value by the co. constructing a railway over part of such land.—*BIRD v. GREAT EASTERN RY. CO.* (1865), 19 C. B. N. S. 268; 34 L. J. C. P. 366; 13 L. T. 365; 11 Jur. N. S. 782; 13 W. R. 989; 144 E. R. 790.

Annotations:—*Folld. Warr v. L. C. C.* (1903), 88 L. T. 689. *Reid. Wright v. Shrubbs* (1887), 4 T. L. R. 32.

154. — Use of board room.]—*MUNICIPAL FREEHOLD LAND CO. v. METROPOLITAN & DISTRICT*

PART III. SECT. 1, SUB-SECT. 2.—A.

m. Owner not ascertained at date of entry—Compensation paid to another—Promoters liable to true owner.]—Defts. did not give the owner of land notice to appear before the arbitrators, but treated the land as that of another person, & paid him amount awarded:—*Held*: defts. remained liable to the true owner.—*THOMPSON v. SYDNEY CITY* (1905), 40 N. S. R. 562.—CAN.

n. — Person claiming under possessory title—Land taken while title inchoate.]—Land was resumed by Minister of Public Instruction. At date of resumption the rightful owner was unknown & out of possession, & F. had ten years previously entered into possession as vacant land, enclosed it, & to the date of resumption held exclusive possession without notice of any adverse claim, received rents & paid rates & taxes & the land stood in his name in rate books:—*Held*: F. not a mere trespasser, but had a possessory title, good at date of resumption, against every one but the rightful owner, & in course of becoming absolute as against him. Having been deprived of the land, he had a *prima facie* case for compensation within Lands Acquisition Act, 1880, s. 13, which was not excluded by the circumstance that under Public Works Act, 1900, the Minister had acquired title of rightful owner.—*PERRY v. CLISSOLD*, [1907] A. C. 73.—AUS.

149 i. Owner when land taken.]—The owner at the time of the expropriation, & not the registered owner, is the true owner.—*Re TORONTO SUBURBAN RY.*

CO. & ROGERS (1920), 48 O. L. R. 72.—CAN.

o. Purchaser from owner—After expropriation of part.]—Land forming part of a block owned by A. was compulsorily acquired by a ry. co.; A. conveyed the whole block to B.:—*Held*: the conveyance did not of itself carry to B. the right to compensation for the part taken.—*ESKERY v. GRAND TRUNK RY. CO.* (1891), 21 O. R. 224.—CAN.

p. Person in possession as owner—*Railway Act*, 1888.]—Under above Act the person in possession as owner, is entitled to compensation, & the matter of title is to be held in abeyance until a later stage in the expropriation proceedings.—*STEWART v. OTTAWA & NEW YORK RY. CO.* (1899), 30 O. R. 599.—CAN.

q. Tenants in common—Infants—Conveyance by parent not being guardian—*Railway Act*, 1868.]—The mother of infants, resident with her, being entitled to a third undivided interest in land, they owning the residue, by deed agreed with a ry. co. to grant a right of way "through my land in P., consisting of such portion of lots 18 & 19 as may be required to carry the ry. across said lots," & conveyed to them accordingly. At time of conveyance she had not been appointed guardian to her children:—*Held*: under above Act her deed barred the children's interest as well as her own, & they were therefore not entitled to compensation.—*DUNLOP v. CANADA CENTRAL RY. CO.* (1880), 45 U. C. R. 74.—CAN.

r. — Under will—Refusal to carry out testator's wish to dedicate as road—Not entitled to compensation—*Railway Act*, 1906.]—*CANADIAN NORTHERN RY. CO. v. BILLINGS* (1914), 21 Can. Ry. Cas. 310; 32 D. L. R. 351.—CAN.

PART III. SECT. 1, SUB-SECT. 2.—B.

s. Entitled—Machinery.]—A foundry was expropriated & the owner was unable to find suitable premises elsewhere to carry on his business:—*Held*: entitled to compensation for the depreciation in value of the machinery & other personal property with which his foundry was fitted up.—*R. v. THOMPSON* (1907), 11 Exch. C. R. 161; 27 C. L. T. 669.—CAN.

a. — — — — —.]—*R. v. STAIRS* (1907), 11 Exch. C. R. 137; 27 C. L. T. 670.—CAN.

PART III. SECT. 1, SUB-SECT. 2.—C.

b. Entitled—Where licence irrevocable—*Public Works Act*, 1882, s. 4.]—In 1848, P., with leave of Govt., moored a ship on the foreshore of a public harbour & used it as a wharf; he afterwards substituted a jetty in its place, which, at Govt.'s request, was lengthened, & used by Govt. till 1878, & a rent paid for such use:—*Held*: P. had acquired a perpetual right to the jetty for the purpose of the original licence so as to entitle him to compensation under above Act.—*PLIMMER v. WELLINGTON CORPN.* (1884), 9 App. Cas. 699; 53 L. J. P. C. 105; 51 L. T. 475.—N.Z.

1. — *Where land purchased or taken: Sub-sect. 2, C., D. & E.; sub-sect. 3, A. & B.]*

RAILWAYS JOINT COMMITTEE (1883), 1 Cab. & El. 184.

Annotation:—Folld. Warr v. L. C. C. (1903), 88 L. T. 689.

155. — **Exclusive right to sell refreshments, etc., in theatre.]**—By a contract made between the lessees of a theatre & plffs. it was agreed that plffs. should have the exclusive right for a term of years to supply refreshments in the theatre, & for that purpose should have the necessary use of the refreshment rooms, bars & wine cellars of the theatre, & that they should have an exclusive right to advertise, & let spaces for advertisements, in certain parts of the theatre:—*Held*: the contract did not confer on plffs. an interest in land which could form the subject of compensation under Lands Act, 1845, s. 68.—*WARR (FRANK) & CO. LTD. v. LONDON COUNTY COUNCIL*, [1904] 1 K. B. 713; 73 L. J. K. B. 362; 90 L. T. 368; 68 J. P. 335; 52 W. R. 405; 20 T. L. R. 346; 2 L. G. R. 723, C. A.

Annotation:—Distd. Joel v. International Circus & Christmas Fair (1920), 124 L. T. 459.

D. Lessees, Yearly Tenants, etc.

See Part XIII., post.

E. Incumbrancers.

See Part XIII., post.

SUB-SECT. 3.—SUBJECTS AND MEASURE OF COMPENSATION—ASCERTAINMENT OF VALUE OF LAND PURCHASED OR TAKEN.

See Lands Act, 1845, s. 49.

A. In General.

156. **Principles of valuation.]**—(1) Where an owner of two contiguous pieces of land, forming an area suitable, & it may be best suited, for development & use as one building site, sells under com-

pulsion a part of one piece & without any reference to his interest in the other piece, the purchase price for the land so contracted to be sold must be ascertained without reference to the vendor's interest in the other piece, & is not to be ascertained by deducting the value of what is left to the owner of the two pieces after the sale from their aggregate value immediately prior to the sale.

(2) From this it results that the matter resolves itself into an inquiry as to the mode in which the amount to be paid as purchase-money is to be ascertained. In answering such inquiry the following propositions may, I think, be treated as established by authorities binding on this Ct.: (1) the value to be ascertained is the value to the vendor, not its value to the purchaser; (2) in fixing the value to the vendor all restrictions imposed on the user & enjoyment of the land in his hands are to be taken into account, but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked; (3) market price is not a conclusive test of real value; (4) increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded; (5) the value to be ascertained is the price to be paid for the land with all its potentialities & with all the use made of it by the vendor; (6) the true contractual relation of the parties, that of purchaser & vendor, is not to be obscured by endeavouring to construe it as another contractual relation altogether, that of indemnifier & indemnified (*EVE, J.*).—*Re SOUTH EASTERN RY. CO. & LONDON COUNTY COUNCIL'S CONTRACT, SOUTH EASTERN RY. CO. v. LONDON COUNTY COUNCIL*, [1915] 2 Ch. 252; 84 L. J. Ch. 756; 113 L. T. 392; 79 J. P. 545; 13 L. G. R. 1302; *sub nom. LONDON COUNTY COUNCIL v. SOUTH EASTERN RY. CO.* 59 Sol. Jo. 508, C. A.

157. — **Land subject to restrictions.]**—Where land is taken compulsorily for public purposes, the value upon which compensation is to be assessed is the value to the old owner who

PART III. SECT. 1, SUB-SECT. 3.—A.

156 i. **Principles of valuation.]**—The true principle of the law of compensation is founded on common sense; & its measure is neither the gain nor loss of the person who takes the land, but the loss of the person from whom the land is taken.—*NEW ZEALAND & AUSTRALIAN LAND CO. v. LANDS MINISTER* (1895), 13 N. Z. L. R. 714.—N.Z.

c. — **Value to owner—Not to taker.]**—Compensation for land taken is to be estimated upon the value to the owner, not the value to the taker.—*GREEN v. CANADIAN NORTHERN RY. CO.* (1915), 30 W. L. R. 572; 7 W. W. R. 1072; 22 D. L. R. 15.—CAN.

d. — — — — —.]—*R. v. NAGLE* (1917), 17 Exch. C. R. 88; 40 D. L. R. 266.—CAN.

e. — — — — —.]—*FRASER v. FRASERVILLE CITY, SAME v. SAME* (1917), 86 L. J. P. C. 91.—CAN.

f. — — — — —.]—*R. v. BARRETT* (1919), 19 Exch. C. R. 175; 49 D. L. R. 138.—CAN.

value of land to the owner is what must be regarded, & that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition.—*BOMBAY IMPROVEMENT TRUSTEES v. KARSANDAS* (1908), 1 L. R. 33 Bom. 28.—IND.

h. — — — — —.]—*Not price which might*

be obtained on voluntary sale in open market.]—Re GRANT'S ESTATE (NO. 2), [1914] 1 I. R. 364.—IR.

k. — — — — —.]—*Not "saleable" value.]*—The amount of compensation for land compulsorily taken is the value of the land to the person from whom it is taken, which is not necessarily the "saleable" value.—*RUSSELL v. LANDS MINISTER (NO. 2), SAINSBURY v. LANDS MINISTER (NO. 2)* (1899), 17 N. Z. L. R. 780.—N.Z.

157 i. — **Land subject to restrictions.]**—A ry. co. ran their line diagonally through claimant's land taking 12½ acres:—*Held*: the value of land is its value in the owner's hands, subject to such restrictions upon its use as may exist & not the value it will have in the hands of the co. free from all restrictions.—*Re TVEIT & CANADIAN NORTHERN RY. CO.* (1913), 25 W. L. R. 188.—CAN.

157 ii. — — — — —.]—*R. v. LACK* (1920), 20 Exch. C. R. 113.—CAN.

l. — **Where different classes of property.]**—In assessing compensation for lands compulsorily taken arbitrators must confine themselves to one basis of valuation only. If the lands as a whole are valued as commercial property, nothing can be added to such valuation on the basis of depreciation in the residential value of the lands or any part thereof.—*HAWKINS v. HALIFAX CITY* (1913), 12 K. L. R. 167; 10 D. L. R. 747.—CAN.

m. — **Annual value of produce.]**—In assessing compensation for lands acquired where the letting value of

lands is not ascertainable & the selling value of lands in the neighbourhood does not afford a reliable guide, the best course is to ascertain what is the annual value of the produce of the land in question & to proceed on that basis.—*RAM SAHOY SHAH v. SECRETARY OF STATE FOR INDIA* (1904), 8 C. W. N. 671.—IND.

n. — **Market value—Basis of valuation—Price of adjoining properties.]**—When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar & similarly situated properties constitute the best test of such value.—*FALCONER v. R.* (1889), 2 Exch. C. R. 82.—CAN.

o. — — — — —.]—*R. v. MURPHY* (1909), 12 Exch. C. R. 401; 27 D. L. R. 405.—CAN.

p. — — — — —.]—*R. v. McLAUGHLIN* (1915), 15 Exch. C. R. 417; 26 D. L. R. 373.—CAN.

q. — — — — —.]—*R. v. GRASS* (1916), 18 Exch. C. R. 177.—CAN.

a. — — — — —.]—**Estimated at best use to which land can be put.]**—The owner of property is entitled to get the market value of his land, estimated at the best use it can be put to.—*R. v. LYNCH* (1915), 19 Exch. C. R. 198.—CAN.

b. — — — — —.]—Where govt. takes property under statutory powers, owners should obtain such measure of compensation as is warranted by the

parts with the property, not the value to its new owner who takes it over. If therefore the old owner holds the property subject to restrictions, the question of how far those restrictions affect the value is to be considered in assessing the compensation.—*CORRIE v. MACDERMOTT*, [1914] A. C. 1056; 83 L. J. P. C. 370; 111 L. T. 952, P. C.

B. Potential Value.

158. Church land—Prospective use for secular purposes to be considered.]—*HILCOAT v. CANTERBURY & YORK (ARCHBPS.)* (1850), 10 C. B. 327; 19 L. J. C. P. 376; 15 L. T. O. S. 344, 365; 138 E. R. 132.

Annotations:—Distd. Stebbing v. Metropolitan Board of Works (1870), L. R. 6 Q. B. 37. *Consd. Re C. & S. L. Ry. & St. Mary Woolnoth & St. Mary Woolchurch Haw*, [1903] 2 K. B. 728; *Corrie v. MacDermott*, [1914] A. C. 1056.

159. ———.]—By their special Acts which incorporated the Lands Act, 1845, except where expressly varied, a railway co. were empowered to take land adjoining a church & an easement or right of using the subsoil under the church, but were prohibited from taking any part of the church.

current price of similar property in the neighbourhood, without special reference to the price which owners may previously have given for it. In accordance with this principle, the question for enquiry is, what is the market value of the property, not according to its present disposition, but laid out in the most lucrative way in which owners could dispose of it.—*PREMIERAND BURRAL v. COLLECTOR OF CALCUTTA* (1876), 1 L. R. 2 Calc. 103.—IND.

c. ———.]—Profit from the most advantageous disposition of land is one test for determining its market price. The probable use of land in the most advantageous way in accordance with the use already made of neighbouring lands leads to speculative advance in prices to which regard should be paid. The utility of land is an element for consideration in estimating its value, i.e. the utility which may be calculated by a prudent business man. The market value of the acquired lands is also to be ascertained from recent instances of sales in the same or in adjoining localities, & from the average rental of similar lands in the vicinity. If there is any dispute as to the relative value of interests, the judge should determine the total amount payable for the land leaving the question of apportionment to be decided in a separate proceeding. The general demand for land, and the consequent reflex action on the prices of all classes of lands, is a factor in the calculation of the market value of the lands under acquisition.—*FINK v. SECRETARY OF STATE FOR INDIA* (1907), 1 L. R. 34 Calc. 599.—IND.

d. ———.]—*Not necessarily proper test.]—*The price which the land would fetch in the market is not necessarily the proper test. The ct. must consider all circumstances, & see what sum of money will place the dispossessed owner as nearly as possible in a similar position financially.—*RUSSELL v. LANDS MINISTER, SAINSBURY v. LANDS MINISTER* (1898), 17 N. Z. L. R. 241.—N.Z.

e. ———.]—*Based on capitalised rental—After deducting repairs.]—*In assessing the market value of house property the ct. may award a capital sum which at the rate of six per cent. per annum, would yield interest equal to the ascertained annual rental of the premises after deducting the amount necessarily expended for annual repairs.—*CAREY v. BANU MIYA, CAREY v. KALU MIYA* (1872), 10 Bom. 34.—IND.

Whether additional

*allowance for compulsory sale.]—*In assessing the value of land compulsorily taken a reasonable percentage may be awarded in respect of the sale being compulsory, in addition to the actual market value of the land.—*LESLIE v. BOARD OF LAND & WORKS* (1876), 2 V. L. R. 21.—AUS.

g. ———.]—*WILSON, & STATE ELECTRICITY COMMISSION OF VICTORIA*, [1921] V. L. R. 459.—AUS.

h. ———.]—Where the actual value of lands can be closely & accurately determined, a percentage of such actual value should be added for compulsory taking; but where that cannot be done, & where the price allowed is liberal & generous, nothing should be added for such taking.—*SYMONDS v. R.* (1903), 8 Exch. C. R. 319.—CAN.

j. ———.]—Where full compensation has been awarded there is no warrant for adding a bonus or percentage to the amount awarded.—*Re WATSON & TORONTO CITY* (1916), 27 O. W. R. 367; 38 O. L. R. 103; 32 D. L. R. 637.—CAN.

k. ———.]—*R. v. VASSIE & CO., LTD.* (1917), 17 Exch. C. R. 75; 40 D. L. R. 306.—CAN.

l. ———.]—There is no definite rule that in estimating the value of land taken compulsorily 10 per cent. should be added on the ground that the land is taken compulsorily; but a compensation ct. ought to make a liberal estimate, which may in many cases amount to 10 per cent. above what the ct. considers a vendor anxious to sell might be willing to take.—*RUSSELL v. LANDS MINISTER, SAINSBURY v. LANDS MINISTER* (1898), 17 N. Z. L. R. 241.—N.Z.

m. ———.]—*Occupied unoccupied land.]—*In determining compensation for land taken for public purposes, the ct. distinguished between occupied & unoccupied land. In the case of the former the income yielded was taken into account to consider the number of years' purchase to be allowed, & in estimating the value of godowns yielding rent, deduction was made for the chance of some of them being unoccupied for part of the year, & for periodical repairs & taxes. In the case of unoccupied land, the thing to be looked at was not the cost of what had been done to preserve the land or the money spent on improvements, but the market value at the time, with an allowance for the manner in which the land was taken from claimant.—*COLLECTOR OF HOOGHLY v.*

The co. having given notice to treat for part of the adjoining land & the subsoil under the church:—Held: (1) there was nothing to show an intention that the church should remain in situ in perpetuity; & (2) in assessing the compensation to be paid by the co. the arbitrator was entitled to award compensation under Lands Act, 1845, s. 63, for severance or the injurious affecting of the other lands, upon the basis that the site of the church might under a scheme under the Union of Benefices Act, 1860 (c. 142), or otherwise at some future time cease to be the site of a church & become available for building; & (3) the arbitrator was at liberty to draw his own conclusion as to when that time would be likely to arrive.—CITY & SOUTH LONDON RY. CO. v. ST. MARY WOOLNETH & ST. MARY WOOLCHURCH HAW, UNITED PARISHES, [1905] A. C. 1; 74 L. J. K. B. 147; 92 L. T. 34; 69 J. P. 101; 21 T. L. R. 127, H. L.

Burial grounds.]—See BURIAL & CREMATION, Vol. VII., pp. 550, 551, Nos. 280–285.

160. Agricultural land—Prospective value as building land—Severance with access cut off.]—By the construction of a railway part of an owner's

RAJ KRISTO MOOKERJEE (1874), 22 W. R. 234.—IND.

n. ———.]—*Vacant land producing no income.]—*Where property yields practically no revenue & is not occupied, no allowance for compulsory taking should be allowed.—*R. v. HEARN* (1916), 16 Exch. C. R. 146; *revid.* 55 S. C. R. 562.—CAN.

o. ———.]—*Determined with reference to nature of title.]—*The market value is to be determined with reference to the nature of the title.—*SAMSON v. R.* (1888), 2 Exch. C. R. 30.—CAN.

p. ———.]—*Determined with reference to owner's rights.]—**R. v. CANADIAN PACIFIC LUMBER CO* (1915), 15 Exch. C. R. 350; 26 D. L. R. 80.—CAN.

PART III. SECT. 1, SUB-SECT. 3.—B.

q. Whether prospective capabilities considered.]—In assessing compensation the prospective capabilities of the property taken must be considered, as they may form an important element in determining its real value.—*LEFEVRE v. R.* (1884), 1 Exch. C. R. 121.—CAN.

r. ———.]—In assessing damages in cases of expropriation, regard should be had to prospective capabilities of the property which arise from its situation & character.—*PAINT v. R.* (1890), 2 Exch. C. R. 149; 18 S. C. R. 718.—CAN.

s. ———.]—*Re GILBERT & SAINT JOHN HORTICULTURAL ASSOCN.* (1897), 1 N. B. Eq. Rep. 432.—CAN.

t. ———.]—*R. v. MONCTON LAND CO.* (1912), 10 E. L. R. 333.—CAN.

u. ———.]—*R. v. LYNCH* (1915), 19 Exch. C. R. 198.—CAN.

a. ———.]—When a land is compulsorily acquired, any use to which the land may be put in future should not be taken into consideration in determining its value.—*MANINDRA CHANDRA NANDI v. SECRETARY OF STATE FOR INDIA* (1914), 1 L. R. 41 Calc. 967.—IND.

b. ———.]—*When land improved.]—*An arbitrator may take into account the potential value of property when improved after allowing for the cost of improving it, as a means of arriving at its actual value.—*Re MACPHERSON & CITY OF TORONTO* (1895), 26 O. R. 558.—CAN.

158 i. Church land—Prospective use for secular purposes to be considered.]—Land belonging to a religious body was expropriated:—

Sect. 1.—Where land purchased or taken: Sub-sect. 3, B. & C.]

land was taken, & several acres were severed from the rest, & all access cut off; the land was at the time the railway was constructed agricultural, but it had a prospective value for building:—*Held*: the compensation jury, valuing it as building land, might estimate the damage by severance as if all access were cut off, without any regard to the power of justices to order accommodation works under Railways Act, 1845, ss. 68, 69, as those works could only be ordered with reference to the land as then used for agricultural purposes, & would have been useless as an access to building land.—*R. v. BROWN* (1867), L. R. 2 Q. B. 630; 36 L. J. Q. B. 322; 16 L. T. 827; 32 J. P. 54; 15 W. R. 988.

Annotations:—*Consd. Taff Vale Ry. v. Canning*, [1909] 2 Ch. 48. *Refd. Mid. Ry. v. Gribble*, [1895] 2 Ch. 129; *Rhondda & Swansea Ry. v. Talbot*, [1897] 2 Ch. 131; *L. & N. W. Ry. v. Runcorn R. Co.*, [1898] 1 Ch. 34; *G. W. Ry. v. Talbot*, [1902] 2 Ch. 759.

161. Land suitable for intended erection of buildings—Mills—Profits from supplying water to mills when built—Reservoir on adjoining land.]—A railway co. took land on which cotton-mills would probably have been built; the owner had other land on which he had built a reservoir from which water might be supplied to such cotton-mills when built. In proceeding under Lands Act, 1845, to ascertain the compensation, the umpire received evidence as to the profits which might have been derived from supplying water to the mills when built, & awarded compensation for the loss of those prospective profits:—*Held*: the umpire was right in receiving the evidence & in awarding such compensation.—*RIPLEY v. GREAT NORTHERN RY. CO.* (1875), 10 Ch. App. 435; 23 W. R. 685, L. J.J.

Held: evidence was admissible to show the value of the land as a building site for shops & offices, intended to be built for the purpose of letting the same & thus obtaining a revenue for church purposes.—*DUTCH REFORMED CHURCH v. CAPE TOWN TOWN COUNCIL* (1898), 15 S. C. 14.—S. AF.

c. Agricultural land—Prospective value as residential property.]—Lands had a prospective value for residential purposes, besides their value for agricultural purposes:—*Held*: the ct. entitled to take such prospective value into consideration.—*TURNBULL REAL ESTATE CO. v. R., CORKERY v. R., DEBURY v. R.* (1903), 33 S. C. R. 677.—CAN.

161 i. Land suitable for intended erection of buildings.]—Land on which the owner was about to erect a building, was compulsorily acquired:—*Held*: evidence of the net rental that the proposed building would produce was admissible as showing the income likely to be produced by the property either to the existing owner or a possible purchaser.—*SCOTTISH HALLS, LTD. v. THE MINISTER* (1915), 15 S. R. N. S. W. 87; 32 N. S. W. W. N. 25.—AUS.

161 ii. — Adjoining street—Bye-law restricting use of street—Possibility of repeal.]—Land fronting a street was expropriated, a city bye-law prohibited the erection of a building within a certain distance of the street:—*Held*: the possibility or probability of the bye-law being repealed, & the possibility of the owner being able to use the land for commercial purposes at some future date was not too remote to found a claim for compensation.—*Re GIBSON & TORONTO CITY* (1913), 28 O. J. R. 20; 4 O. W. N. 612; 11 D. L. R. 529.—CAN.

d. Material in land giving potential

*value.]—*While material in the soil of the lands expropriated may largely increase the potential value of such lands, the ct. will not go into abstract calculations with respect to the quantity of such material *in situ*, but will treat the lands as possessing a value that is entire & indivisible.—*R. v. KENDALL* (1912), 14 Exch. C. R. 71; 8 D. L. R. 900.—CAN.

e. —.]—*BEHARRIELL v. R.* (1919), 19 Exch. C. R. 95; 48 D. L. R. 272.—CAN.

f. Land in vicinity of prospective tramway.]—The enhancement in the value of land by reason of the probability of a tramway coming to the district & the suitability of the land for probable tramway purposes is to be taken into account.—*Re PRAHVAN & MALVERN TRAMWAYS TRUST & WARD*, [1915] V. L. R. 656.—AUS.

g. Water front—Suitable for wharves & piers.]—Land, including a lot extending into the harbour, was expropriated for a ry. The lot could be made very valuable by the erection of wharves & piers for which, however, it would be necessary to obtain a licence from the government of Canada as they would obstruct navigation:—*Held*: the owners were not entitled to compensation on the basis of the water lot being utilised for wharves & piers.—*CUNARD v. R.* (1910), 30 C. L. T. 527; 43 S. C. R. 88.—CAN.

h. — Suitable for summer resort.]—In estimating compensation for the expropriation of water-front property, mere prospects of developing the property into a summer resort cannot be taken into consideration.—*R. v. DAVIS & FINDLAY* (1914), 18 Exch. C. R. 73.—CAN.

k. Prospective profits—Uncertainty.]—Prospective profits were always uncertain & if they are to be taken

162. — School—Nothing done towards carrying out intention—Special adaptability to be considered.]—*BAILEY v. ISLE OF THANET LIGHT RYS. CO.*, [1900] 1 Q. B. 722; 69 L. J. Q. B. 442; 82 L. T. 713; 48 W. R. 589, D. C.

Land especially adapted for promoters' purposes.]—*See* Sub-sect. 3, C., *post*.

163. Minerals likely to prove profitable.]—Where in an action for compensation in respect of land compulsorily taken for public purposes the jury, after hearing the conflicting evidence of experts as to the existence of payable coal there under, assessed damages in respect thereof:—*Held*: (1) there was no rule which imposed upon a pltf., in order to sustain such verdict, the burden of proving by costly experiments the mineral contents of his land; (2) it did not follow that because a seam of coal was not presently workable at a profit that no compensation was to be given for it if it was likely to prove profitable in the future.—*BROWN v. RAILWAYS COMR.* (1890), 15 App. Cas. 240; 59 L. J. P. C. 62; 62 L. T. 469, P. C.

Annotation:—*Generally, Mentd. Alcock v. Hall*, [1891] 1 Q. B. 444.

164. Right to grant licences—For use of Thames foreshore—Land required for landing places—Value of right to be considered.]—*THAMES RIVER CONSERVATORS v. LONDON, TILBURY & SOUTHEAST RY. CO.* (1892), 68 L. T. 21; 3 R. 178.

Damage by severance.]—*See* Sect. 2, *post*.

C. Special Adaptability.

165. Land taken for reservoir—Value enhanced by natural adaptability to be considered.]—*Re RIDDELL & NEWCASTLE & GATESHEAD WATER CO.* (1879), 90 L. T. 44, n., C. A.

Annotation:—*Consd. Re Gough & Aspatria, Silloth & District Joint Water Board*, [1904] 1 K. B. 417.

166. —.]—*Re OSSALINSKY (COUNTESS)*

into account at all, the degree of uncertainty is for the arbiter's decision.—*LANARKSHIRE & DUMFRIES & GALLOWAY RY. CO. v. MAIN* (1895), 3 S. L. T. 93; 22 R. (Ct. of Sess.) 912; 32 S. C. R. 685.—SCOT.

l. — No right of property.]—While the value may be enhanced by expectation the ct. will not assess compensation on a hope or expectation which cannot be regarded as a right of property in the owner.—*R. v. WILSON* (1914), 15 Exch. C. R. 283; 22 D. L. R. 585.—CAN.

m. — From business not in existence.]—An owner of property expropriated is not entitled to claim as an element of its market value at the time of the expropriation a sum representing estimated profits from a business which he asserts might have been done on the property, but which in fact had never been undertaken.—*R. v. CROSBY* (1919), 18 Exch. C. R. 372; 46 D. L. R. 528.—CAN.

n. —.]—An owner claimed a larger price for his land because adaptable for orchard purposes, to which purpose he had intended to devote it; he had not proved the land to be fit for such purpose, & the evidence tended to disprove it:—*Held*: he could not receive compensation on that ground.—*DODGE v. R.* (1906), 27 C. L. T. 151; 38 S. C. R. 149.—CAN.

PART III. SECT. 1, SUB-SECT. 3.—C.

o. General rule.]—In assessing compensation for lands compulsorily taken under expropriation proceedings any "special adaptability" which the property may have for some use or purpose is to be treated as an element of market value. In such cases the ct. should apply itself to a consideration

& MANCHESTER CORPN. (1888), Browne & Allan's Law of Compensation, 2nd ed. 659, D. C.

Annotations:—Consd. Re Gough & Aspatria Silloth & District Joint Water Board, [1904] 1 K. B. 417; Re Lucas & Chesterfield Gas & Water Board, [1909] 1 K. B. 16. Refd. Sidney v. N. E. Ry., [1914] 3 K. B. 629.

167. ——— For use in conjunction with land of other owners.]—*Re TYNEMOUTH CORPN. & NORTHUMBERLAND (DUKE) (1903), 89 L. T. 557; 67 J. P. 425; 19 T. L. R. 630.*

168. ——— No other probable purchasers.]—In estimating the value of land to be acquired by a water board under statutory powers for the purpose of constructing a reservoir, the natural adaptability of the land for the purpose of a reservoir is a proper matter for consideration as an element of value. In order to exclude such an element of value from being taken into consideration, it must be shown on the facts that there is no reasonable possibility of a market for the land apart from the particular scheme under which it is taken.—*Re GOUGH & ASPATRIA, SILLOTH & DISTRICT JOINT WATER BOARD, [1904] 1 K. B. 417; 73 L. J. K. B. 228; 90 L. T. 43; 68 J. P. 229; 52 W. R. 552; 20 T. L. R. 179; 48 Sol. Jo. 207, C. A.*

Annotations:—Consd. Re Lucas & Chesterfield, Gas & Water Board, [1908] 1 K. B. 571. Refd. Sidney v. N. E. Ry., [1914] 3 K. B. 629.

169. ——— Statutory powers necessary to purchase land.]—(1) Where land is compulsorily taken for the purpose of making a reservoir, & the

of the value as if the scheme in respect of which the compulsory powers are exercised had no existence.—*R. v. WILSON (1914), 15 Exch. C. R. 283; 22 D. L. R. 585.—CAN.*

p. ——— "Special adaptability" — "Special value."—"Special value" refers to the present use of land & means its added worth to the owners for the actual & particular use to which it is being put & for which it is specially fit, while "special or exceptional adaptability" refers to an apparent but future use to which the land, may be, but is not now, put & for which it is particularly adapted.—*Re SCHOOLEY & LAKE ERIE & NORTHERN RY. CO. (1915), 8 O. W. N. 34 O. L. R. 328.—CAN.*

a. ———.]—"Special adaptability" as used in expropriation cases does not denote something detached or separable from the value of the land in the market, but on the contrary signifies something that enters into & forms part of the actual market value.—*RAYMOND v. R. (1916), 16 Exch. C. R. 1; 59 S. C. R. 682.—CAN.*

b. Land taken for harbour extension—Owner having no title to beach or land covered with water—Special adaptability for purposes of promoters.]—Lands fronting on a harbour owned by the Crown were expropriated for forming the shore end of a wharf extending into the harbour. The suppliants had no grant & claimed no title to the beach or the land covered with water at medium high tide, but claimed that the special adaptability of the lands for wharf purposes should be considered in assessing compensation:—*Held: such special adaptability was not to be considered.—GILLESPIE v. R. (1909), 12 Exch. C. R. 406.—CAN.*

c. ———.]—*R. v. INVERNESS RY. & COAL CO. (1909), 7 E. L. R. 291; 12 Exch. C. R. 383.—CAN.*

d. ———.]—*R. v. INVERNESS RY. & COAL CO. (1909), 7 E. L. R. 291; 12 Exch. C. R. 383.—CAN.*

e. Lands taken for public purposes—Adaptability for business of owner.]—Loss by compulsory purchase of portion of a vineyard which pro-

duced grapes of peculiar quality, & of value as a blend with other grapes in wine making, allowed by arbitrators as special damage, in addition to the market value of the vineyard, regarded as a separate profit-earning concern, in the hands of one having no special use for the wine.—*Re REYNELL & SOUTH AUSTRALIAN RAILWAYS COMR. (1914), S. A. L. R. 175.—AUS.*

f. ——— Business not carried on.]—Land taken for a public work was the site of a discarded industrial enterprise with no hope of revival at the time of the taking. The unused building & plant connected with the enterprise gave no added value, on the other hand the land had potential capabilities in a general way for commercial purposes by reason of its proximity to rail & water-side:—*Held: damages ought not to be assessed on the basis of the former use of the property being restored, but in view of the general adaptability of the property for commercial purposes.—R. v. PETERS (1915), 15 Exch. C. R. 462; 32 D. L. R. 692.—CAN.*

g. Land taken for quarry—Value enhanced by special adaptability for purposes of promoters.]—Where land is compulsorily acquired by Govt. for quarrying purposes, its special adaptability for quarrying is an element for consideration in fixing the amount of compensation.—*DAYA KUMAR v. SURAT (ASSISTANT COLLECTOR) (1913), 1 L. R. 38 Bom. 37.—IND.*

h. ———.]—*RAGHUNATHA, ETC. v. SECRETARY OF STATE FOR INDIA (1921), 1 L. R. 44 Mad. 264.—IND.*

j. Land taken for railway—Whether value enhanced by special adaptability for owner's business.]—The whole of an owner's property on which he had been carrying on business was compulsorily acquired by a ry. co. & the property had a special value for his business:—*Held: its special value as a business site became an element in the market value of the land & should have been considered in assessing the value.—R. v. RICHARDS (1912), 14 Exch. C. R. 365.—CAN.*

k. ———.]—Where property

land has a special adaptability for the construction of a reservoir, the tribunal assessing the compensation is not precluded from taking into consideration the special adaptability as an element of value by reason of the fact that the land could not be utilised for the construction of a reservoir by other possible competitors unless statutory powers for its compulsory purchase were first obtained.

(2) In determining the value arising from such special adaptability the tribunal should have regard to the contingent value arising from the possibility of the land coming into the market when required for the particular purpose, & not to the value of the realised possibility arising from the fact of the promoters having obtained statutory powers for the construction of the reservoir.—*Re LUCAS & CHESTERFIELD GAS & WATER BOARD, [1909] 1 K. B. 16; 77 L. J. K. B. 1009; 99 L. T. 767; 72 J. P. 437; 24 T. L. R. 858; 52 Sol. Jo. 173; 6 L. G. R. 1106, C. A.*

Annotations:—As to (2) Refd. Corrie v. MacDermott, [1914] A. C. 1056; Sidney v. N. E. Ry., [1914] 3 K. B. 629; Fraser v. Fraserville City, [1917] A. C. 187. Generally, Mentd. Cedars Rapids Manufacturing & Power Co. v. Lacoste, [1914] A. C. 569; I. R. Comrs. v. Clay, I. R. Comrs. v. Buchanan, [1914] 1 K. B. 339; Metropolitan Water Board v. Chertsey Assmt. Com., [1916] 1 A. C. 337; Melbourne Tram. & Omnibus Co. v. Tramway Board, [1919] A. C. 667.

170. Value enhanced by possible competition.]—*Re LUCAS & CHESTERFIELD GAS & WATER BOARD, No. 169, ante.*

expropriated for a ry. is, owing to its location & adaptability for business, worth more to the owner than its intrinsic value, he is not entitled to have the capital amount representing the excess added to the market value of the property. His proper compensation is the amount which a prudent man in the position of the owner would be willing to pay.—*LAKE ERIE & NORTHERN RY. CO. v. SCHOOLEY (1918), 21 Can. Ry. Cas. 334; 53 S. C. R. 416; 30 D. L. R. 289.—CAN.*

l. Land taken for street—House thereon specially adapted for flats.]—Premises on a city street were expropriated for the erection of public buildings. The house, although not new, was well built, & the owner claimed that it possessed special adaptability for the purpose of being used as apartments or flats:—*Held: compensation was to be assessed in respect of its market value, & on the facts the alleged special adaptability was not an element of such value.—R. v. HAYES (1909), 12 Exch. C. R. 395.—CAN.*

169 i. Value enhanced by possible competition.]—In estimating the market value of land the purpose for which the land is taken should not be taken into consideration. The special though natural adaptability of the land for the purpose for which it is taken, is, however, an important element to be taken into consideration in determining the market value. But it is only the possibility of the site going into the market as being required for the purpose & not the realised possibility that must form the basis of calculation.—*WERNICKE v. SECRETARY OF STATE FOR INDIA (1909), 13 C. W. N. 1046.—IND.*

m. Land suitable for factory site—No evidence that land would be so required.]—*R. v. RIVERS, R. v. TAGGART (1912), 21 O. W. R. 320; 1 D. L. R. 505.—CAN.*

n. Land suitable for particular business—Intention of owner to transfer—To be considered.]—The compensation payable to the owner of land expropriated is the amount which a prudent man in the position of the

Sect. 1.—Where land purchased or taken: Sub-sect. 3, C., D., E., F., G., H. & I.]

171. — Use of railway.]—Part of the main line of a railway was laid upon land in which the railway co. had only a leasehold interest. The lease being about to expire the co. obtained statutory powers to acquire it compulsorily. There were in the immediate neighbourhood two collieries, the only means of carrying coals from which to their port of shipment was over this particular piece of railway, & if on the expiry of the lease it had been offered for sale in the market it was possible that the colliery owners might have competed with the railway co. for its purchase:—*Held*: for the purpose of assessing the compensation payable to the landowner the arbitrator was entitled to take into consideration the special adaptability for railway purposes arising out of the possible competition between the colliery owners & the railway co., but not that arising from the fact of the existence upon the land of an integral part of the railway co.'s main line.

Where there is no competition or where the price has been raised by biddings to a point at which competition ceases there is no room for the application of the doctrine of special adaptability (ROWLATT, J.).—*SIDNEY v. NORTH EASTERN RY. Co.*, [1914] 3 K. B. 629; 83 L. J. K. B. 1640; 111 L. T. 677, D. C.; *subsequent proceedings*, [1916] 2 K. B. 760.

Annotation:—Mentd. *Fraser v. Fraserville City*, [1917] A. C. 187.

172. — Above agricultural value —Use of water rights.]—*CEDAR RAPIDS MANUFACTURING & POWER Co. v. LACOSTE*, No. 187, *post*.

173. Under Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2 (3)—Arbitrator must consider offer to purchase previous to Act—Not limited to cases mentioned in section—Agreement resulting from offer becoming void.]—The proviso to above sub-sect. is not limited to cases which come within the sub-sect., & in an arbitration, therefore, under the Act the arbitrator ought to take into consideration any offer made before the passing of the Act, even though such offer resulted in an agreement which subsequently from any cause became null & void.—*PERCIVAL v. PETERBOROUGH CORPN.*, [1921] 1 K. B. 414; 90 L. J. K. B. 184; 124 L. T. 240; 85 J. P. 77; 65 Sol. Jo. 80; 18 L. G. R. 810, D. C.

D. Loss of Trade and Goodwill.

174. Loss of trade — Until other suitable premises found—To be included.]—*JUBB v. HULL DOCK Co.* (1846), 9 Q. B. 443; 115 E. R. 1342; *sub nom.* *R. v. HULL DOCK Co.*, 3 Ry. & Can. Cas. 795; 15 L. J. Q. B. 403; 8 L. T. O. S. 293; 10 J. P. 835; 11 Jur. 15.

owner would have been willing to give rather than fail to obtain it. The special suitability of the land for a business which the owner carries on elsewhere but intends to transfer to the land expropriated, & the savings & additional profits which he will derive from so doing, are elements in assessing the compensation, but the owner is not entitled to have the capitalised value of those savings & profits added to the market value of the land.—*PASTORAL FINANCE ASSOCN., LTD. v. THE MINISTER*, [1914] A. C. 1083, P. C.—*AUS.*

PART III. SECT. 1, SUB-SECT. 3.—D.

o. Loss of trade—Anticipated profits —Hotel.]—Re CAVANAGH & CANADIAN

ATLANTIC RY. Co. (1907), 9 O. W. R. 842; 14 O. L. R. 523.—*CAN.*

p. — — —.]—DUBLIN CORPN. v. DOWLING (1880), 6 L. R. Ir. 502.—*IR.*

*q. — — — Damage not attributable to taking.]—*The loss of business not attributable to the taking, or the loss of profits in connection with a business in anticipation but not actually embarked on, are not elements of compensation.—*MAXWELL v. R.* (1917), 17 Exch. C. R. 97; 40 D. L. R. 715.—*CAN.*

r. — Removal of plant.]—R. v. MONTGOMERY-CAMPBELL & NORTH-

Annotations:—Reid. Chamberlain v. West End of London & Crystal Palace Ry. (1862), 3 B. & S. 605; *Ricket v. Met. Ry.* (1865), 5 B. & S. 156; *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221. *Mentd.* *Curtis v. Stovin* (1889), 5 T. L. R. 248.

175. Loss of goodwill—Claim must be specifically made.]—*R. v. DUDLEY IMPROVEMENT ACT COMRS.* (1848), 10 L. T. O. S. 372; 12 J. P. Jo. 54.

176. — Prospective on change of premises.]—A. carried on an old-established business at No. 11, P. street. His lease of the premises being about to determine, he purchased the lease of No. 10 with the intention of transferring his business to No. 10 upon the determination of his lease of No. 11. Before such transfer was effected the Comrs. of Works & Public Buildings gave him notice to treat with respect to No. 10, under the powers of the Public Offices Site Act, 1866 (c. 21), which incorporated Lands Act, 1845. The question of the amount that the comrs. were to pay to him for the compulsory taking of No. 10 was referred to arbn. under the Act. The arbitrator admitted evidence of the profits that he had been making at No. 11, & awarded to him a sum of £1,000 in respect of goodwill, attaching to or loss of profits which might or would have been made at No. 10, if the premises had not been taken for the purposes of the Act:—*Held*: the arbitrator had not exceeded his powers in so doing, & the award of such compensation was good.—*WHITE v. WORKS & PUBLIC BUILDINGS COMRS.* (1870), 22 L. T. 591.

Annotations:—Mentd. *Re Harvey & L. C. C.* (1908), 7 L. G. R. 247; *Re Harvey & L. C. C.* (1909), 78 L. J. Ch. 285.

177. Personal to owner—Whether passing to mortgagee.]—A public body acting under the powers of their Act & of Lands Act, 1845, gave notice to pltf., who was a tailor, to take his house, which was leasehold. After some negotiation they offered him £400, of which £150 was to be apportioned to his leasehold interest & £250 to his trade damage & personal expenses, to which pltf. agreed. Pltf. had mortgaged his leasehold interest & could not make a good title. Pltf. then brought an action for specific performance of the agreement, & defts. afterwards paid the £400 into ct. under Lands Act, 1845, s. 76, executed a deed poll, & took possession:—*Held*: pltf. was entitled to have the £250 paid at once to him, with interest from the time when defts. took possession, for, although in some cases the goodwill of trade premises passes to a mtgee., that does not apply to a case where the goodwill depends on the personal skill of the owner.—*COOPER v. METROPOLITAN BOARD OF WORKS* (1883), 25 Ch. D. 472; 53 L. J. Ch. 109; 50 L. T. 602; 32 W. R. 709, C. A.

Annotation:—Mentd. *West London Syndicate v. I. R. Comrs.*, [1898] 2 Q. B. 507.

FIELD COAL Co., LTD. (1917), 17 Exch. C. R. 32; 40 D. L. R. 147.—*CAN.*

176 i. Loss of goodwill—Local goodwill only not personal goodwill.]—The authority determining compensation under Public Works Act, 1902, s. 63 may award compensation for local goodwill, but not for personal goodwill in respect of a business carried on upon lands resumed, & the principle applies to a leasehold as well as to a freehold interest.—*HAYES v. WORKS MINISTER*, [1913] 15 W. A. L. R. 106.—*AUS.*

176 ii. — Where land where trade is carried on is taken.]—*Re McCauley & Toronto City* (1889), 18 O. R. 416.—*CAN.*

E. Reinstatement.

178. When principle applicable—Removal to new premises—Business previously carried on at a loss.]—METROPOLITAN & DISTRICT RY. CO. *v.* BURROW (1884), Hudson's Compensation, Vol. 2, 1521, H. L.

179. — Cost of acquiring new site—For school.]—LONDON SCHOOL BOARD *v.* SOUTH EASTERN RY. CO. (1887), 3 T. L. R. 710, C. A.

F. Licensed Premises.

180. Tied house—Benefit of covenant taken into consideration.]—Pltfs., who were brewers, were the owners in fee of a public-house, which was let for an unexpired term of seven years, & there was in the lease a covenant by the tenant not to sell on the premises any beer other than that purchased of pltfs.; defts. were empowered, by their special Act, with which was incorporated Lands Act, 1845, to take the premises:—*Held*: in ascertaining, under ss. 18, 63, the amount of purchase-money & compensation to be paid by defts. to pltfs., the additional value of the premises to pltfs. by reason of the covenant to sell pltfs.' beer only was to be taken into consideration.—*BOURNE v. LIVERPOOL CORPN.* (1863), 2 New Rep. 425; 33 L. J. Q. B. 15; 8 L. T. 573; 10 Jur. N. S. 125.

181. — — —.]—*Re* CHANDLER'S WILTSHIRE BREWERY CO. & LONDON COUNTY COUNCIL, [1903] 1 K. B. 569; 72 L. J. K. B. 250; 88 L. T. 271; 67 J. P. 119; 51 W. R. 573; 19 T. L. R. 268; 47 Sol. Jo. 319; 1 L. G. R. 269.

182. — — —.]—*Re* LONDON COUNTY COUNCIL & CITY OF LONDON BREWERY CO., [1898] 1 Q. B. 387; 67 L. J. Q. B. 382; 77 L. T. 463; 61 J. P. 808; 46 W. R. 172; 14 T. L. R. 69; 42 Sol. Jo. 81, D. C.

183. "Initial valuation" —Under London County Council (Tower Bridge Southern Approach) Act, 1895—Benefit of covenant not taken into consideration.]—*Re* LONDON COUNTY COUNCIL & CITY OF LONDON BREWERY CO., [1898] 1 Q. B. 387; 67 L. J. Q. B. 382; 77 L. T. 463; 61 J. P.

PART III. SECT. 1, SUB-SECT. 3.—E.

s. When principle applicable—Not when land unused for long period.]—The reinstatement doctrine in expropriation cases ought not to be applied to the case of a mill which has been closed down for ten or eleven years before the expropriation.—*R. v. PETERS* (1915), 15 Exch. C. R. 462; 32 D. L. R. 692.—CAN.

178 i. — — — Agreement to reinstate in new premises.]—Land used as a site for a gas & electric plant, having been expropriated, an agreement was made providing for reinstatement of the owners on a new site:—*Held*: the owners were entitled to compensation only according to the terms of the agreement, with interest on the unpaid amount from the time of surrendering possession of the lands expropriated; but they could not claim for the additional value of the old site as compared with the new site, in regard to the increased cost of erections & operations.—*R. v. HALIFAX ELECTRIC TRAMWAY CO., LTD.* (1918), 17 Exch. C. R. 47; 40 D. L. R. 184.—CAN.

PART III. SECT. 1, SUB-SECT. 3.—F.

184 i. License taken into consideration.]—The value of the license of an hotel is a proper subject of allowance, though merely a personal right, & the renewal thereof, though reasonably probable, is not absolutely certain.—*Re* CAVANAGH & CANADIAN ATLANTIC RY. CO. (1907), 14 O. L. R. 523; 9 O. W. R. 842.—CAN.

t. — Special value of premises to owner arising from liquor license.]—

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808; 46 W. R. 172; 14 T. L. R. 69; 42 Sol. Jo. 81, D. C.

184. Reversionary value of—Present market value as licensed house.]—BELTON *v.* LONDON COUNTY COUNCIL (1893), 62 L. J. Q. B. 222; 68 L. T. 411; 57 J. P. 185; 41 W. R. 315; 9 T. L. R. 232; 37 Sol. Jo. 252; 5 R. 230, D. C.

G. Burial Grounds.

See BURIAL & CREMATION, Vol. VII., pp. 550, 551, Nos. 280–285.

H. Land subject to Leases.

See Part XIII., *post*.

I. Time of Ascertainment.

185. Whether date of taking—When notice to treat given.]—PENNY *v.* PENNY (1868), L. R. 5 Eq. 227; 37 L. J. Ch. 340; 18 L. T. 13; 16 W. R. 671.

186. — Increase in value after notice.]—Owners of coal mines under & near waterworks gave the undertakers notice, under Waterworks Act, 1847, s. 22, that they intended to work the coal. The undertakers replied by a counter-notice requiring the mine owners not to work & stating their willingness to make compensation. In an arbn. under the Act & the Lands Act, 1815, to assess the compensation the mine owners gave evidence to prove that coal rose in value after the date of the counter-notice:—*Held*: the inquiry was not what was the value of the coal at the date of the counter-notice, but what would the coal owners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it, & the evidence was admissible.—*BWLEA & MERTHYR DARE STEAM COLLIERIES (1891) LTD. v. PONTYPRIDD WATERWORKS CO.*, [1903] A. C. 426; 72 L. J. K. B. 805; 89 L. T. 280; 52 W. R. 193; 19 T. L. R. 673, H. L.

*Annotations:—***Apld.** *Re* Richard & G. W. Ry., [1905] 1 K. B. 68. **Consd.** *Eden v. N. E. Ry.*, [1907] A. C. 400. **Refd.** *Manchester Corpn. v. New Moss Colliery*, [1906] 1 Ch. 278.

Premises were expropriated which the owner used as a hotel licensed to sell liquor. The license was an annual one, but could be renewed in favour of the then owner, or, in case of his death, of his widow; but no license could be granted to any other person for such premises:—*Held*: while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation, & was an element to be considered in determining the amount of compensation to be paid to him for the premises taken.—*R. v. ROGERS* (1907), 11 Exch. C. R. 132.—CAN.

PART III. SECT. 1, SUB-SECT. 3.—I.

185 i. Whether date of taking—When notice to treat given time for valuation.]—In determining the compensation to be made for compulsory taking under statutory authority the value of the land is to be ascertained as at the time when the notice to treat is given.—*Re* PRAHMAN & MALVERN TRAMWAYS TRUST & WARD, [1915] V. L. R. 656.—AUS.

185 ii. — — —.]—The date for valuation is that of the notice.—*TORONTO SUBURBAN RY. CO. v. EVERSON* (1917), 54 S. C. R. 395; 34 D. L. R. 421.—CAN.

185 iii. — — —.]—The value of the land is to be determined as of the date of service of the notice.—*Re* TORONTO SUBURBAN RY. CO. & ROGERS (1920), 48 O. L. R. 72.—CAN.

u. — — — Market value before notice.]—Compensation for lands com-

pulsorily acquired should be estimated upon the basis of the market value of the lands as before the giving of the notice of expropriation.—*Re* FALSE CREEK RECLAMATION ACT & VANCOUVER CITY (1914), 20 B. C. R. 453.—CAN.

w. — First notice to treat abandoned—Second notice—Time for valuation.]—A notice to treat was served on the owner of land. The notice was withdrawn, & a second notice to treat served on the owner simultaneously with the withdrawal of the first notice:—*Held*: the first notice to treat having been abandoned, the value of the land should be estimated as at the date of the second notice.—*LAYCOCK v. VICTORIAN RAILWAYS COMRS.*, [1917] V. L. R. 556.—AUS.

y. — — — Or at date of deposit of map & book of reference.]—JAMES *v.* ONTARIO & QUEBEC RY. CO. (1888), 15 A. R. 1.—CAN.

z. — — —.]—HOLMESTED *v.* CANADIAN NORTHERN RY. CO., ANNABLE, THIRD PARTY (1915), 31 W. L. R. 896; 22 D. L. R. 55.—CAN.

principle upon which compensation & damages should be awarded is the market value at the time of the of the plans & book of reference.—*ST. JOHN & QUEBEC RY. CO. v. FRASER* (1915), 43 N. B. R. 388.—CAN.

].—*Re* CALGARY & EDMONTON RY. CO. & SASK. LAND & HOMESTEAD CO. (1915), 8 W. W. R. 312.—CAN.

Sect. 1.—Where land purchased or taken: Sub-sect.

Mentd. Jones v. West Derby Union (1911), 75 J. P. 375; *Re Todd & North Riding of Yorkshire Agricultural Executive Committee*, [1921] 1 K. B. 281.

187. —. —.]—The law of Canada as regards the principles upon which compensation for land taken compulsorily is to be awarded is the same as the law of England; that is to say, the value to be paid for is the value to the owner as it exists at the date of taking, not the value to the taker, & this value consists in the present value of all such advantages as the land possesses, present or future.

(2) Where there is a value above the bare agricultural value of the land, consisting in a possibility of use for a certain undertaking, the price is not to be calculated as a proportional part of the whole value of such undertaking, but is such price above the bare agricultural value as possible intending undertakers would give.—**CEDAR RAPIDS MANUFACTURING & POWER CO.**

187i. *Time of expropriation.*—*R. v. CLARKE* (1896), 5 Exch. C. R. 64.—**CAN.**

187ii. —. —.]—*R. v. KENDALL* (1912), 14 Exch. C. R. 71; 8 D. L. R. 900.—**CAN.**

187iii. —. —.]—*R. v. LOGGIE* (1912), 15 Exch. C. R. 80.—**CAN.**

187iv. —. —.]—*R. v. BOWLES* (1916), 17 Exch. C. R. 482; 41 D. L. R. 254.—**CAN.**

187v. —. —.]—*R. v. BARRETT* (1919), 19 Exch. C. R. 175; 49 D. L. R. 138.—**CAN.**

c. *Date of order appointing arbitrator time for valuation.*—The date of an order appointing an arbitrator to fix the amount of compensation for land expropriated is the time with reference to which the amount of compensation is to be ascertained.—**CANADIAN NORTHERN WESTERN RY. CO. v. MOORE (1915), 30 W. L. R. 676; 7 W. W. R. 1327; 23 D. L. R. 646.—**CAN.****

d. *Publication of notice of appointment of arbitrator—Time for valuation.*—The publication under Railways (Ireland) Act, 1851, s. 8, of the notice of the arbitrator's appointment is the time at which the computation of value is to be made of premises compulsorily purchased.—*Re DOYNE'S TRAVERSERS & SOUTH CITY MARKET CO.* (1888), 24 L. R. Ir. 287.—**IR.**

e. *Date of award time for valuation—Where values changed.*—*Re BYERLEY & WINNIPEG CITY* (1911), 20 Man. L. R. 438; 17 W. L. R. 192.—**CAN.**

f. —. —.] *Arbitration pending.*—*Re TAYLOR & CANADIAN NORTHERN RY. CO.* (1913), 3 W. W. R. 1072.—**CAN.**

g. *Date of passing bye-law for expropriation time for valuation.*—When a municipal corporation expropriates land, the date of the passing of the bye-law defining the lands & the nature of the rights required is the date in relation to which the compensation should be assessed.—*Re PRITIE & TORONTO CITY* (1892), 19 A. R. 503.—**CAN.**

h. *Date of publication of proclamation for compulsory taking.*—Where land is entered upon under Public Works Act, 1908, s. 200, & is thereafter taken in pursuance of the requisition of the owner, the compensation payable is to be equal to the value of the land at the date of the Proclamation taking the same, & not at the date when it was entered upon, together with compensation for damage suffered between the entry & the taking.—**NEW PLYMOUTH (MAYOR) v. PUBLIC WORKS MINISTER** (1914), 33 N. Z. L. R. 1537.—**N.Z.**

v. LACOSTE, [1914] A. C. 569; 83 L. J. P. C. 162; 110 L. T. 873; 30 T. L. R. 293, P. C.

Annotations:—As to (1) **Consd.** *Fraser v. Fraser* [1917] A. C. 187. **Reid.** *Corrie v. Mac Dermott*, A. C. 1056; *Odum v. City of Vancouver* (1915), 85 L. J. P. C. 95; *Metropolitan Water Board v. Chertsey Assmt. Com.*, [1916] 1 A. C. 337; *Melbourne Tram. & Omnibus Co. v. Tramway Board*, [1919] A. C. 667.

Of interest of applicant.—See Nos. 2086, 2087.

J. Evidence as to Value.

188. *Money spent bonâ fide on land—Not conclusive.*—(1) Money spent *bonâ fide* on land is not conclusive evidence as to the value of the land; it is only evidence to be taken into consideration in ascertaining the value, & may be regarded or disregarded when the land is taken compulsorily.

(2) At the hearing of an inquisition held for the purposes of ascertaining & determining the value of land taken under the Lands Act, 1845, the high bailiff used somewhat loose language which might have led one to infer that he told the jury to disregard the amount spent *bonâ fide* by claimants on the land & premises in question:—**Held:**

ONTARIO RY. CO. (1913), 5 O. W. N. 396; 29 O. L. R. 608.—**CAN.**

o. —. —.] *Subsequent to notice of expropriation.*—**TORONTO SUBURBAN RY. CO. v. EVERSON** (1917), 54 S. C. R. 395; 34 D. L. R. 421.—**CAN.**

p. *Sales of similar land in neighbourhood.*—*R. v. BICKERTON* (1913), 15 Exch. C. R. 61.—**CAN.**

q. —. —.]—**DEMERS v. R.** (1915), 15 Exch. C. R. 499.—**CAN.**

r. —. —.]—Where valuation of land cannot be based on what the property was producing at the time of the notice of acquisition, & where there have been no recent sales of the land, the value must be determined by sales of similar land in the neighbourhood.—*Re KARIM TAR MAHOMED* (1908), 1 L. R. 33 Bom. 325.—**IND.**

s. —. —.] *Made thirteen years before expropriation.*—Evidence of the price realised by voluntary sales of similar land in the same locality was properly rejected in the absence of evidence showing that the conditions attending those sales were so nearly like the transaction in question as to throw light on the matter.—**HARRIS v. PUBLIC WORKS MINISTER** (1912), 14 C. L. R. 721; 29 N. S. W. W. N. 156.—**AUS.**

t. *Offer by owner to settle for less than demanded.*—Where claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in the pleadings, the ct., while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the estimates made by claimant's witnesses.—**FALCONER v. R.** (1889), 2 Exch. C. R. 82.—**CAN.**

u. *Single sale on boom market.*—A single sale on a boom market does not prove the value of adjoining lots.—*Re WATSON & TORONTO CITY* (1916), 27 O. W. R. 367; 38 O. L. R. 103; 32 D. L. R. 637.—**CAN.**

w. *Indefinite offers to purchase—Not evidence of value.*—Offers more or less indefinite to purchase property, & not so made as to be binding upon the persons making them, are not satisfactory evidence of the value of such property.—*R. v. CROSBY* (1919), 18 Exch. C. R. 572; 46 D. L. R. 528.—**CAN.**

y. *Rents paid by under-tenants.*—Evidence of rents paid by under-tenants is not relevant for the purpose of ascertaining the value.—**MANINDRA CHANDRA NANDI v. SECRETARY OF STATE FOR INDIA** (1914), 1 L. R. 41 Cal. 967.—**IND.**

j. *Time of taking*
Compensation must be assessed in respect of the value of the lands at the time of taking possession.—*R. v. ROYAL TRUST CO. OF CANADA* (1908), 12 Exch. C. R. 212.—**CAN.**

k. —. —.] *Where no change in value.*—Notices were given, under Railway Act, 1906, ss. 180, 193 & 194, & before any change had taken place in respect to the value of the lands to be taken, the ry. co. obtained an order permitting it to do so & took possession of the lands:—**Held:** the title of the co. to the lands must be considered as relating back to the date when possession was taken & the compensation payable therefor should be ascertained with reference to that time.—**SASKATCHEWAN LAND & HOMESTEAD CO. & TRUSTS & GUARANTEE CO. v. CALGARY & EDMONTON RY. CO.** (1915), 31 W. L. R. 122; 21 D. L. R. 172; 51 S. C. R. 1; 8 W. W. R. 312; 19 Can. Ry. Cas. 126.—**CAN.**

l. —. —.] *Depreciation in value.*—It is the value of the land at the time of the expropriation that the ct. has to consider in assessing compensation. If the property has depreciated in value between the time it was acquired by the person seeking compensation & the time of the expropriation, the former has to bear the loss.—*R. v. SEDGER* (1901), 22 C. L. T. 81; 7 Exch. C. R. 274.—**CAN.**

m. —. —.] *Not in view of subsequent developments.*—A ry. co. appealed against an award on the ground that it was against the weight of evidence & that damages should not be allowed for depreciation for severance, as a sale by the owner of the portion severed precluded recovery upon that head:—**Held:** the effect of the taking by the ry. co. is to be judged in view of the situation created at the time by the taking of the land & not in view of subsequent developments.—**MYERS-ROUCH & LAKE ERIE & NORTHERN RY. CO.** (1913), 24 O. W. R. 535; 4 O. W. N. 1249; 11 D. L. R. 458; 15 Can. Ry. Cas. 168.—**CAN.**

PART III. SECT. 1, SUB-SECT. 3.—J.

189i. *Burden of proof—Of minerals under land taken.*—In a case of expropriation the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land.—*R. v. MCCURDY* (1891), 2 Exch. C. R. 311.—**CAN.**

n. *Price paid to owner of adjoining land.*—The price paid by the expropriator for adjoining lands is direct evidence as to value of the land taken.—*Re BILLINGS & CANADIAN*

that fact was not sufficient in itself to entitle claimants to a writ of *certiorari* to bring up the inquisition that it might be quashed, inasmuch as the jury had had all the facts before them when, & had had an opportunity of viewing the land & premises before, giving their verdict.—*Ex p. STREATHAM & GENERAL ESTATES CO. LTD.* (1888), 4 T. L. R. 766, C. A.; *affg. S. C. sub nom. STREATHAM & GENERAL ESTATES CO. LTD. v. WORKS & PUBLIC BUILDINGS COMRS.*, 52 J. P. 615, D. C.

189. Burden of proof—Of existence of minerals under land taken.]—*BROWN v. RAILWAYS COMR.*, No. 163, *ante*.

SECT. 2.—WHERE LAND DAMAGED BY SEVERANCE.

See Lands Act, 1845, ss. 49, 63.

190. General rule—Right depends on cause & effect—Not distance nor proximity.]—*CALEDONIAN RY. CO. v. LOCKHART*, No. 321, *post*.

191. What constitutes severance—Part of land taken—Premises not contiguous—Precarious interest over intervening lands.]—*Pltfs.*, a volunteer corps, obtained leases of different plots of land for the erection of a rifle range. Immediately behind the butts was a field occupied by A., & beyond that some marsh land, which were required by the rifle corps for the purpose of making provision for the safety of the public during the time the butts were in use. *Pltfs.* obtained a lease of this land, but only made a verbal agreement with A. for the use of his land during the rifle practice, in consideration of an annual payment of £19. *Defts.* under their compulsory powers took portion of the marsh land occupied by *pltfs.*, & so used it as to put a stop to the use of the rifle range. At an inquisition under the Lands Act, 1845, ss. 38, 50, the jury assessed the value of the land taken, & damage for the injury to the rifle range:—*Held*: there might be an injury from severance, although the premises were not immediately contiguous, & the fact that *pltfs.* had only a precarious interest in the field only affected the *quantum* of compensation to be awarded to them.—*HOLT v. GAS LIGHT & COKE CO.* (1872), L. R. 7 Q. B. 728; 41 L. J. Q. B. 351; 27 L. T. 442; 37 J. P. 20.

Annotations:—Consd. Hobbs v. Mid. Ry. (1882), 20 Ch. D. 418. *Expld. R. v. Essex* (1886), 55 L. J. Q. B. 313. *Expld. & Distd. Bexley Heath Ry. v. North*, [1894] 2 Q. B. 579.

192. ——— Lands “held with” lands taken—Part of land taken for sewage works.]—*COWPER ESSEX v. ACTON LOCAL BOARD*, No. 216, *post*.

193. ——— Reservoir on building land—Value of reservoir affected.]—*RIPLEY v. GREAT NORTHERN RY. CO.*, No. 161, *ante*.

194. ——— Street & pavement closed by statute—Acquisition of pavement by local authority—Access to warehouse affected.]—A warehouse owned by a railway co. was constructed with openings which were covered by flaps that could be lowered to a level with the floor of the ware-

house. When the flaps were lowered so as to stretch about 5 ft. above the ground in front of the warehouse, they were used for the convenient conveyance of goods between the warehouse & the co.'s vans. The ground in front of the warehouse, over which the flaps stretched when they were lowered, was the absolute property of the co. This piece of ground was taken by a local authority under their powers in a private Act incorporating the Lands Clauses Acts for the purpose of making a public footway over it:—*Held*: the warehouse had been injuriously affected so as to entitle the co. to compensation.—*Re GREAT EASTERN RY. CO. & LONDON COUNTY COUNCIL* (1907), 98 L. T. 116; 72 J. P. 1, C. A.

195. ——— Part of land not taken—Personal right of pre-emption over land not taken—Not incidental to land taken.]—*CLOUT v. METROPOLITAN & DISTRICT RAILWAYS JOINT COMMITTEE* (1883), 48 L. T. 257.

196. Measure of damages—Part of land taken—Access to remainder cut off.]—*R. v. BROWN*, No. 160, *ante*.

197. ——— Compensation for “material detriment” to remainder—Sufficiency of access material.]—A railway co., under their special Act, were entitled, notwithstanding Lands Act, 1845, s. 92, to take a portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The co. gave notice to treat for a portion of certain property, & before the arbitrator appointed under the Lands Act to assess compensation, they undertook to provide access to the remainder of the property by means of a right of way over the portion taken. On a case stated by the arbitrator in his award:—*Held*: (1) the arbitrator was entitled, in determining whether there would be “material detriment” to the remainder of the property arising from the taking of a portion, to take into consideration all the circumstances of the case, including the sufficiency of the proposed access; (2) as the giving the proposed right of way over the lands of the co. was not inconsistent with the purposes for which the lands were taken, the co. had power to grant it.—*Re GONTY & MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, [1896] 2 Q. B. 439; 65 L. J. Q. B. 625; 75 L. T. 239; 45 W. R. 83; 12 T. L. R. 617, 620, C. A.

Annotations:—As to (1) Consd. Cale. Ry. v. Turcan, [1898] A. C. 256. *As to (2) Consd. S. E. Ry. v. Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12. *Refd. Stretford U. D. C. v. Manchester, South Junction & Altrincham Ry.* (1903), 1 L. G. R. 683. *Generally, Refd. G. C. Ry. v. Balby-with-Hexthorpe U. C.*, A.-G. v. G. C. Ry., [1912] 2 Ch. 110. *Mentd. G. E. Ry. v. L. C. C.* (1906), 51 Sol. Jo. 132; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

198. ——— Lands adjoining church & use of subsoil—Potential value of severed land.]—*CITY & SOUTH LONDON RY. CO. v. ST. MARY WOOLNOTH & ST. MARY WOOLCHURCH HAW, UNITED PARISHES*, No. 159, *ante*.

PART III. SECT. 2.

a. General rule—Part taken must be connected with part left so as to prejudice owner in use of latter.]—Upon compulsory taking of lands the owner is not entitled to compensation for severance from other lands owned by him unless the lands taken are so connected with, or related to, the lands left that he is prejudiced in his ability to use or dispose of the latter.—

I. v. CANADIAN NORTHERN ONTARIO RY. CO., [1916] 1 A. C. 536; 27 D. L. R. 14; 20 Can. Ry. Cas. 101.—CAN.

aa. ———.]—*R. v. STUDD* (1916), 16 Exch. C. R. 365.—CAN.

bb. ———.]—*TORONTO SUBURBAN RY. CO. v. EVERSON* (1917), 54 S. C. R. 395; 34 D. L. R. 421.—CAN.

a. ———.]—*Re CANADIAN NORTHERN PACIFIC RY. CO. & BYNG-HALL* (1917), 23 B. C. R. 38; 35

D. L. R. 773.—CAN.

b. ——— Additional burden cast on part left to be considered.]—In awarding compensation where one of two estates under the same management is taken compulsorily, any additional burden thereby thrown on the other estate must be taken into account.—*NEW ZEALAND & AUSTRALIAN LAND CO. v. LANDS MINISTER* 13 N. Z. L. R. 714.—N.Z.

Sect. 2.—Where land damaged by severance. Sect. 3: Sub-sects. 1 & 2.]

199. ——— Contiguous pieces of land separately acquired—Sale of one without reference to interest in other.]—*Re SOUTH EASTERN RY. CO., & LONDON COUNTY COUNCIL'S CONTRACT, SOUTH EASTERN RY. CO. v. LONDON COUNTY COUNCIL, No. 156, ante.*

200. ——— Land not taken—Gas pipes, mains, etc., treated as land—Severance of mains, pipes & works—Not subject for compensation.]—*Re WOLSTANTON UNITED URBAN DISTRICT COUNCIL & BURSLEM CORPN. (1907), 72 J. P. 28; 6 L. G. R. 523.*

—— **Contingent damages.]—***See Sect. 5, post.*

SECT. 3.—WHERE LAND INJURIOUSLY AFFECTED.

See Lands Act, 1845, ss. 16-68.

SUB-SECT. 1.—IN GENERAL.

201. Lands Act, 1845, s. 84, not applicable—Damage to property of third party—Consequential on exercise of powers by promoters.]—*HUTTON v. LONDON & SOUTH WESTERN RY. CO. (1849), 7 Hare, 259; 18 L. J. Ch. 345; 13 L. T. O. S. 135; 13 Jur. 486; 68 E. R. 106.*

Annotations:—Distd. Ferrand v. Bradford Corpn. (1856), 21 Beav. 412. Consd. A.-G. v. Thames River Conservators (1862), 1 Hem. & M. 1; Macey v. Metropolitan Board of Works (1864), 33 L. J. Ch. 377. Expld. Clowes v. Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 129, n. Expld. & Distd. Clark v. London School Board (1873), 21 W. R. 723. Consd. Parkdale Corpn. v. West (1887), 12 App. Cas. 602. Refd. Swainston v. Finn & Metropolitan Board of Works (1883), 48 L. T. 634.

202. Lands Act, 1845, s. 68—"Injurious affected"—Comprehends injuries independent of taking land—Not limited to damages when lands taken, used or directly interfered with.]—(1) The words "injuriously affected" in Lands Act, 1845, s. 68, comprehend cases of injury independent of taking land, & are not limited to damage sustained by persons whose lands or a part of whose lands are taken, used or directly interfered with, & the right to compensation extends to & may be asserted in respect of consequential damage.

(2) A lessee of premises not required for the

purpose of a railway, served a notice & claim upon the co. for a certain amount of compensation under the above sect. The alleged injuries resulted from the dust & dirt occasioned by the works of the railway, from the temporary diversion of a footpath which passed along the premises of claimant, & from the stoppage of a lane along which he claimed to be entitled to a right of way to the back of his premises. The co. filed their bill, & obtained an injunction to restrain any further proceedings under the notice:—*Held*: claimant was entitled to proceed under the notice & to have the amount of compensation assessed by a jury & the injunction must be dissolved.

(3) By summoning a jury to assess the amount of compensation claimed by a party under the above sect., the co. is not precluded from questioning the right of the claimant to any compensation whatever.

(4) The jury have jurisdiction to construe the Act upon the point whether the claim made is within its provisions.—*EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. v. GATTKER (1851), 3 Mac. & G. 155; 6 Ry. & Can. Cas. 371; 20 L. J. Ch. 217; 17 L. T. O. S. 85; 15 Jur. 261; 42 E. R. 220, L. C.*

Annotations:—As to (1) Consd. Ricket v. Met. Ry. (1867), L. R. 2 H. L. 175. Refd. Re Byles (1855), 11 Exch. 464; Chamberlain v. West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605; Cale. Ry. v. Ogilvy (1855), 25 L. T. O. S. 106. As to (2) Expld. & Apld. L. & Y. Ry. v. Evans (1851), 15 Beav. 322. Expld. & Folld. L. & N. W. Ry. v. Bradley (1851), 3 Mac. & G. 336. Consd. South Staffordshire Ry. v. Hall (1851), 1 Sim. N. S. 373. Distd. Norfolk v. Tennant (1852), 9 Hare, 745. Folld. Bradford L. B. of Health v. Hopwood (1858), 6 W. R. 818. Distd. Maunsell v. Mid. G. W. (Ireland) Ry. (1863), 1 Hem. & M. 130. Consd. Ricket v. Met. Ry. (1867), L. R. 2 H. L. 175; Brierley Hill L. B. v. Pearsall (1884), 9 App. Cas. 595; London & Blackwall Ry. v. Cross (1886), 31 Ch. D. 354. Distd. Birmingham & District Land Co. v. L. & N. W. Ry. (1887), 36 Ch. D. 650. Consd. Re East London Ry., Oliver's Claim (1890), 63 L. T. 147; Kitts v. Moore, [1895] 1 Q. B. 253. Refd. Re Bradby & Southampton L. B. of Health (1855), 4 E. & B. 1014; Brand v. Hammersmith & City Ry. (1867), L. R. 2 Q. B. 223, 246, n.; Eagle v. Charing Cross Ry. (1867), L. R. 2, C. P. 638. As to (4) Expld. R. v. Metropolitan Sewers Comrs. (1853), 22 L. J. Q. B. 231. Consd. R. v. L. & N. W. Ry. (1851), 3 E. & B. 443; Road v. Victoria Station & Picnic Ry. (1863), 1 H. & C. 826. Refd. Rhodes v. Airedale Drainage Comrs. (1876), 1 C. P. D. 380. Generally, Mentd. Sutton Harbour Improvement Co. v. Hitchens (1852), 15 Beav. 161; A.-G. v. Royal College of Physicians (1861), 1 John. & H. 561; Abrahams v. London Corpn. (1868), L. R. 6 Eq. 625.

203. ——— Does not create any original equity

c. Measure of damage—Part of land taken—Damage to owner's business—Recovery of actual damage.]—

Land taken had two dwelling houses thereon & was contiguous to other land belonging to the owner on which stood a mill & other buildings used by him for his business. The land was acquired for the business but had not yet been used in connection therewith though it would have been used for extending the business:—*Held*: owner was entitled to recover such damage as in fact had been suffered by reason of the severance.—*HOUSE v. WORKS MINISTER (1914), 17 W. A. L. R. 31.—AUS.*

d. ——— Loss of occupation of part severed.]—*WILKES v. GZOWSKI 13 U. C. R. 308.—CAN.*

196 i. ——— Access to remainder cut off.]—The land taken for ry. purposes severed owner's remaining lands, & he was deprived of communication therewith:—*Held*: owner entitled to compensation for being deprived of communication, which should be estimated at the cost of providing & maintaining a crossing & gates.—*DEBLOIS v. R. (1873), 1 P. R. I. 434.—CAN.*

196 ——— ———.]—*R. v. (1908), E. L. R. 440.—CAN.*

196 iii. ———.]—*GRAY v. GRAND TRUNK PACIFIC BRANCH CO. (1913), 24 W. L. R. 45; 11 D. L. R. 861.—CAN.*

e. ——— Personal inconvenience.]—In assessing damages for land taken, a jury, besides the value of the land taken, may allow damages for inconvenience caused by the severance.—*GLASIER v. FREDERICTON BRANCH RY. CO. (1870), 2 Han. 3.—CAN.*

f. ——— Liberal compensation.]—The claimant should be liberally compensated for the personal inconvenience to owner.—*Re TVEIT & CANADIAN NORTHERN RY. CO. (1913), 25 W. L. R. 188.—CAN.*

g. ——— Method of computation.]—A jury, in estimating the amount of damages, may consider the damage to the remainder of ptff.'s land by reason of the nature of the works for which the land had been taken.—*CAMPBELL v. YOUNG (1897), 18 N. S. W. L. R. 171; 13 N. S. W. W. N. 217.—AUS.*

h. ———.]—To estimate the injury to the portion of the land not taken, the original price paid for the whole property should be taken, interest thereon from the time of

purchase to the date of the award added, & the value of the portion left after the severance deducted from the total.—*Re BRENNAN & OTTAWA ELECTRIC RY. CO., 21 C. L. T. 208.—CAN.*

j. ———.]—*DAVIES v. JAMES BAY RY. CO. (1910), 15 O. W. R. 625; 20 O. L. R. 534.—CAN.*

k. ———.]—*MYERS- COUGH & LAKE ERIE & NORTHERN RY. CO. (1913), 24 O. W. R. 535; 4 O. W. N. 1249; 11 D. L. R. 458.—CAN.*

l. ———.]—Upon expropriation the general rule of damages is that the owner is entitled to the difference between the market value of the whole before the taking & the market value of what remains after such taking.—*PACIFIC GREAT EASTERN RY. CO. v. LARSEN & LINTON & CO. (1915), 8 W. W. R. 1, 630.—CAN.*

PART III. SECT. 3, SUB-SECT. 1.

202 i. 31 Vict. c. 12, s. 40—"Injury done"—Means "injuriously affected."]—The phrase "injury done" in above sect. is equivalent to the words "injuriously affected" in Lands Act, 1845.—*MCPHERSON v. R. (1882), 1 Exch. C. R. 53.—CAN.*

affecting claim.]—**NORFOLK (DUKE) v. TENNANT** (1852), 9 Hare, 745; 19 L. T. O. S. 225; 16 Jur. 398; 68 E. R. 716.

204. Right to prosecute claims under Not restrained—Though no provision to determine whether property injuriously affected.]—NORFOLK (DUKE) v. TENNANT (1852), 9 Hare, 745; 19 L. T. O. S. 225; 16 Jur. 398; 68 E. R. 716.

205. — Sufficient to confer right to compensation—Where entire Act incorporated.]—When the entire Lands Act, 1845, is incorporated in a special Act, no other enactment is required, beyond s. 68, to confer the right to compensation for lands injuriously affected by the works under the special Act.

By Chelsea Improvement Act, 1845, s. 83, so much of the Lands Act, 1845, as was applicable, & was not modified or was not inconsistent with the provisions thereof, should apply to the improvements authorised by the Act to be made, & should be read as forming part of the Act. By s. 101 of the local Act the comrs. under the Act might, subject to the provisions of the Act, alter the level of the streets, nothing being said as to compensation. By ss. 124, 127, the comrs. might remove from houses projections into the street which were existing at the passing of the Act, & also, on the rebuilding of projecting houses, set them back to the line of the street, with a proviso that the comrs. should make compensation to the owner, etc., in either case. The comrs., by raising the level of a street under s. 104, impeded access to the house of which the prosecutor was lessee, & so injuriously affected it:—*Held*: (1) the lessee of the house was entitled to compensation under Lands Act, 1845, s. 68; (2) the fact of compensation being expressly given in cases under the local Act, ss. 124, 127, was not inconsistent with the intention that it should be given in cases within s. 104, by virtue of Lands Act, 1845, s. 68.—*R. v. St. Luke's* (1871), L. R. 7 Q. B. 148, Ex. Ch.

206. — Applicable to persons under disability—Claiming compensation for permanent injury to land.]—(1) Lands Act, 1845, s. 9, applies to compensation for injuriously affecting land not taken by the promoters as well as to compensation for taking lands, the words "injury to any such lands" meaning injury to lands held by persons under disability.

(2) S. 68 applies to persons under disability claiming compensation for permanent injury to land as well as to owners in fee.—*STONE v. YEOVIL CORPN.* (1876), 2 C. P. D. 99; 46 L. J. Q. B. 137; 36 L. T. 279; 42 J. P. 212; 25 W. R. 240, C. A.

Annotations:—Generally, Mentd. Re Gough & Aspatria, Silloth & District Joint Water Board (1903), 88 L. T. 421; *R. v. Vasey & Lally* (1905), 22 T. L. R. 1.

207. Right co-extensive with rights of action landowner deprived of—Position of party injured not improved.]—METROPOLITAN BOARD OF WORKS v. MCCARTHY, No. 272, *post*.

205 i. Dominion Railway Act, 1888—Sufficient to confer right to compensation.]—HENDRIE v. TORONTO, HAMILTON, &

*to claim existing at passing of Act.]—*above sect., limiting the time for the enforcement of claims for compensation by persons injuriously affected by expropriation, does not apply to a claim existing at the time of the passage of the Act.—*Re ROSEN* (1898), 25 A. R. 12.—

be made within one of ss town has given 1 of
olation—Town Act, ss. 340,

Damages are recoverable under above sects., for land injuriously affected, if a claim is made within one year after the injury is sustained.—*AMSON v. RADISSON (TOWN OF)*, [1919] 1 W. W. R. 1036; *reversd.* 49 D. L. R. 517.—**CAN.**

o. Public Works Act, 1891—Measure of damages under.]—The effect of above Act is to entitle a person whose lands are injuriously affected to full compensation for all damage sustained by the execution of a public work, irrespective of whether any land has been taken.—*FITZGERALD v. KEL-BURNE & KAIORI TRAMWAY CO., LTD.* (1901), 20 N. Z. L. R. 406.—**N.Z.**

p. Where no remedy is provided by statute.]—A corpn., in exercise of

Whether compensation proper remedy—Acts authorised by Legislature.]—See Sect. 3, sub-sect. 4, A. (a), *post*.

— Injunction to restrain proceedings for.]—See Part VII., Sect. 3, *post*.

Nature of claim—Not claim for damages—Assignability.] CHOSSES IN ACTION, Vol. VIII., p. 432, No.

SUB-SECT. 2. —INCORPORATION OF LANDS CLAUSES ACTS.

208. Whether Lands Act, 1845, s. 68, incorporated—Exception of compulsory purchase clauses.]—(1) By a special Act, Lands Act, 1845, except so much as related exclusively to the purchase & taking of land by compulsion, was incorporated with it:—*Held*: s. 68 was not excepted, although that sect. was within the division of the Act relating to the purchase & taking of lands otherwise than by agreement.

(2) S. 68 only gives compensation in cases where the co. incorporated is doing what is authorised by their private Act, but which nevertheless causes damage to an individual. For anything else the common law remedy is properly applicable.—*IMPERIAL GAS LIGHT & COKE CO. v. BROADBENT* (1859), 7 H. L. Cas. 600; 29 L. J. Ch. 377; 34 L. T. O. S. 1; 23 J. P. 675; 5 Jur. N. S. 1319; 11 E. R. 239, H. L. *Affg. S. C. sub nom. BROADBENT v. IMPERIAL GAS CO.* (1857), 7 D. G. M. & G. 430, L. C.

Annotations:—As to (1) Distd. Dungey v. London Corpn. (1869), 38 L. J. C. P. 298; *Ferrar v. London Sewers Comrs.* (1869), L. R. 4 Exch. 227. *As to (2) Consd. Re Stockport, Timperley & Altringham Ry.* (1864), 33 L. J. Q. B. 251; *Hammersmith & City Ry. v. Brand* (1869), L. R. 4 H. L. 171. *Refd. Ware v. Regent's Canal Co.* (1858), 3 De G. & J. 212; *Re Brogden & Llynvi Valley Ry.* (1860), 9 C. B. N. S. 229; *Bagnall v. L. & N. W. Ry.* (1861), 7 H. & N. 423; *Bedford v. Dawson* (1875), 39 J. P. 804; *Jordeson v. Sutton, Southcoates, & Drypool Gas Co.*, [1898] 2 Ch. 614. *Generally, Mentd. Southampton & Itchin Floating Bridge Co. v. Southampton L. B. of Health* (1858), 4 Jur. N. S. 1298; *New River Co. v. Johnson* (1860), 2 E. & E. 435; *Coe v. Wise* (1866), L. R. 1 Q. B. 711; *Crump v. Lambert* (1867), 17 L. T. 133; *A.-G. v. Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71; *Clowes v. Staffordshire Potteries Waterworks* (1872), 8 Ch. App. 129, n; *Shelfer v. London Electric Lighting Co., Meux's Brewery Co. v. London Electric Lighting Co.*, [1895] 1 Ch. 287; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Saunby v. London (Ont.) Water Comrs.*, [1906] A. C. 110; *Price's Patent Candle Co. v. L. C. C.* (1908), 78 L. J. Ch. 1; *A.-G. v. Birmingham Tame & Rea Drainage Board*, [1910] 1 Ch. 48; *Wood v. Conway Corpn.*, [1914] 2 Ch. 47; *Stollmeyer v. Petroleum Development Co.*, [1918] A. C. 498, n.

209. — Claim by yearly tenant.]—(1) By London City Improvement Act, 1847, s. 1, Lands Act, 1845, was incorporated so far as the provisions were not expressly varied or excepted; by s. 19 so much of Lands Act, 1845, as related to the purchase of land otherwise than by agreement was not to be incorporated in the Act; by s. 5 of Holborn Valley Improvement Act, 1864, all

powers conferred by statute which provided no remedy for persons whose property was thereby injured, altered the gradient of a street in a manner which injured ptff.'s house:—*Held*: ptff. was not entitled to compensation, & was without any remedy as he could not maintain an action.—*EAST FREEMANTLE CORPN. v. ANNOIS* (1901), 71 L. J. P. C. 39.—**AUS.**

q. —.]—Where any right of property is injuriously affected by a ry. co. in the exercise of statutory powers, the co. is not liable in damages for such injury unless the Act has made provision therefor.—*LAURENTIDE PAPER CO., LTD. v. R.* (1915), 15 Exch. C. R. 499.—**CAN.**

Sect. 3.—Where land injuriously affected: Sub-sects. 2 & 3.]

the provisions, etc., of London City Improvement Act, 1847, except s. 19, & of Lands Act, 1845, except the part with respect to the purchase & taking of lands otherwise than by agreement, were incorporated, except so far as the provisions, etc., were repealed, altered or varied by, or were inconsistent with, the provisions of the Act:—*Held*: Lands Act, 1845, was incorporated with both the special Acts, excepting only ss. 16–68, which came under the heading with respect to the purchase & taking of lands otherwise than by agreement, & the other clauses, which related to the purchase of lands otherwise than by agreement, but did not come under that heading, were not excepted.

(2) Lands Act, 1845, s. 121, which enacts that compensation to a person having no greater interest than as tenant from year to year shall be determined by two justices, comes as a proviso upon the clauses which enact in general terms that compensation for any interest in land is to be assessed by a jury, & s. 121 may therefore be treated as a proviso to, & not inconsistent with, the clauses in the special Acts which enact in equally general terms that compensation for any interest in land is to be assessed by a jury; consequently, compensation to a person having no greater interest than as tenant from year to year in premises required under the Holborn Valley Improvement Act, 1864, can only be determined by justices.—*R. v. LONDON CORPN.* (1867), L. R. 2 Q. B. 292; 16 L. T. 280.

Annotations:—*As to* (1) *Refd.* *Ferrar v. London Sewers Comrs.* (1868), L. R. 4 Exch. 1; *Sharpe v. Met. Dist. Ry.* (1879), 4 Q. B. D. 645. *As to* (2) *Consd.* *G. N. & City Ry. v. Tillett*, [1902] 1 K. B. 874.

210. ———.]—*DUNGEY v. LONDON CORPN.* (1869), 38 L. J. C. P. 298; 20 L. T. 921; 17 W. R. 1106.

211. ———.]—City of London Sewers Act, 1848, s. 2, incorporated Lands Act, 1845; but s. 3 excluded the operation of those provisions of Lands Act, 1845, which related to the purchase & taking of lands otherwise than by agreement; & those words were the descriptive heading of ss. 16–68 of that Act. Compensation was given by the special Act in certain special cases of injury to, & interference with, property; but no compensation was given for the injurious affecting of lands generally. *Pltf.*, whose premises were injuriously affected by works executed by *defts.* under the powers of the local Act, claimed compensation under Lands Act, 1845, s. 68:—*Held*: Lands Act, 1845, s. 68, was not incorporated in the local Act.

Qu.: whether, if s. 68 had been incorporated, compensation could have been claimed under it, *pltf.* not being entitled to compensation by any other statutory provision.—*FERRAR v. LONDON SEWERS COMRS.* (1869), L. R. 4 Exch. 227; 38 L. J. Ex. 102; 21 L. T. 295; 17 W. R. 709, Ex. Ch.

Annotations:—*Consd.* & *Folld.* *Dungey v. London Corpn.* (1869), 38 L. J. C. P. 298. *Appld.* *R. v. St. Luke's* (1871), L. R. 6 Q. B. 572; *Baker v. St. Marylebone Vestry* (1876), 35 L. T. 129. *Distd.* *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437. *Refd.* *Turner v. Mid. Ry.* (1911), 80 L. J. K. B. 516.

212. ———.]—*BAKER v. ST. MARYLEBONE VESTRY* (1876), 35 L. T. 129; 24 W. R. 848.

Effect of incorporation.]—*See* Nos. 21, 22, *ante*.

PART III. SECT. 3, SUB-SECT. 3.
r. General rule.]—Matters other than the value of the mere quantity of

land taken may be considered: thus a sum may be allowed for depreciation to a farm generally by the permanent

SUB-SECT. 3.—WHERE OTHER LAND OF CLAIMANT TAKEN.

213. *General rule—Actionable wrong immaterial—Danger of fire from passing trains.*]—The rule for assessing compensation under Lands & Railways Acts, 1845, namely, that compensation is only given by such Acts where what would have been actionable but for the special Act of Parliament is permitted by it, & compensation allowed in lieu of such right of action being taken away, is inapplicable where part of the land is taken & compensation is given, not only for the value of the part taken but for the rest of the land being injuriously affected.

Where therefore claimant for compensation against the railway co. was the owner of premises consisting of a cotton-mill & land, some of which land was required by the co., & the usual warrant had issued for the jury to assess compensation for the land taken for severance & for the land being otherwise injuriously affected, & they found one sum for the value of the land, another for severance, & a third including injury to the premises by reason of the risk of fire being so much increased by the proximity of the railway as to render it less fit for the purposes of a cotton-mill & to make the mill not insurable, except at a greatly increased premium, & to render the property of less value to the purchaser:—*Held*: as the injury to claimant's property, by increased risk of fire, was caused by what was done by the co. upon the land taken by them, the jury had rightly included damages for such injury in their verdict &, as they had not exceeded their jurisdiction in so doing, there was no ground for granting a *certiorari*.—*Re STOCKPORT, TIMPERLEY & ALTRINCHAM RY. CO.* (1864), 33 L. J. Q. B. 251; 10 Jur. N. S. 614; *sub nom.* *R. v. CHESHIRE (CLERK OF THE PEACE)*, 4 New Rep. 167; 12 W. R. 762; *sub nom.* *LEIGH v. STOCKPORT, TIMPERLEY & ALTRINCHAM RY.* 10 L. T. 426.

Annotations:—*Distd.* *Brand v. Hammersmith & City Ry.* (1865), L. R. 1 Q. B. 130; *R. v. Vaughan* (1868), 9 B. & S. 892; *City of Glasgow Union Ry. v. Hunter* (1870), L. R. 2 Sc. & Div. 78. *Apprvd. & Extd.* *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153. *Consd.* *Re L. T. & S. Ry. & Gower's Walk Schools Trustees* (1889), 24 Q. B. D. 326; *R. v. Mountford*, *Ex p. London United Tramways*, [1906] 2 K. B. 814; *Horton v. Colwyn Bay & Colwyn U. C.*, [1908] 1 K. B. 327. *Refd.* *Buccleuch v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418; *Re L. & N. W. Ry. & Reddaway* (1907), 71 J. P. 150.

214. ———.]—*Injury by smoke & vibration.*]—*CITY OF GLASGOW UNION RY. CO. v. HUNTER*, No. 324, *post*.

215. ———.]—(1) Though compensation may not be granted to persons annoyed by the smoke & vibration occasioned by trains passing along a railway, constructed under the authority of an Act of Parliament, where no part of his land has been taken, compensation may be given for deterioration in the value of his property occasioned in a similar manner, where a part of his land has been taken for the construction of a work authorised by an Act; & in this question of compensation may be considered his particular & individual use of that in which he has no proprietary right, such as the shore of a tidal river.

(2) In the action upon an award the arbitrator's evidence is admissible to show in respect of what matters he allowed or refused compensation, but not to explain his reasons for awarding a particular sum in respect of any particular matter.—*BUCCLEUCH (DUKE) v. METROPOLITAN BOARD*

occupation of the land as a ry.—*GREAT WESTERN RY. CO. v. WARNER* (1872), 19 Gr. 506.—*CAN.*

OF WORKS (1872), L. R. 5 H. L. 418; 41 L. J. Ex. 137; 27 L. T. 1; 36 J. P. 724, H. L.

Annotations:—As to (1) **Consd.** *M'Carthy v. Metropolitan Board of Works* (1872), L. R. 7 C. P. 508; *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153; *Re L. T. & S. Ry. & Gower's Walk Schools Trustees* (1889), 24 Q. B. D. 326. **Distd.** *Re Tynemouth Corpn. & Northumberland* (1900), 67 J. P. 425. **Consd.** *London & India Dock Co. v. N. L. Ry.* (1903), *Times*, Feb. 6; *R. v. Mountford, Ex p. London United Tramways*, [1906] 2 K. B. 814. **Refd.** *City of Glasgow Union Ry. v. Hunter* (1870), L. R. 2 Sc. & Div. 78; *Holt v. Gas Light & Coke Co.* (1872), L. R. 7 Q. B. 728; *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662; *R. v. Sheward* (1880), 9 Q. B. D. 741; *Calo. Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259; *R. v. Seard* (1894), 10 T. L. R. 545; *Re L. & N. W. Ry. & Reddaway* (1907), 71 J. P. 150; As to (2) **Folld.** *O'Rourke v. Rys. Comr.* (1890), 15 App. Cas. 371. **Refd.** *Ripley v. (N. Ry.)* (1875), 23 W. R. 685; *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 402; *Re Whiteley & Roberts*, [1891] 1 Ch. 558; *Falkingham v. Victorian Rys. Comr.*, [1900] A. C. 452; *L. & N. W. Ry. v. Walker* (1903), 72 L. J. K. B. 578; *Odlum v. Vancouver, City* (1915), 85 L. J. P. C. 95; *Recher v. North British & Mercantile Insee.*, [1915] 3 K. B. 277. **Generally**, **Mentd.** *A.-G. of Southern Nigeria v. Holt, Liverpool*, [1915] A. C. 599; *Selby v. Whitbread*, [1917] 1 K. B. 736.

216. "Lands held therewith or other lands"—Contiguity not essential—Unity of ownership.—Under statutory powers incorporating Lands Act, 1845, resps. gave the applt. notice to treat for the purchase of part of his land, which they required for sewage works. In an inquisition held under the Act evidence was given that the existence of sewage works, even if conducted so as not to create an actionable nuisance, depreciated the market value of applt.'s other lands for building purposes. The land taken was let on long building leases; of the other lands part was in hand, & part was let for short periods for brick-making. The land taken was separated from the other lands, in part by other property of applt.'s, & in part by a railway. The jury gave a verdict for the value of the land taken & a further sum for all damage sustained or to be sustained by reason of the injuriously affecting the other lands by the exercise of respts.' statutory powers:—**Held**, the jury had not exceeded their jurisdiction in awarding the further sum: because (a) part of applt.'s land having been taken for the sewage works, compensation might be awarded for damage to be sustained by reason of the injuriously affecting his other lands, not only by the construction of the sewage works but by their use; (b) the damage was not too remote to form the subject of compensation, even though no nuisance might be caused; (c) the lands taken & the lands injuriously affected being held by the same owner so that the unity of ownership conduced to the advantage of the property as one holding, the lands injuriously affected were "held with" the lands taken within Lands Act, 1845, s. 49. Where several pieces of land owned by the same person are, though not adjoining, so near to each other & so situated that the possession & control of each gives an enhanced value to all of them, they are lands held together within Lands Act, 1845, ss. 49, 63, so that if one piece is compulsorily taken & converted to uses which depreciate the value of the rest the owner

2171. Depreciation due to anticipated legal use of works.—Upon assessment of damages for injury to land in respect of part being taken for a ry., the probable risk of accidental fire arising from the working of the railway may be taken into account.—**HARDING v. BOARD OF LAND & WORKS (1880), 6 V. R. (Law) 389.—**AUS.****

s. —.—A portion of lands having been taken by a ry.:—**Held**: compensation should be allowed for depreciation in the value of the land not taken, occasioned by anticipation of the subsequent operation & user of

the ry. on the land taken.—**Re SCOTT & RAILWAY COMR.** (1889), 6 Man. L. R. 193.—**CAN.**

t. Land taken for railway—Injury to other land by stopping up ditch.—Defts. purchased part of pltf.'s land for a ry. running through it; the price was fixed by agreement, & the land conveyed without any reservation. Pltf. had previously drained his land by means of a ditch running through the land conveyed. In constructing their ry. defts. stopped up the ditch, & pltf.'s land was overflowed:—**Held**: the injury being attributable to the

has a right to compensation for the depreciation (LORD WATSON).—**COWPER ESSEX v. ACTON LOCAL BOARD** (1889), 14 App. Cas. 153; 58 L. J. Q. B. 597; 38 W. R. 209; 5 T. L. R. 395; *sub nom.* **ESSEX v. ACTON DISTRICT LOCAL BOARD**, 61 L. T. 1; 53 J. P. 756, H. L.; *affg.* *S. C. sub nom. R. v. ESSEX* (1886), 17 Q. B. D. 447, C. A.

Annotations:—**Consd.** *Re L. T. & S. Ry. & Gower's Walk Schools Trustees* (1889), 24 Q. B. D. 326; *London & India Dock Co. v. North London Ry.* (1903), *Times*, Feb. 6; *R. v. Mountford, Ex p. London United Tramways*, [1906] 2 K. B. 814. **Appld.** *Horton v. Colwyn Bay & Colwyn U. C.*, [1908] 1 K. B. 327. **Consd.** *Holditch v. Canadian Northern Ontario Ry.*, [1916] 1 A. C. 536. **Refd.** *Long Eaton Recreation Grounds v. Mid. Ry.* (1901), 71 L. J. K. B. 74; *R. v. Middlesex Clerk of the Peace*, [1914] 3 K. B. 259. **Mentd.** *M'Murray v. Cadwell* (1889), 6 T. L. R. 76; *Re Tynemouth Corpn. & Northumberland, Tynemouth Corpn. & Trovelyan, Tynemouth Corpn. & Orde* (1900), 67 J. P. 425.

217. Depreciation due to anticipated legal use of works—To be constructed.—**COWPER ESSEX v. ACTON LOCAL BOARD**, No. 216, *ante*.

218. Land taken for school—Injury to adjoining lands by noisy children—Ground for compensation.—**R. v. PEARCE, Ex p. LONDON SCHOOL BOARD** (1898), 67 L. J. Q. B. 842; 78 L. T. 681; 14 T. L. R. 465.

Land taken under Defence of Realm Acts—Injurious affection from user thereof.—**See CONSTITUTIONAL LAW.**

219. Street widening for tramway—Tramways not laid on land taken—Injury to other property by running of trams—Not ground for compensation.—**R. v. MOUNTFORD, Ex p. LONDON UNITED TRAMWAYS (1901) LTD.**, [1906] 2 K. B. 814; 75 L. J. K. B. 1003; 95 L. T. 675; 70 J. P. 511; 22 T. L. R. 752; 4 L. G. R. 1058, D. C.

Annotations:—**Consd.** *Re L. & N. W. Ry. & Reddaway* (1907), 71 J. P. 150. **Distd.** *Taylor v. Dolter Electric Traction* (1907), 51 Sol. Jo. 702. **Consd.** *Horton v. Colwyn Bay & Colwyn U. C.*, [1908] 1 K. B. 327.

220. ——— Injury to adjoining property by widening of street & by tramway—Ground for compensation.—**TAYLEUR v. DOLTER ELECTRIC TRACTION, LTD.** (1907), 51 Sol. Jo. 702.

221. Land taken for public footway—Obstruction of access to adjoining warehouse.—**Re GREAT EASTERN RY. CO. & LONDON COUNTY COUNCIL**, No. 194, *ante*.

222. Injury not caused on lands taken—Railway—Ground for compensation.—**Re LONDON & NORTH WESTERN RY. CO. & REDDAWAY** (1907), 71 J. P. 150; 23 T. L. R. 279.

Annotation:—**Consd.** *Horton v. Colwyn Bay & Colwyn U. C.*, [1908] 1 K. B. 327.

223. ——— Sewage works—Public Health Act, 1875 (c. 55), s. 308.—Resps., acting under the powers conferred by Public Health Act, 1875, constructed an intercepting sewer, a pumping station, a sewage reservoir & an outfall sewer, which were integral parts of, & together formed, one scheme of sewerage. The sewers were in part constructed on land the property of claimant; the pumping station & the reservoir were constructed on land the property of other persons. The present value of certain portions of claimant's

construction of the ry., should have been taken into consideration at the sale.—**L'ESPERANCE v. GREAT WESTERN RY. CO.** (1855), 14 U. C. R. 173.—**CAN.**

u. Damages cannot be assessed in action for trespass.—An owner is not entitled to have damages for the deterioration of adjoining land taken assessed in a trespass action, especially where he did not proceed for any other relief.—**HOLMESTED v. CANADIAN NORTHERN RY. CO., ANNABLE, THIRD** (1915), 31 W. L. R. 896.—**CAN.**

Sect. 3.—Where land injuriously affected: Sub-sects. 3

land which were in proximity to the pumping station & reservoir was depreciated by reason of the contemplated user of that station & reservoir for sewage purposes:—*Held*: as the acts of user, the contemplation of which caused the depreciation, would be done on land not the property of claimant, the damage was not sustained "by reason of the exercise of the powers" of Public Health Act, 1875, s. 308, & claimant was not entitled to any compensation under the Act in respect of that depreciation.—*HORTON v. COLWYN BAY & COLWYN URBAN COUNCIL*, [1908] 1 K. B. 327; 77 L. J. K. B. 215; 98 L. T. 547; 72 J. P. 57; 24 T. L. R. 220; 52 Sol. Jo. 158; 6 L. G. R. 211, C. A.

Annotations:—*Reid. Re L. & N. W. Ry. & Reddaway* (1907), 71 J. P. 150. *Mentd. Tayleur v. Dolter Electric Traction* (1907), 51 Sol. Jo. 702; *Griffith v. Clay*, [1912] 2 Ch. 291.

Future damages.—*See Sect. 5, post.*

SUB-SECT. 4.—WHERE LAND OF CLAIMANT NOT TAKEN.**A. Injury must arise from Authorised Acts.****(a) Acts Authorised by Legislature.**

224. Compensation proper remedy—Common law remedy for unauthorised acts.—*IMPERIAL GAS & COKE CO. v. BROADBENT*, No. 208, *ante*.

225. ———— *]*—A railway co., in making their line, crossed & interfered with C.'s private railway. By Railways Act, 1845, they were bound to restore a substituted railway within a certain period under a penalty. C., calculating on the substituted railway being made within the time specified by the statute, granted a lease of his lands & railway to M., reciting that the co. were bound to restore his railway, & that C. would do so at his own expense if the co. failed or refused to do so. The co. failed to restore the railway, & M. sued C., & recovered £451 damages; whereon C. sued the railway co. for this sum on an implied indemnity & for special damage:—*Held*: (1) as the co. were bound by the statute to restore the railway, & neglected to do so, C. had a right of action *ex delicto* against them, & such right of action was not extinguished by the provision of the statute as to penalties, for the penalty was only a cumulative remedy; (2) C. was not entitled to recover against the co. the £451 paid as damages to M., for the latter action arose *ex contractu*, & the damages incurred by C. to M. were not the direct & immediate consequence of the co.'s dis-

obedience of the statute, C. ought himself to have restored the railway, & sued the co. for the cost & any other special damages.

(3) The tribunal established by the Railways Act, 1845, only gives compensation for losses sustained in consequence of what the railway co. may do lawfully under their statutory powers, but for anything done in excess of these powers, or contrary to what the Legislature in conferring those powers has commanded, the proper remedy is a common law action in a common law court.—*CALEDONIAN RY. CO. v. COLT* (1860), 3 L. T. 252; 7 Jur. N. S. 475, H. L.

226. ———— *]*—*DAVIS v. MYERS* (1851), 17 L. T. O. S. 304, N. P.

227. ———— **Not action at law—Damage by waterworks.**—*R. v. NOTTINGHAM OLD WATERWORKS CO.* (1835), 6 Ad. & El. 355; 5 Nev. & M. K. B. 498; 5 L. J. K. B. 11; 112 E. R. 135; *subsequent proceedings* (1837), 6 Ad. & El. 362.

See, generally, WATER SUPPLY.

228. ———— **Unless special damage—Obstruction of right of way.**—*WATKINS v. GREAT NORTHERN RY. CO.* (1851), 16 Q. B. 961; 20 L. J. Q. B. 391; 17 L. T. O. S. 74; 15 Jur. 1127; 117 E. R. 1150.

Annotation:—*Distd. Cale. Ry. v. Colt* (1860), 3 L. T. 252.

229. ———— **Nuisance—Loss of amenities.**—*CESSFORD v. DOVER HARBOUR BOARD* (1898), 42 Sol. Jo. 451.

230. ———— **Not action for trespass—Party entitled to easement.**—Where an Act of Parliament gave comrs. power to purchase lands, etc., & directed them to make compensation to persons interested in lands, etc., for damage, etc.:—*Held*: a party entitled to an easement over lands so purchased by them could not maintain trespass for acts done upon those lands to the prejudice of his easement, but that as soon as damage was actually sustained, he should claim compensation under the Act.—*THICKNESSE v. LANCASTER CANAL CO.* (1838), 4 M. & W. 472; 1 Horn & H. 365; 8 L. J. Ex. 49; 3 Jur. 11; 150 E. R. 1515.

Annotations:—*Distd. Bostock v. Sidebottom* (1852), 18 Q. B. 813. *Mentd. Hedges v. Met. Ry.* (1860), 28 Beav. 109; *Scott v. Ebury* (1867), L. R. 2 C. P. 255.

231. ———— **Erection of electric cable standard in pavement—Act not amounting to "taking of land."**—*ESCOTT v. NEWPORT CORPN.*, [1904] 2 K. B. 369; 73 L. J. K. B. 693; 90 L. T. 348; 68 J. P. 135; 52 W. R. 513; 20 T. L. R. 158; 2 L. G. R. 779, D. C.

Annotations:—*Consd. Andrews v. Abertillery U. C.* (1911), 80 L. J. Ch. 724. *Reid. Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299.

232. ———— **Not injunction—Obstruction of access to warehouse.**—*WEDMORE v. BRISTOL CORPN.*

PART III. SECT. 3, SUB-SECT. 4.—A. (a).

224 i. Compensation proper remedy—Common law remedy for unauthorised acts.—The compensation clauses in statutes authorising public works apply only where the act complained of is authorised by the statute.—*HOOD v. SYDNEY CORPN.* (1860), 2 Legge, 1291.—**AUS.**

227 i. ———— **Not action at law.**—Premises belonging to pltf. were "injuriously affected" by the level of the street on which they fronted being raised in order to construct a proper approach to a bridge that defts. were lawfully rebuilding:—*Held*: he could not maintain an action against defts., but must, in the absence of any negligent construction, proceed under Municipal Act, 1887, c. 184.—*PURATT v. STRATFORD CITY CORPN.* (1888), 16 A. R. 5.—**CAN.**

227 ii. ———— *]*—Where lands are injuriously affected, no part thereof

being taken, the owners must resort to compensation under Government Railways Act, 1881, when the injury is occasioned by an act made lawful by the statutory powers exercised.—*R. v. BARRY* (1891), 2 Exch. C. R. 333.—**CAN.**

227 iii. ———— **Damage by waterworks.**—Damages caused by waterworks for which compensation was claimed arose from lawful acts done by the defts. by virtue of legislative authority:—*Held*: recourse must be had to the special statutory remedy.—*ROSE v. ST. JOHN CITY* (1905), 37 N. B. R. 58.—**CAN.**

w. ———— **Lowering road.**—Pltf. occupied a cottage & land abutting on a road, from which a passage over pltf.'s land afforded access to his cottage. A ry. co. lowered the road, obliging pltf. to use a ladder to obtain access from the road to the passage:—*Held*: an action was not maintainable, the injury complained

of being an injury of a permanent nature & the subject of compensation.—*MOORE v. GREAT SOUTHERN & WESTERN RY. CO.* (1858), 10 L. C. L. R. 46; 11 Ir. Jur. 50.—**IR.**

x. ———— **Raising road.**—Pltf. occupied a house abutting on a public road. A ry. co., in the execution of their works, raised the road opposite pltf.'s house, so that the access to the house was impeded, & the house rendered damp & unwholesome. To an action against the ry. co., defts. pleaded a justification under their Act:—*Held*: the action was not maintainable, pltf.'s loss of health being the consequence of the injury to his house, & such injury being of a permanent nature, & the subject of statutory compensation.—*TUOHNEY v. GREAT SOUTHERN & WESTERN RY. CO.* (1859), 10 L. C. L. R. 98.—**IR.**

y. ———— **Deprivation of access.**—A ry. co. having by virtue of a private Act acquired a piece of

(1862), 1 New Rep. 120; 7 L. T. 459; 11 W. R. 136; *reversd.* on other grounds, 1 New Rep. 187, L. J.J.

233. — Obstruction to ancient lights.]—Where a school board acquires land as a site for a school under the compulsory powers given by the Elementary Education Act, 1870 (c. 75), & builds a school so as to obstruct the ancient lights of an adjoining landowner, his remedy is by claiming compensation under Lands Act, 1845, s. 68, & not by bill for an injunction; but notice to treat to the owners of easements over the land taken is unnecessary.—**CLARK v. LONDON SCHOOL BOARD** (1874), 9 Ch. App. 120; 43 L. J. Ch. 421; 29 L. T. 903; 38 J. P. 101; 22 W. R. 354, L. C. & L. J.J.

*Annotations:—***Consd.** Bedford v. Dawson (1875), L. R. 20 Eq. 353; Swainston v. Finn & Metropolitan Board of Works (1883), 48 L. T. 634; Wigram v. Fryer (1887), 36 Ch. D. 87; Barlow v. Ross (1890), 59 L. J. Q. B. 183; Kirby v. Harrogate School Board, [1896] 1 Ch. 437. **Refd.** London School Board v. Smith, [1895] W. N. 37; Anderson v. M., S. & L. Ry., M., S. & L. Ry. v. Anderson (1898), 78 L. T. 251; Barnard v. G. W. Ry. (1902), 86 L. T. 798.

234. — BEDFORD (DUKE) v. DAWSON (1875), L. R. 20 Eq. 353; 44 L. J. Ch. 549; 33 L. T. 156; 39 J. P. 801.

*Annotations:—***Folld.** French v. L. T. & S. Ry. (1886), 2 T. L. R. 395. **Consd.** Wigram v. Fryer (1887), 36 Ch. D. 87. **Refd.** Long Eaton Recreation Grounds Co. v. Mid. Ry. (1901), 71 L. J. K. B. 74; Mercer v. Liverpool, St. Helens & South Lancashire Ry. (1903), 88 L. T. 374.

235. — FRENCH v. LONDON TILBURY & SOUTHEND RY. CO. (1886), 2 T. L. R. 395.

236. — WIGRAM v. FRYER (1887), 36 Ch. D. 87; 56 L. J. Ch. 1098; 57 L. T. 255; 36 W. R. 100; 3 T. L. R. 652.

*ns:—***Refd.** Goddard v. Mid. Ry. (1891), 8 T. L. R. 120; London School Board v. Smith, [1895] W. N. 37.

237. — A railway co. acquired some land in 1865, under a special Act, & in 1891 obtained another special Act, empowering the co. to enlarge its station. A new parcels office was built, partly on land acquired under the Act of 1891, & partly on land acquired in 1865. The building obstructed plff.'s ancient lights:—*Held*: plff. was not entitled to maintain an action for an injunction & damages, but must seek compensation under Lands Act, 1845.—EMSLEY v. NORTH EASTERN RY. CO.**, [1896] 1 Ch. 418; 65 L. J. Ch. 385; 74 L. T. 113; 60 J. P. 182; 12 T. L. R. 219, C. A.**

*Annotations:—***Refd.** L. & N. W. Ry. v. Ogwen District

vacant ground across which a road ran forming an access to a house built at the boundary of the ground, executed operations upon the road by which its value as an access was diminished:—*Held*: the proprietor of the house was not entitled to an action at common law against the co., but must proceed in the manner provided by Railway (Scot.) Act, 1845.—**LAWSON v. CALDONIAN RY. CO.** (1881), 8 R. (Ct. of Sess.) 442; 18 Sc. L. R. 275.—**SCOT.**

232. — Not injunction—Obstruction of access to property.]—In a case where the owner is merely able to instruct that his property is injuriously affected by the operations of the co. he cannot proceed by way of interdict against the co., but his remedy is that of compensation under Railways (Scot.) Act, 1845, s. 6.—**DON v. NORTH BRITISH RY. CO.**, **DON v. NEWPORT RY. CO.** (1878), 5 R. (Ct. of Sess.) 972; 15 Sc. L. R. 617.—**SCOT.**

PART III. SECT. 3, SUB-SECT. 4.— A. (b).

z. General rule.]—A ry. co. is responsible for injury done in the construction of their ry. to adjoining property, unless with due & proper

skill it could not be avoided.—**MINOR v. BUFFALO & LAKE HURON RY. CO.** (1858), 9 C. P. 280.—**CAN.**

244 i. Remedy by action—Unreasonable exercise of statutory powers.]—Where a work is constructed by a public body under authority of a statute which gives a right to compensation for any injury done, the full extent of the injury thereby caused to private individuals is recoverable as compensation under the statute, notwithstanding that there may have been negligence in the execution of the work; & the fact that there has been negligence does not give rise to an action for damages unless the public body has acted in excess of its statutory powers.—**COUNTY OF GREY (CHAIRMAN, ETC.) v. FRANKPITT** (1899), 18 N. Z. L. R. 111.—**N.Z.**

244 ii. — PALMERSTON NORTH (MAYOR, ETC.) v. FITZ (1901), 20 N. Z. L. R. 396.—**N.Z.**

246 i. — Overflow of water into adjoining lands.]—Defts., acting under statutory powers, made a ry. along the boundaries of plff.'s land. In constructing such railway, defts. made excavations, to build an embankment.

Council (1890), 80 L. T. 401; Kirby v. Harrogate School Board, [1896] 1 Ch. 437; Arnott v. Whitby U. D. C. (1909), 73 J. P. 369.

238. — COURAGE & CO. v. SOUTH EASTERN RY. CO. (1902), 19 T. L. R. 61.

239. — Obstruction of right of way.]—**LONDON SCHOOL BOARD v. SMITH**, [1895] W. N. 37. *Annotation:—***Refd.** Barnard v. G. W. Ry. (1902), 86 L. T. 798.

240. — BARNARD v. GREAT WESTERN RY. (1902), 86 L. T. 798; 66 J. P. 568.

241. — Extinguishment of right to support.]—**SWAINSTON v. FINN & METROPOLITAN BOARD OF WORKS** (1883), 52 L. J. Ch. 235; 48 L. T. 634; 31 W. R. 498.

242. — Damage caused by negligence—Percolation of water.]—**EVANS v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.** (1887), 36 Ch. D. 626; 57 L. J. Ch. 153; 57 L. T. 194; 36 W. R. 328; 3 T. L. R. 691.

243. Injunction proper remedy—Not compensation—Constantly recurring injury.]—**KEATES v. HOLYWELL RY. CO.** (1873), 28 L. T. 183.

See, also, Part VIII., Sect. 1, sub-sect. 2, A. B. (d), *post*.

(b) Authorised Acts Improperly Performed.

244. Remedy by action—Unreasonable exercise of powers.]—**COATS v. CLARENCE RY. CO.** (1830), 1 Russ. & M. 181; 8 L. J. O. S. Ch. 72; 39 E. R. 70, L. C.

*Annotations:—***Consd.** Statton v. Woolrych (1857), 23 Beav. 225. **Expld. & Distd.** Biddulph v. St. George's Vestry (1863), 3 De G. J. & Sm. 493; Hood v. N. E. Ry. (1870), L. R. 11 Eq. 116. **Distd.** Fielden v. Morley Corp. (1898), 14 T. L. R. 566. **Consd.** Roberts v. Charing Cross, Euston & Hampstead Ry. (1903), 87 L. T. 732. **Refd.** Milward v. Redditch L. B. of Health (1873), 21 W. R. 429; Dowling v. Pontypool, Caerleon & Newport Ry. (1874), L. R. 18 Eq. 714; Vernon v. St. James Vestry (1880), 42 L. T. 82; Southwark & Vauxhall Water Co. v. Wandsworth Board of Works, [1898] 2 Ch. 603.

245. — Working by night—Jurisdiction of court not ousted.]—**ROBERTS v. CHARING CROSS, EUSTON & HAMPSTEAD RY. CO.** (1903), 87 L. T. 732; 19 T. L. R. 160.

246. — Overflow of flood waters into adjoining lands—Insufficient openings.]—**LAWRENCE v. GREAT NORTHERN RY. CO.** (1851), 16 Q. B. 643; 6 Ry. & Can. Cas. 656; 20 L. J. Q. B. 293; 17 L. T. O. S. 39; 15 Jur. 652; 117 E. R. 1026.

*Annotations:—***Consd.** Cale. Ry. v. Lockhart (1860), 3 L. T. 65; Clothier v. Webster (1862), 12 C. B. N. S. 790. **Expld.** Mason v. Shrewsbury & Hereford Ry. (1871), 25 L. T. 239. **Distd.** Todd v. Met. Dist. Ry. (1871), 24 L. T. 435.

The excavations filled with water which flowed over on to plff.'s land. The excavations were negligently made:—*Held*: defts. were liable to plff. for damage caused to his land by escape of water from their excavations.—**PEERS v. VICTORIAN RAILWAYS COMRS.** (1893), 19 V. L. R. 617.—**AUS.**

246 ii. — A co. purchased from plff. land for the purposes of the co., the consideration being "in full compensation for the land & the co. so using it as aforesaid." Defts. built their ry. so unskillfully as to cause water to overflow plff.'s land:—*Held*: the compensation paid could not be considered paid as compensation for such unskillful construction of the ry. & defts. were liable.—VANHORN v. GRAND TRUNK RY. CO.** (1858), 9 C. P. 264.—**CAN.****

246 iii. — A ry. co. in exercise of statutory power, constructed a culvert upon a right of way it had acquired over plff.'s lands, but in such negligent manner that the lands were flooded:—*Held*: Water Clauses Act, 1897, s. 130, did not preclude plff. from recovering by action at law for damages sustained by reason of the negligent exercise of their powers.—

Sect. 3.—Where land injuriously affected:

4, A. (b) & (c) & B. (a), (b) & (c) i.]

Expld. *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 129, n. **Distd.** *Maxey Drainage Board v. G. N. Ry.* (1912), 106 L. T. 429. **Refd.** *Broadbent v. Imperial Gas Co.* (1857), 7 De G. M. & G. 436; *Re Brogdon & Llynvi Valley Ry.* (1860), 9 C. B. N. S. 229; *Coe v. Wise* (1866), L. R. 1 Q. B. 711.

247. — Obstruction to drains & right of way.]

—**BLAUGRAVE v. BRISTOL WATERWORKS CO.** (1856), 1 H. & N. 369; 26 L. J. Ex. 57; 156 E. R. 1245.

Annotation:—Mentd. *Goldsmid v. Hampton* (1858), 27 L. J. C. P. 286.

248. — Injurious & excessive exercise of powers—No damage to individual—Right in Attorney-General.]—**WARE v. REGENT'S CANAL CO.**, No. 62, *ante*.

249. — Lack of due care & skill.]—CLOTHIER v. WEBSTER (1862), 12 C. B. N. S. 790; 31 L. J. C. P. 316; 6 L. T. 461; 9 Jur. N. S. 231; 10 W. R. 624; 142 E. R. 1353.

Annotations:—Refd. *Mersey Dock Trustees v. Gibbs* (1866), L. R. 1 H. L. 93. **Mentd.** *Ohrby v. Ryde Comrs.* (1864), 28 J. P. 663.

250. — — — —.]—A railway co. for the purposes of their undertaking took certain houses standing in a row & structurally connected with the adjoining tenements. In removing one of such houses the stability of the neighbouring house, which had not been taken by the co., was impaired, & the owners sustained damage as well to that house as to others in their occupation. A bill was filed for an injunction, it appearing that by due precaution such damage might have been avoided:—*Held*: an injunction was rightly granted, the case not being one for compensation under Lands Act, 1845, s. 68, & an inquiry as to damages, including damages incurred since bill filed, would be directed.—BISCOE v. GREAT EASTERN RY. CO.** (1873), L. R. 16 Eq. 636; 21 W. R. 902.**

(c) Unauthorised Acts.

251. Remedy by action—Obstruction of easement of light—Injury by dust, etc.]—TURNER v. SHEFFIELD & ROTHERHAM RY. CO. (1842), 10 M. & W. 425; 3 Ry. & Can. Cas. 222; 152 E. R. 536.

Annotations:—Refd. *Brand v. Hammersmith & City Ry.* (1867), L. R. 2 Q. B. 223. **Mentd.** *Brine v. G. W. Ry.* (1862), 2 B. & S. 402.

252. — Pollution of water.]—A waterworks co. were authorised by their private Act to take & use the water of springs which supplied a river upon the banks of which mills were situate. The Act provided that the co. should not abstract more than a certain amount of water before they had constructed a compensation reservoir for storing the water during floods for the benefit of the mill owners. The Act gave the co. compulsory powers

MCCRIMMON v. B. C. ELECTRIC RY. CO. (1914), 29 W. L. R. 517; 7 W. W. R. 137; 20 D. L. R. 834.—**CAN.**

246 iv. — — —.]—If a local body, by virtue of special statutory power, constructs a canal with flood-gates properly & without negligence, but allows the flood-gates to get out of repair so as to cause adjacent land to be flooded which before the construction of the canal would not have been flooded, it is liable to compensate the owner of the land for the damages caused thereby, although it is under no statutory duty to repair the canal & flood-gates.—ATCHESON v. BRUCE COUNTY (CHAIRMAN OF)** (1896), 15 N. Z. L. R. 483.—**N.Z.****

a. — Obstruction to access.]—Pltf. claimed damages from defts. for negligently depressing certain streets in a town thereby making it incon-

venient for persons to approach pltf.'s store; also for blocking them up & thereby negligently destroying pltf.'s business:—*Held*: the work was negligently done, which gave a cause of action, even though the work itself might be lawful.—QUILLINAN v. CANADA SOUTHERN RY. CO. & NIAGARA FALLS CORPN.** (1884), 6 O. R. 567.—**CAN.****

249 i. — Lack of due care & skill.]—Neglect to take proper precautions in itself, however legal the making of act may have been if skilfully executed, entitles the owner of adjacent land to recover damages for the injury sustained.—NEW WESTMINSTER (CITY OF) CORPN. v. BRIGHOUSE** (1892), 20 S. C. R. 520.—**CAN.****

249 ii. — — —.]—HOUNSOME v. VANCOUVER POWER CO.** (1913), 23 W. L. R. 167, 404; 3 W. W. R. 953;**

for acquiring land, streams & springs for their undertaking & powers to acquire by consent lands for constructing their compensation reservoir. The Act contained a reservation of the right of the owners & occupiers of any lands, mills or works to the use of the waters of the stream, except so far as provided & declared by the Act. Waterworks Act, 1847, was incorporated with this Act. The co. constructed a compensation reservoir & a subsequent Act of Parliament, which gave them further powers, including powers of emptying & cleansing the reservoir, recognised this reservoir as a sufficient compensation reservoir for the mill owners, & directed it to be maintained. The owner of some dye works situate on the river below the reservoir filed a bill against the co. complaining that the effect of the reservoir was to make the water of the river more muddy than it was before its construction, & to render it unfit for the process of dyeing, & praying for an injunction to restrain defts. from fouling the stream. These allegations being established:—*Held*: (1) the Acts gave defts. no power to foul the water; (2) the compensation clauses in the Waterworks Act did not apply, inasmuch as the injury was such as the co. were not authorised to commit; (3) pltf. was entitled to an injunction.

Qu.: whether Waterworks Act, s. 6, gives compensation for injuries to the lands of third persons caused by works on land which could be taken only by consent.—CLOWES v. STAFFORDSHIRE POTTERIES WATERWORKS CO.** (1872), 8 Ch. App. 125; 42 L. J. Ch. 107; 27 L. T. 521; 36 J. P. 760; 21 W. R. 32, L. J.**

Annotations:—As to (2) Refd. *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614. **As to (3) Refd.** *Shelfer v. London Electric Lighting Co.*, *Meux's Brewery Co. v. London Electric Lighting Co.*, [1895] 1 Ch. 287. **Generally, Refd.** *Truman v. L. B. & S. C. Ry.* (1883), 25 Ch. D. 423. **Mentd.** *Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769.

— — — By sewers.]—See SEWERS & DRAINS; WATERS & WATERCOURSES.

253. — Obstruction of right of navigation—Previous claim for compensation made in ignorance of illegality—No bar.]—PENTNEY v. LYNN PAVING COMRS.** (1865), 12 L. T. 818; 13 W. R. 983.**

See Nos. 208, 225, *ante*.

Damage to party-structure—Adjoining building removed.]—See BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 308, No. 300.

B. Injury must be Actionable in Absence of Compulsory Powers.**(a) In General.**

See Nos. 213, 229, *ante*; Nos. 259, 262, 263, 265, 270, 282, 324, 727, 769, *post*.

9 D. L. R. 823.—CAN.

PART III. SECT. 3, SUB-SECT. 4.—A. (c).

b. Remedy by action.]—Pltf.'s land was injuriously affected by works constructed by a ry. co.; the co. asserted that the works, which were erected for the purpose of improving the navigation of a stream owned by them, were authorised by their statute:—*Held*: (1) the power they had to erect the works was distinct from those granted for the purpose of the ry.; (2) pltf. could recover damages.—R. v. BUFFALO & LAKE HURON RY. CO.** (1864), 23 U. C. R. 208.—**CAN.****

c. — Obstruction of right of access.]—A corpn. lowered the grade of a street upon which F.'s property abutted thereby depriving him of

(b) *Structural Damage.*

254. Injury caused by pulling down party-wall—Proceeding under Building Act, 1774 (c. 78)—Not subject of compensation under special Act.]—*R. v. HUNGERFORD MARKET CO., Ex p. YEATES* (1833), 1 Ad. & El. 668; 2 Nev. & M. K. B. 340; 3 L. J. K. B. 50; 110 E. R. 1362.

Annotation:—Consd. R. v. Hungerford Market Co., Ex p. Eyre (1834), 1 Ad. & El. 676.

255. — Taking down adjoining house—Houses not specified in special Act—Not subject of compensation under that Act.]—*R. v. HUNGERFORD MARKET CO., Ex p. EYRE* (1834), 1 Ad. & El. 676; 3 Nev. & M. K. B. 622; 3 L. J. K. B. 168; 110 E. R. 1365.

See, further, BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., Part III., p. 296 et seq.

(c) *Obstruction of Access and Diversion of Traffic.*
i. *Access to Highway from Claimant's Land or Premises.*

256. Alteration of levels—By lowering roadway in front of land.]—By a railway Act a co. were empowered, *inter alia*, to raise or lower certain roads or ways, in order the more conveniently to carry same over or under or by the side of the railway, doing as little damage as might be in the execution of the powers thereby granted & making full satisfaction in manner thereafter mentioned, to all persons interested in any lands which should be taken, used or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers thereby granted. The co. had lowered a road in front of a piece of land & thereby injured its value, by impeding the access to it & causing the necessity of additional fences, etc., but they had not actually touched any part of the land:—*Held*: the co. were bound to issue their warrant to summon a jury to make compensation for damage to the land in question.

The alleged injury is to land adjoining a road,

access to & from the street from & to his house:—*Held*: what was complained of was done by the corp., not in the exercise of any of its powers, but wrongfully, & F.'s remedy was by action.—*Re FORSTER & MEDICINE HAT* (1913), 23 W. L. R. 200; 3 W. W. R. 618; 9 D. L. R. 555.—CAN.

PART III. SECT. 3, SUB-SECT. 4.—
B. (a).

d. *General rule.]—*Where lands are injuriously affected no part thereof being taken, the owners can resort to statutory compensation only when the injury is such as would have sustained an action but for such statutory powers.—*HOOD v. SYDNEY CORPN.* (1860), 2 Legge, 1291.—AUS.

e. —.]—*R. v. BARRY* (1891), 2 Exch. C. R. 333.—CAN.

f. —.]—If the detriment to claimant's land should alone be considered, he is not entitled to compensation because he is, by construction of a public work, deprived of a mode of reaching an adjoining district from his land, & is obliged to use a substituted route which is less convenient, if the consequent depreciation in the value of his property is general to the inhabitants of the particular locality affected, though his property may be depreciated more than that of any of the others. The claimant in such case would have no right of action at common law, & therefore his land was not injuriously affected within the meaning of the statutes, the test in such cases being, would pltf. have a right of action if the work had been done without statutory authority.—*Re SHRAGUE & CITY OF*

WINNIPEG (1910), 20 Man. L. R. 1.—CAN.

PART III. SECT. 3, SUB-SECT. 4.—
B. (b).

g. *Injury caused by altering grade of street—Means of access interfered with—Not subject of compensation under Dominion Railway Act, 1888.]—*A ry. co., under their powers lowered the grade of a street, doing "structural damage" to A.'s house:—*Held*: A. could not recover "structural damages" caused to his buildings, by reason of his means of access being interfered with.—*Re TORONTO, HAMILTON, & BUFFALO RY. CO. & KERNER* (1896), 28 O. R. 14.—CAN.

PART III. SECT. 3, SUB-SECT. 4.—
B. (c) i.

256 i. Alteration of levels—By lowering roadway in front of land.]—Pltfs. were authorised by bye-law to raise money for improving certain streets, but no bye-law was passed ordering such improvements. The grade of a street was lowered so that the approach from adjacent land became difficult, & no retaining wall having been built, the soil sunk, thereby weakening the supports of the building thereon:—*Held*: the owner could maintain an action for the damage sustained by lowering the grade of the street, & was not obliged to seek statutory redress.—*NEW WESTMINSTER (CITY OF) CORPN. v. BRIGHOUSE* (1892), 20 S. C. R. 520.—CAN.

256 ii. —.]—*WILLIAMS v. CORNWALL TOWN MUNICIPAL CORPN.* (1900), 32 O. R. 255.—CAN.

which has been lowered under the provisions of the Act, & is, therefore, land injuriously affected by an act expressly within the powers conferred on the co. (*LORD DENMAN, C.J.*).—*R. v. EASTERN COUNTIES RY. CO.* (1841), 2 Q. B. 317; 2 Ry. & Can. Cas. 736; 1 Gal. & Dav. 589; 11 L. J. Q. B. 66; 114 E. R. 136.

Annotations:—Consd. East & West India Dock & Birmingham Junction Ry. v. Galtke (1851), 3 Mac. & G. 155; *R. v. L. & N. W. Ry.* (1854), 3 E. & B. 443. *Distd. Cale. Ry. v. Ogilvy* (1855), 25 L. T. O. S. 106. *Consd. Chamberlain v. West End of London & Crystal Palace Ry.* (1863), 2 B. & S. 617. *Distd. Ricket v. Met. Ry.* (1867), L. R. 2 H. L. 175. *Consd. McCarthy v. Metropolitan Board of Works* (1872), L. R. 8 C. P. 191. *Refd. Re Edmundson* (1851), 17 Q. B. 67; *Glover v. North Staffordshire Ry.* (1851), 16 Q. B. 912; *Re Penny & S. E. Ry.* (1857), 26 L. J. Q. B. 225; *Beckett v. Mid. Ry.* (1867), L. R. 3 C. P. 82; *Eagle v. Charing Cross Ry.* (1867), L. R. 2 C. P. 638. *Mentd. Sutton Harbour Improvement Co. v. Hitchens* (1851), 1 De G. M. & G. 161.

257. — By raising street.]—*R. v. ST. LUKE'S* No. 205, *ante*.

258. — By making line under street.]—By a deed of conveyance land, the situation, dimensions & boundaries thereof being particularly described in the map or plan drawn thereon, was conveyed to resps.' predecessor in title, together with all streets, ways, rights, easements & advantages. The plan showed a piece of land at the intersection of "G. street" & "M. street," which were delineated as communicating on a level. The land was in fact, at the date of the conveyance, waste building land on the outskirts of a town, & neither of the streets had been made or dedicated to the public. The soil of the intended streets was the property of the vendor. Houses were built on the land, fronting M. street, & both streets were made & used as streets; but the applt. co. afterwards made a branch line passing under G. street, near the property in question, & thereby altered the level of that street, & cut off the access for horses & vehicles from M. street into G. street; a means of access for

256 iii. —.]—*NEW MINSTER v. VANCOUVER CITY CORPN.* (1908), 14 B. C. R. 136.—CAN.

h. — Compensation should not include loss of business.]—Under Dominion Ry. Act, s. 155, the compensation awarded, where land is injuriously affected by destruction of access through lowering the adjoining street grade, should not include compensation for loss of business.—*ALBIN v. CANADIAN PACIFIC RY. CO.*, [1919] 3 W. W. R. 873.—CAN.

257 i. — By raising street.]—Owners of property abutting upon a public highway are entitled to compensation under R. S. 1877, c. 174, s. 456, for injury by the municipality having raised the highway so as to cut off access to such property.—*Re YEOMANS & COUNTY OF WELLINGTON* (1878), 43 U. C. R. 522; 4 A. R. 301.—CAN.

i. — Agreement by railway with corporation not to raise above certain height—Breach of agreement—Liability of railway.]—A ry. co. obtained permission from a corp. to run their line along a street, agreeing not to raise the grade to more than a certain height. They built the line & raised the grade of the street to more than the specified height, the corp. not consenting, but not taking steps to prevent violation of the agreement, pltf. were owners of property injuriously affected by the unauthorised raising of the grade:—*Held*: (1) the ry. co. were liable to pltf. in an action for damages; (2) as against the corp. pltf. were restricted to remedy by arbn.—*BASKERVILLE v. CITY OF OTTAWA* (1892), 20 A. R. 108.—CAN.

Sect. 3.—Where land injuriously affected: Sub-sect. 4, B. (c) i. & ii.]

foot-passengers remained:—*Held*: the conveyance granted to the purchaser a right of way from M. street into G. street, & the alteration of levels had injuriously affected the land within the meaning of Railways Act, 1845, so as to entitle resps. to compensation.—*FURNESS RY. CO. v. CUMBERLAND CO-OPERATIVE BUILDING SOCIETY* (1884), 52 L. T. 144; 49 J. P. 292, II. L.

Annotation:—*Mentd.* *Cooke v. Ingram* (1893), 68 L. T. 671.

259. Owner compelled to make longer detour with steeper gradients.]—(1) In order to found a claim for compensation under Lands or Railways Acts, 1845, it must be shown (a) that the act done is one which would have been actionable, if not authorised by Act of Parliament; (b) that it causes not merely a personal damage, but injury to the land of the claimant; (c) that the injury arises from the construction, & not only from the use, of the works complained of.

(2) The obstruction of direct access to land is a proper subject for compensation.—*CALEDONIAN RY. CO. v. WALKER'S TRUSTEES* (1882), 7 App. Cas. 259; 46 L. T. 826; 46 J. P. 676; 30 W. R. 569, II. L.

Annotations:—*As to* (1) *Consd.* *A. G. v. Met. Ry.*, [1894] 1 Q. B. 384. *Refd.* *Ford v. Met. & Met. Dist. Rys.* (1886), 17 Q. B. D. 12; *Re Holliday & Wakefield Corpn.* (1888), 20 Q. B. D. 699; *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153. *As to* (2) *Consd.* *Furness Ry. v. Cumberland Co-op. Bldg. Soc.* (1884), 52 L. T. 144. *Generally, Mentd.* *Davidson v. McRobb*, [1918] A. C. 304.

ii. Access by Highway to Claimant's Land or Premises.

260. Stopping up highways—& obstruction of neighbourhood—Loss of trade—Not subject of compensation.]—*R. v. LONDON DOCK CO.* (1836). 5 Ad. & El. 163; 2 Har. & W. 267; 6 Nev. & M. K. B. 390; 5 L. J. K. B. 195; 111 E. R. 1127.

Annotations:—*Consd.* *R. v. Hull Dock Co.* (1846), 3 Ry. & Can. Cas. 795. *Distd.* *Re Cooling & G. N. Ry.* (1849), 6 Ry. & Can. Cas. 246. *Consd.* *Cale. Ry. v. Ogilvy* (1855), 25 L. T. O. S. 106; *Ricket v. Met. Ry.* (1867), L. R. 2 H. L. 175; *R. v. Vaughan* (1868), L. R. 4 Q. B. 190. *Expld.* *Cale. Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259. *Refd.* *R. v. Thames & Isis Navigation Comrs.* (1836), 5 Ad. & El. 804; *Chamberlain v. West End of London & Crystal Palace Ry.* (1862), 2 B. & S. 605; *Eagle v. Charing Cross Ry.* (1867), 36 L. J. C. P. 297; *McCarthy v. Metropolitan Board of Works* (1872), L. R. 8 C. P. 191.

261. Level crossing—Personal inconvenience from.]—A proprietor, who holds lands adjoining a newly constructed railway, cannot, under Lands Act, 1845, or the usual special Acts of Parliament authorising the construction of railways, claim compensation from the co. in respect of his lands being injuriously affected in that, at a short distance from the entrance to his grounds, the railway crosses on a level an important public road which is the main approach to his house.—*CALEDONIAN RY. CO. v. OGILVY* (1855), 25 L. T. O. S. 106; 2 Macq. 229, H. L.

Annotations:—*Apld.* *Re Penny* (1857), 7 E. & B. 660. *Consd.* *R. v. S. E. Ry.* (1857), 29 L. T. O. S. 124. *Distd.* *Manley v. St. Helen's Canal & Ry. Co.* (1858), 27 L. J. Ex. 159. *Consd.* *Chamberlain v. West End of London & Crystal Palace Ry.* (1863), 2 B. & S. 617; *Beckett v. Mid. Ry.* (1867), L. R. 3 C. P. 82; *Brand v. Hammersmith & City Ry.* (1867), L. R. 2 Q. B. 223; *Ricket v. Met. Ry.* (1867), L. R. 2 H. L. 175; *Expld.* *Hall v. Bristol Corpn.* (1867), L. R. 2 C. P. 322. *Consd.* *R. v. Metropolitan Board of Works* (1869), L. R. 4 Q. B. 358; *Metropolitan Board of*

Works v. McCarthy (1874), L. R. 7 H. L. 243; *Rhodes v. Alredale Drainage Comrs.* (1876), 1 C. P. D. 380; *Bell v. Quebec Corpn.* (1879), 5 App. Cas. 84. *Distd.* *Cale. Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259. *Expld.* *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153. *Refd.* *Senior v. Met. Ry.* (1863), 2 H. & C. 258; *Wood v. Stourbridge Ry.* (1864), 16 C. B. N. S. 222; *Metropolitan Board of Works v. Met. Ry.* (1868), L. R. 3 C. P. 612; *Hammersmith & City Ry. v. Brand* (1869), L. R. 4 H. L. 171; *City of Glasgow Union Ry. v. Hunter* (1870), L. R. 2 Sc. & Div. 78; *Benjamin v. Storr* (1874), 30 L. T. 362; *Hill v. Metropolitan Asylum District Managers* (1879), 4 Q. B. D. 433; *Horton v. Colwyn Bay & Colwyn U. C.*, [1908] 1 K. B. 327. *Mentd.* *Cale. Ry. v. Carmichael* (1870), L. R. 2 Sc. & Div. 56.

262. ——— Not subject of compensation.]—*WOOD v. STOURBRIDGE RY. CO.* (1864), 16 C. B. N. S. 222; 143 E. R. 1111.

263. Obstruction & deviation of highway—Diminution of value of premises.]—Pltf. was the lessee of certain houses erected & in course of erection, situate on a high road. Defts. a railway co. being authorised by their Act, made an obstruction & deviation in the road near the houses, so that that part of the road running by the houses was no longer used as a high road, & the access to the houses was made less convenient, & the number of persons passing them was much reduced & the houses were rendered less suitable for shops & their value was greatly diminished:—*Held*: pltf. had received such a special damnification beyond the rest of the public from the railway works that he was entitled to compensation under Lands Act, 1845, & Railways Act, 1845.—*CHAMBERLAIN v. WEST END OF LONDON & CRYSTAL PALACE RY. CO.* (1863), 2 B. & S. 617; 2 New Rep. 182; 32 L. J. Q. B. 173; 8 L. T. 149; 9 Jur. N. S. 1051; 11 W. R. 472; 121 E. R. 1202, Ex. Ch.

Annotations:—*Folld.* *Senior v. Met. Ry.* (1863), 2 H. & C. 258; *Cameron v. Charing Cross Ry.*, *Bourhill v. Charing Cross Ry.* (1864), 16 C. B. N. S. 430. *Consd.* *Brand v. Hammersmith & City Ry.* (1865), L. R. 1 Q. B. 130. *Apld.* *Beckett v. Mid. Ry.* (1867), L. R. 3 C. P. 82. *Consd.* *Ricket v. Met. Ry.* (1867), L. R. 2 H. L. 175; *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243; *Cale. Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259. *Refd.* *Leigh v. Stockport, Timperley & Altrincham Ry.* (1864), 10 L. T. 426; *R. v. Cheshire Clerk of the Peace* (1864), 4 New Rep. 167; *Wood v. Stourbridge Ry.* (1864), 16 C. B. N. S. 222; *Brand v. Hammersmith & City Ry.* (1867), L. R. 2 Q. B. 223; *Eagle v. Charing Cross Ry.* (1867), L. R. 2 C. P. 638; *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662.

264. Stopping up carriage-way & partial obstruction of footway—Temporary obstruction—Loss of trade—Subject of compensation.]—*SENIOR v. METROPOLITAN RY. CO.* (1863), 2 H. & C. 258; 2 New Rep. 334; 32 L. J. Ex. 225; 8 L. T. 544; 9 Jur. N. S. 802; 11 W. R. 836; 159 E. R. 107.

Annotations:—*Folld.* *Cameron v. Charing Cross Ry.*, *Bourhill v. Charing Cross Ry.* (1864), 16 C. B. N. S. 430. *Overd.* *Ricket v. Met. Ry.* (1867), L. R. 2 H. L. 175. *Refd.* *Brand v. Hammersmith & City Ry.* (1867), L. R. 2 Q. B. 223.

265. ———.]—(1) Unless an injury to an individual, occasioned by the Act of a public co., would have been the subject of a claim for damages before the co. obtained statutory powers to do that which occasioned the injury, it could not, except expressly so provided, be a subject for compensation when occasioned by something done in the exercise of those powers. No case comes within the purview of Lands Act, 1845, s. 68, or Railways Act, 1845, s. 6, unless in respect of damage to the land itself, which damage

PART III. SECT. 3, SUB-SECT. 4.—B. (c) ii.

263 i. Destruction of highway—Depreciation in value of premises.]—*R. v. MOSS* (1895), 5 Exch. C. R. 30.—*CAN.*

263 ii. ——— & deviation—Diminution of value of premises.]—Pltf. owned land suitable for residential purposes. Defts. constructed their ry. so as to obstruct

the access to his property by obstructing & deviating roads in a way suggesting danger of accident & the exercise of great caution:—*Held*: pltf.'s property was substantially depreciated in value.—*HOLMESTED v. CITY OF MOORE JAW & THE C. N. R.*, [1917] 2 W. W. R. 36 D. L. R. 747.—*CAN.*

*j. ——— Personal inconvenience.]—*A claim for compensation, by the

owner of lands, under Railway (Scot.) Act, 1845, s. 6, on the ground that he had been deprived of frontage to a road & of frontage & access to a canal in consequence of the ry. co. diverting the line of the road & of the canal:—*Held*: relevant.—*GLASGOW, YOKER & CLYDEBANK RY. CO. v. LIDGERWOOD* (1895), 33 Sc. L. R. 146.—*SCOT.*

would have been the subject of an action at law before those statutes. A mere temporary obstruction, the cause of loss of trade to an individual, occasioned by the performance of some lawful & necessary work, would not have been the subject of such an action & is not, under Railways Act, 1845, s. 16, the subject of compensation.

(2) *Semble* : it does not follow, because a party might have had a right of action before the statute, that he would, in respect of the same cause, have a title to claim compensation after it (LORD CHELMSFORD, C.).

(3) The words of Railways Act, "injuriously affected," do not mean wrongfully in the sense of unlawfully, but damnously, *i.e.* injuriously, affected in the ordinary sense of that word; (4) there is nothing in the two statutes to warrant the position that there shall be no compensation where at common law there would have been no right of action; (5) the trade carried on in particular premises is a thing appertaining to the premises, & as such, is included in the "interest" of the occupier, & that interest is part of the value of the property, & if injuriously affected, is to be compensated; (6) the meaning of "parties interested," in Railways Act, s. 16, is, parties sustaining a special & individual loss by reason of the works which the sect. empowers the co. to construct (LORD WESTBURY).—*RICKET v. METROPOLITAN RY. CO. (DIRECTORS, ETC.)* (1867), L. R. 2 H. L. 175; 36 L. J. Q. B. 205; 16 L. T. 542; 31 J. P. 484; 15 W. R. 937, H. L.

Annotations :— As to (1) **Foldl.** Cameron v. Charing Cross Ry., Bourhill v. Charing Cross Ry. (1865), 19 C. B. N. S. 764. **Expld. & Distd.** Eagle v. Charing Cross Ry. (1867), L. R. 2 C. P. 638. **Distd.** Beckett v. Mid. Ry. (1867) L. R. 3 C. P. 82. **Consd.** Bigg v. London Corpn. (1873), L. R. 15 Eq. 376; Metropolitan Board of Works v. McCarthy (1874), L. R. 7 H. L. 243; Fritz v. Hobson (1880), 14 Ch. D. 542; Cale. Ry. v. Walker's Trustees (1882), 7 App. Cas. 259. **Expld.** *Re* Wadham & N. E. Ry. (1884), 52 L. T. 894; Anglo-Algerian S.S. Co. v. Houlder Line, [1908] 1 K. B. 659. **Refd.** Brand v. Hammersmith & City Ry. (1867), 36 L. J. Q. B. 139; Winterbottom v. Derby (1867), L. R. 2 Exch. 316; *Re* Clarke & Wandsworth District Board of Works (1868), 17 L. T. 549; Martin v. L.C.C. (1898), 79 L. T. 170; *Re* Bwlfa & Merthyr Daro Steam Collieries & Pontypridd Waterworks Co. (1902), 71 L. J. K. B. 613. As to (2) & (1) **Consd.** R. v. Metropolitan Board of Works (1869), L. R. 4 Q. B. 358. **Distd.** *It. v.* Cambrian Ry. (1871), L. R. 6 Q. B. 422. **Consd.** Martin v. L.C.C. (1898), 79 L. T. 170; Lingke v. Christchurch Corpn., [1912] 3 K. B. 595. **Refd.** Dungey v. London Corpn. (1869), 38 L. J. C. P. 298; Hammersmith & City Ry. v. Brand (1869), L. R. 4 H. L. 171; Burgess v. Northwich L. B. (1880), 6 Q. B. D. 264. As to (3) **Distd.** Herring v. Metropolitan Board of Works (1865), 19 C. B. N. S. 510; **Consd.** R. v. Metropolitan Board of Works (1869), L. R. 4 Q. B. 358; Buccleuch v. Metropolitan Board of Works (1870), L. R. 5 Exch. 221. **Distd.** Ripley v. G. N. Ry. (1875), 10 Ch. App. 435. **Expld.** Ford v. Met. & Met. Dist. Rys. (1886), 17 Q. B. D. 12. **Refd.** Hammersmith & City Ry. v. Brand (1869), L. R. 4 H. L. 171; City of Glasgow Union Ry. v. Hunter (1870), L. R. 2 Sc. & Div. 78; Benjamin v. Storr (1874), 43 L. J. C. P. 162; Rhodes v. Alfredeale Drainage Comrs. (1876), 1 C. P. D. 380; R. v. Essex (1886), 17 Q. B. D. 447; R. v. Poulter (1887), 56 L. J. Q. B. 581; Belton v. L.C.C. (1893), 9 T. L. R. 232. As to (5) **Consd.** Eagle v. Charing Cross Ry. (1867), L. R. 2 C. P. 638; Beckett v. Mid. Ry. (1868), 17 L. T. 499. **Refd.** Bigg v. London Corpn. (1873), L. R. 15 Eq. 376; Montreal Corpn. v. Drummond (1876), 1 App. Cas. 384; I. R. Comrs. v. Muller Margarine, [1901] A. C. 217. *Generally, Mentd.* Biscoe v. G. E. Ry. (1873), L. R. 16 Eq. 636.

266 i. Closing of highway—Depreciation of property.—By construction of a public work a highway was closed at a point 250 feet from pltf.'s property, which fronted on the highway. No part of his property was taken:—*Held*: the depreciation of the property by reason of the closing up of the highway should be taken into account as one of the elements of damages.—*McQUADE v. R.* (1902), 22 C. L. T. 87; 7 Exch. C. R. 318.—**CAN.**

266 ii. .1—A street opposite

266. Closing of highway — Depreciation in special value of premises—Public-house.]—Under statutory powers conferred by an Act incorporating Lands Act, 1845, a railway co. stopped up a street in which were a house & premises used as an hotel, whereby the value thereof for using, selling or letting as an hotel & public-house was diminished : —*Held* : the owner was entitled to compensation under Lands Act, 1845, for the depreciation in the special value of the premises as an hotel & public-house.—*Re WADHAM & NORTH EASTERN RY. CO.* (1885), 16 Q. B. D. 227 ; 55 L. J. Q. B. 272 ; 34 W. R. 342, C. A.

Annotation :—*Consd. Belton v. L. C. C.* (1893), 62 L. J. Q. B. 222.

267. Obstruction of passage leading to highway—Whether temporary or permanent—Loss of trade.]—An injury to the goodwill or a loss of profit in the business of a shop, caused by an obstruction, whether permanent or temporary, of a highway, in the lawful execution of the works of a railway co., where no part of the land on which the business is carried on is taken or otherwise injuriously affected, is not the subject of compensation under Lands Act, 1845, s. 68.—CAMERON v. CHARING CROSS RY. CO. (1865), 19 C. B. N. S. 764; 5 New Rep. 376; 12 L. T. 121; 11 Jur. N. S. 282 13 W. R. 390; 144 E. R. 987, Ex. Ch.; *reversg.* (1864), 16 C. B. N. S. 430.

Annotations :—*Consd. Healey v. Thames Valley Ry.* (1864), 5 B. & S. 769; *Ricket v. Met. Ry.* (1867), L. R. 2 H. L. 175.

268. ———. ———.] —The mere temporary obstruction of access to premises, though it may cause some inconvenience & loss of business to the occupier, is not a damage in respect of which he is entitled to claim compensation under Metropolitan Management Act, 1855 (c. 120), ss. 135, 225. —*HERRING v. METROPOLITAN BOARD OF WORKS* (1865), 19 C. B. N. S. 510; 31 L. J. M. C. 224; 144 E. R. 886.

Annotations:—Expld. & Dists. *Lingko v. Christchurch Corpn.*, [1912] 3 K. B. 595. **Mentd.** *Price's Patent Candle Co. v. L. C. C.* (1908), 78 L. J. Ch. 1.

269. ———.]—(1) Where a person sustains damage by reason of an act done by a local authority in the exercise of the powers conferred upon them by Public Health Act, 1875, & done reasonably & without negligence, that person is entitled to compensation under s. 308, notwithstanding that the act done is lawful, if the act is one which, but for their statutory powers, would have rendered the local authority liable to an action at law.

(2) The mere temporary obstruction of access to premises, causing considerable inconvenience & loss of business to the occupier, may constitute damage in respect of which he is entitled to claim compensation under Public Health Act, 1875 (c. 55), s. 308.—*LINGKÉ v. CHRISTCHURCH CORPN.*, [1912] 3 K. B. 595; 82 L. J. K. B. 37; 107 L. T. 476; 76 J. P. 433; 28 T. L. R. 536; 56 Sol. Jo. 735; 10 L. G. R. 773, C. A.

270. Narrowing of highway by erection of embankment--Diminution of value of premises.]—To entitle a claimant to compensation under

266 v. ———.]—CASSIDY v. CITY OF MOOSE JAW, [1917] 1 W. W. R. 1085; 10 Sask. L. R. 51.—CAN.

k. ———.]—Where a road is taken for ry. purposes & closed as a road, adjoining proprietors have no claim for compensation under Public Works Act, 1882, s. 72.—COLENSO v. PUBLIC WORKS MINISTER (1885), 6 N. Z. L. R. 650.—N.Z.

267 i. Obstruction of passage leading

A.'s property was closed up diminishing the value of the property :—*Held* : A.'s property was injuriously affected within Municipal Act, 1903.—*Re TATE & Toronto City* (1905), 10 O. L. R. 651 ; 6 O. W. R. 670.—**CAN.**

266 iii. ———.—]—*Re* BROWN &
OWEN SOUND CORPN. (1907), 9 O. W. R.
727 : 14 O. L. R. 627.—CAN.

266 iv. ———.]—*Re* BILLINGS &
CANADIAN NORTHERN ONTARIO RY.
Co. (1913), 5 O. W. N. 396; 20 O. L. R.
608.—CAN.

Sect. 3.—Where land injuriously affected: Sub-sect. 1, B. (c) ii., iii. & iv.]

Lands Act, 1845, & Railways Act, 1845, he must show that he sustained a particular damage from the execution by the co. of the works authorised by the special Act, & that the damage is one for which he might have maintained an action if the work had not been authorised by Parliament, & further, that the injury of which he complains is an injury to his estate, & not a mere obstruction or inconvenience to him personally or to his trade, although it might have been the subject of an action if the works which occasioned it had not been executed under the sanction of Parliament. The damage must be one which is sustained in respect of the property itself & not in respect of any particular use to which it may from time to time be put.

Pltf. was possessed of a house fronting on a public highway. Defts., a railway co. under the powers conferred upon them by their special Act, erected an embankment on a portion of the highway opposite to pltf.'s house, thereby narrowing the road from fifty to thirty-three feet, & thus, according to the evidence, materially diminishing the value of the house for selling or letting, & obstructing the access of light & air to it:—*Held*: this was such a permanent injury to the estate of pltf. in the premises as to entitle him to compensation under Lands Act, 1845, & Railways Act, 1845.—*BECKETT v. MIDLAND RY. CO.* (1867), L. R. 3 C. P. 82; 37 L. J. C. P. 11; 17 L. T. 499; 16 W. R. 221.

Annotations:—*Apprvd.* Metropolitan Board of Works v. McCarthy (1874), L. R. 7 H. L. 243. *Consd.* Lyon v. Fishmongers' Co. & Thames River Conservators (1875), 44 L. J. Ch. 408; Montreal Corp'n. v. Drummond (1876), 1 App. Cas. 384; Cale. Ry. v. Walker's Trustees (1882), 7 App. Cas. 259. *Refd.* Benjamin v. Storr (1874), 30 L. T. 362; Ripley v. G. N. Ry. (1875), 23 W. R. 685; Rhodes v. Airedale Drainage Comrs. (1876), 1 C. P. D. 380; Bell v. Quebec Corp'n. (1879), 5 App. Cas. 84; Ellis v. Rogers (1885), 29 Ch. D. 661; Belton v. L. C. C. (1893), 41 W. R. 315; Martin v. L. C. C. (1898), 79 L. T. 170. *Mentd.* Campbell v. Paddington Corp'n., [1911] 1 K. B. 869.

271. Obstruction of water highway—Interference with landing stage of draw-dock.]—Claimants were lessees of premises about seventy yards from the river T. At these premises they carried on the business of potters, & required in the course of their business a regular supply of water & sand. It appeared that the public had enjoyed from time immemorial a right of way to a part of the bank of the river nearly opposite these premises for the purpose of dipping & taking water from the river. It also appeared that lower down the river there was a free public draw-lock, where the public had been in the habit of taking carts for the purpose of loading & unloading barges. This dock had a direct communication with claimant's premises by streets. The Metropolitan Board of

Works, in the exercise of their statutory powers, constructed works in front of the spot where the public had the right of taking water, & thereby temporarily obstructed this right. The board also interfered with the hard or landing-place at the dock, so that it was not possible to unload so many barges there as before. No part of claimant's premises was touched or taken by the board. A jury, summoned under Lands Act, 1845, having assessed compensation to claimants for injury to their premises for (1) the obstruction to the right of taking water, & (2) the difficulty in unloading sand at the dock:—*Held*: neither injury was a subject for compensation, as it was not an injury to land or any interest therein, but a personal injury to claimants in the way of their trade.—*R. v. METROPOLITAN BOARD OF WORKS* (1869), L. R. 4 Q. B. 358; 10 B. & S. 391; 38 L. J. Q. B. 201; 33 J. P. 710; 17 W. R. 1094.

Annotation:—*Generally, Consd.* Metropolitan Board of Works v. McCarthy (1874), L. R. 7 H. L. 243.

272. — Destruction of draw-dock—Diminution in value of premises.]—(1) In order to found a claim to compensation under Lands Act, 1845, s. 68, for an interest in land injuriously affected, there must be an injury & damage, not temporary but permanent, peculiarly affecting the house or land itself in which the person claiming compensation has an interest. A mere personal inconvenience, obstruction or damage to a man's trade or the goodwill of his business will not be sufficient, although any one of them might, but for the Act of Parliament which authorises the doing of the thing occasioning the injury, have been the subject of an action against the person occasioning it.

(2) The Legislature in authorising works & taking away any rights of action which the owner of land would have had if the works had been constructed without such authority, intended to confer on such owner a right to compensation co-extensive with the rights of action of which the statute had deprived him, but no more; not to improve the position of the person injured by the passing of the Act; (3) the right to compensation will accrue whenever it can be established that a special value attached to the premises by reason of their proximity to or relative position with the highway obstructed, & that this special value has been permanently injured by the obstruction (LORD PENZANCE).

(4) The Legislature never intended that the community should profit at the expense of a few of its members (LORD O'HAGAN).—*METROPOLITAN BOARD OF WORKS v. MCCARTHY* (1874), L. R. 7 H. L. 243; 43 L. J. C. P. 385; 31 L. T. 182; 38 J. P. 820; 23 W. R. 115, H. L.; *affg.* S. C. *sub nom.* *MCCARTHY v. METROPOLITAN BOARD OF WORKS* (1872), L. R. 8 C. P. 191, Ex. Ch.

Annotations:—*As to* (1) *Consd.* Lyon v. Fishmongers' Co.

to highway—Personal inconvenience.]—Pltf.'s land held to have been affected injuriously by closing of a lane leading to a highway & compensation awarded him.—*STRINGER v. CITY OF EDMONTON*, [1918] 2 W. W. R. 436.—*CAN.*

271 i. Obstruction of water highway—Building bridge.]—Pltf. owned a saw-mill, & claimed that he was prevented from rafting his lumber to a shipping point by the construction of a bridge across a pond some distance from the mill, in connection with the building of a ry.:—*Held*: the right alleged to be interfered with was a right common to the public, & an individual affected by the interference was not entitled to compensation.—*ARCHIBALD v. R.* (1894), 23 S. C. R. 147.—*CAN.*

1. Narrowing of highway—Direct

access not cut off.]—Damages may be recovered under City Act, 1915, for "land injuriously affected," although the claimant's direct access to his property is not cut off & although the use of the street in front thereof as a highway is not prevented, if the street be in fact narrowed.—*REGINA CITY v. ARMOUR*, [1918] 1 W. W. R. 94; 38 D. L. R. 336.—*CAN.*

m. Overhead crossing—Subject of compensation.]—A. owned a house & property fronting on a highway. In the construction of a ry. a bridge or overhead crossing was erected on a portion of the highway so as to obstruct access to A.'s property:—*Held*: A. was entitled to compensation under Government Railways Act & Expropriation Act.—*R. v. MALCOLM* (1891), 2 Exch. C. R. 357.—*CAN.*

n. Construction of subway—Permanent injury to adjoining land—Promoters liable.]—Defts. constructed a subway on a street thereby injuriously affecting pltf.'s property & diminishing its selling value:—*Held*: deft. was liable for any damages sustained by pltf.—*BURT v. DOMINION IRON & STEEL CO.* (1915), 49 N. S. R. 339; *affd.* [1917] A. C. 179.—*CAN.*

o. Railway siding in front of land.]—The construction of a ry. siding along the sidewalk contiguous to a claimant's lands whereby access to such lands is interfered with, & the frontage of the property destroyed for the uses for which it is held, is such injury as will entitle the owner to compensation.—*R. v. BARRY* (1891), 2 Exch. C. R. 333.—*CAN.*

(1875), 10 Ch. App. 681, n.; *Montreal Corpn. v. Drummond* (1876), 1 App. Cas. 384; *Calo. Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259; *Ford v. Met. & Met. Dist. Rys.* (1880), 17 Q. B. D. 12; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1901), 71 L. J. K. B. 74. *Reid. Sharpe v. Met. Dist. Ry.* (1879), 4 Q. B. D. 645; *North Shore Ry. v. Pion* (1889), 14 App. Cas. 612; *Belton v. L.C.C.* (1893), 9 T. L. R. 232; *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437; *Re Masters & G. W. Ry.*, [1900] 2 Q. B. 677. *As to (2) Reid. Bidder v. North Staffordshire Ry.* (1878), 4 Q. B. D. 412; *Turner v. Mid. Ry.* (1911), 104 L. T. 347. *As to (3) Consd. Bell v. Quebec Corpn.* (1879), 5 App. Cas. 84; *Calo. Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259; *R. v. Essex* (1884), 14 Q. B. D. 753. *Reid. Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662. *As to (4) Reid. R. v. Essex* (1884), 14 Q. B. D. 753.

iii. Other Kinds of Access.

273. Access to wharf—From river—Filling up river in front of wharf.]—By Thames Embankment Act, 1862, the word lands was to be construed as including easements over & interests in land, & Lands Act, 1845, was incorporated therewith. Pltf. was the owner of a wharf on the T., with a right to free access from the river thereto, & also to load & unload barges in front thereof. Defts. were proceeding under the Act of 1862 to fill up the river in front of the wharf:—*Held*: defts. were not taking & using for the purposes of the undertaking any easement or interest in lands belonging to pltf., but were injuriously affecting his lands, & could not be restrained from proceeding with their works till they had made compensation to pltf. under Lands Act, 1845.

Qu.: whether, if the title had been clearly made out, an injunction could have been granted on an interlocutory application.—*MACEY v. METROPOLITAN BOARD OF WORKS* (1864), 3 New Rep. ; 33 L. J. Ch. 377; 10 L. T. 66; 10 Jur. N. S. ; 12 W. R. 619.

Annotation:—*Consd. Clark v. London School Board* (1874), 9 Ch. App. 120.

274. ——— By construction of railway—Owner entitled to have new wharf constructed by promoters.]—*BELL v. HULL & SELBY RY. CO.* (1840), 6 M. & W. 699; 2 Ry. & Can. Cas. 279; 9 L. J. Ex. 213; 151 E. R. 593.

Annotation:—*Mentd. Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714.

275. Access to river—Public right to take water from river—Interference with.]—*R. v. METROPOLITAN BOARD OF WORKS*, No. 271, *ante*.

— *Interference with draw-dock.]—*See Nos. 271, 272, *ante*.

276. Access through hall—Access in nature of continuous easement.]—Under Lands Act, 1845, & Railways Act, 1845, the owner or occupier of lands injuriously affected during the execution of the works authorised by the special Act is entitled to compensation, if the injury is sufficient to lessen the value of the property.

PART III. SECT. 3, SUB-SECT. 4.— B. (c) iii.

*p. Access to wharf—From harbour.]—*The right of navigation in a harbour was interfered with so as seriously to affect a private right of access which A. had to the water of the harbour for the lading & unlading of vessels at his wharf:—*Held*: A. was entitled to compensation.—*MAGEE v. R.* (1897), 5 Exch. C. R. 391.—*CAN.*

*q. ———.]—*Pltf. was entitled to compensation for the expropriation of his wharf & for the deprivation of the right of way to & from the wharf over the railway tracks.—*MAXWELL v. R.* (1917), 17 Exch. C. R. 97; 40 D. L. R. 715.—*CAN.*

*r. Access to river.]—*W. owned land upon a river, extending to high water mark. Defts. constructed their road upon cribs in the river, 3 or 4 feet above the level of the water not

touching pltf.'s land, but along the whole front of it & connected with the bank above & below, thus shutting him out from access to the river except across the ry.:—*Held*: pltf.'s land was injuriously affected so as to entitle him to compensation under Railway Act, s. 6.—*R. v. BUFFALO & LAKE HURON RY. CO.* (1861), 23 U. C. R. 208.—*CAN.*

*s. Access to shore—No crossing.]—*By the absence of a crossing over the ry., claimant was deprived of access to the shore, & thereby suffered loss in the use & occupation of her property:—*Held*: claimant was entitled to compensation in respect of the damage resulting from the want of a crossing.—*KEARNEY v. R.* (1888), 2 Exch. C. R. 21; *varied Cass. Dig.* 313.—*CAN.*

PART III. SECT. 3, SUB-SECT. 4.— B. (c) iv.

t. Diversion of highway—Subject

A house was divided into a front & a back block & plths. were lessces of three rooms on the first floor in the back block. The lease did not expressly grant any mode of access. Access to the rooms demised to plths. was gained from the street by passing through a hall or vestibule, & then up some stairs to plths.' rooms. Defts., in the exercise of compulsory powers under Railways Act, 1845, took down the front block of the house & removed the hall. The interference with the hall & the injury to the access to the rooms of which plths. were lessces, lessened their value. An arbitrator having awarded compensation to plths. under Lands & Railways Acts:—*Held*: the award was valid on the grounds, (a) that compensation may be obtained under Railways Act, 1845, for injury done to land by the execution of the works, if it is sufficient to lessen the value thereof; (b) that the access through the hall was not a way of necessity, but was in the nature of a continuous & apparent easement which passed under the demise of the rooms & that an interference with this quasi-easement was sufficient to give rise to a valid claim for compensation.—*FORD v. METROPOLITAN & METROPOLITAN DISTRICT RY. COS.* (1886), 17 Q. B. D. 12; 55 L. J. Q. B. 296; 54 L. T. 718; 50 J. P. 661; 34 W. R. 426; 2 T. L. R. 281, C. A.

Annotations:—*Consd. Brown v. Alabaster* (1887), 37 Ch. D. 490. *Reid. Lingko v. Christchurch Corpn.*, [1912] 3 K. B. 595.

*Access to ferry.]—*See No. 280, *post*.

*Access to sewer.]—*See SEWERS & DRAINS.

iv. Diversion of Traffic.

277. New cut—Towing-path by old cut rendered unprofitable—Obstruction of old navigation—Subject of compensation.]—*R. v. THAMES & ISIS NAVIGATION COMRS.* (1836), 5 Ad. & El. 804; 6 L. J. K. B. 17; 111 E. R. 1370; *subsequent proceedings* (1839), 8 Ad. & El. 901.

Annotations:—*Consd. R. v. East Anglian Ry.* (1853), 2 E. & B. 475. *Mentd. Priestley v. Foulds* (1840), 2 Man. & G. 175; *R. v. Eastern Counties Ry.* (1842), 2 Q. B. 569.

278. Lowering of roadway—Loss of trade—Not subject of compensation.]—*BIGG v. LONDON CORPN.* (1873), L. R. 15 Eq. 376; 28 L. T. 336; 37 J. P. 564. *Annotation*:—*Mentd. Taylor v. Oldham Corpn.* (1876), 35 L. T. 696.

Compare No. 256, *ante*.

279. Building new bridge & thoroughfare—Diminution in value of premises—Subject of compensation.]—*METROPOLITAN BOARD OF WORKS v. HOWARD* (1889), 5 T. L. R. 732, H. L.

Annotation:—*Reid. Long Eaton Recreation Grounds Co. v. Mid. Ry.*, [1902] 2 K. B. 574.

Compare No. 263, *ante*.

*of compensation.]—*A ry. co. applied for permission to divert a highway in a city; the application was opposed by an adjoining owner, but approved by the municipality:—*Held*: (1) the application should be granted, on proper compensation being made to the owners of land affected; (2) the co. must construct a road 41 feet wide alongside its right of way.—*Re CANADIAN NORTHERN RY. CO. & ST. BONIFACE CITY* (1914), 27 W. L. R. 830.—*CAN.*

*u. ———.]—*The alteration of a highway by closing one street & opening another some distance away, is "the construction of a public work" within Municipal Corporations Act, 1900, & persons whose land is injuriously affected are entitled to compensation.—*SYMONS v. FOXTON BOROUGH COUNCIL* (1906), 26 N. Z. L. R. —*N.Z.*

Sect. 3.-- Where land injuriously affected: Sub-sect. (c), (f) & (g), C. (a) & (b).]

(d) Interference with Ferries.

280. Obstruction of access—Ferry appurtenant to land—Subject of compensation.]—*R. v. GREAT NORTHERN RY. CO.* (1849), 14 Q. B. 25; 117 E. R. 10; *sub nom. COOLING v. GREAT NORTHERN RY. CO.*, 6 Ry. & Can. Cas. 246; 19 L. J. Q. B. 25; 14 Jur. 128; *sub nom. Re POOLING v. GREAT NORTHERN RY. CO.*, 13 L. T. O. S. 484; *subsequent proceedings, sub nom. COOLING v. GREAT NORTHERN RY. CO.* (1850), 15 Q. B. 486.

*Annotations:—*Refd. *Chamberlain v. West End of London & Crystal Palace Ry.* (1863), 2 New Rep. 182; *Eagle v. Charing Cross Ry.* (1867), L. R. 2 C. P. 638; *Ricket v. Met. Ry.* (1867), L. R. 2 H. L. 175. *Mentd. Re Penny & S. E. Ry.* (1857), 26 L. J. Q. B. 225.

281. Erection of railway bridge & footbridge—Loss of trade.]—A railway co., under the authority of their Act, constructed across a river, half a mile above an ancient ferry, a railway bridge & a foot-bridge, the foot-bridge being used by persons going to the railway station & also to other places. The traffic across the ferry fell off, & the ferry was given up. The owners of the ferry claimed compensation under Lands & Railways Acts, 1845:—*Held*: no compensation could be recovered on the grounds: (a) that an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the foot-bridge, if they had been erected without the authority of an Act; (b) that the injury to the ferry being occasioned not by the construction, but by the working of the railway, the ferry had not been injuriously affected within Lands Act or Railways Act.—*HOPKINS v. GREAT NORTHERN RY. CO.* (1877), 2 Q. B. D. 224; 46 L. J. Q. B. 265; 36 L. T. 898; 42 J. P. 229, C. A.

*Annotations:—*Consd. *Cowes U. C. v. Southampton, Isle of Wight, & South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287. *Apld. Dibden v. Skirrow*, [1908] 1 Ch. 41. *Consd. Hammerton v. Dysart*, [1916] 1 A. C. 57. *Refd. G. W. Ry. v. Swindon & Cheltenham Extension Ry.* (1881), 9 App. Cas. 787; *North Shore Ry. v. Pion* (1889), 61 L. T. 525; *A.-G. v. Met. Ry.*, [1894] 1 Q. B. 384. *Mentd. Parkdale Corp. v. West* (1887), 12 App. Cas. 602; *General Estates Co. v. Beaver*, [1914] 3 K. B. 918.

Whether injury arising from construction of works or from user thereof.]—See Sub-sect. 4, D., *post*.

(e) Interference with Easements.

282. Right of way—Obstruction of—By erection of gates—Passage of trains—Ground of compensation.]—*GLOVER v. NORTH STAFFORDSHIRE RY. CO.* (1851), 16 Q. B. 912; 20 L. J. Q. B. 376; 17 L. T. O. S. 73; 15 Jur. 673; 117 E. R. 1132.

*Annotations:—*Consd. *Brand v. Hammersmith & City Ry.* (1867), L. R. 2 Q. B. 223. *Refd. Bland v. Crowley* (1851), 6 Exch. 522; *Re Penny & S. E. Ry.* (1857), 26 L. J. Q. B. 225; *Chamberlain v. West End of London & Crystal Palace Ry.* (1862), 2 B. & S. 617; *Ricket v. Met. Ry.* (1867), L. R. 2 H. L. 175; *R. v. Metropolitan Board of Works* (1869), L. R. 4 Q. B. 358. *Mentd. R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710; *Eagle v. Charing Cross Ry.* (1867), L. R. 2 C. P. 638.

— — — **By acts authorised by legislature.]—**See No. 228, *ante*.

— — — **But improperly performed.]—**See No. 247, *ante*.

283. ——— Through hall—Access in nature of continuous easement.]—*FORD v. METROPOLITAN & METROPOLITAN DISTRICT RY. COS.*, No. 276, *ante*.

PART III. SECT. 3, SUB-SECT. 4.— B. (e).

282 i. Right of way—Obstruction of—By rights authorised by legislature. *CARBON v. GREAT WESTERN RY. CO.* (1855), 14 U. C. R. 192.—CAN.

w. ——— Filling up subway —Ground of compensation.]—In building their road defts. left a subway under a

trestle bridge; pltf., the owner of the land crossed by the ry. at this point, had enjoyed the user of the subway as of right for some 20 years, but defts. were now proceeding to fill it up:—*Held*: though pltf. could not prevent the filling up of the subway, he was entitled to damages for his property in the easement.—*WELLS v. NORTHERN*

284. Right to pier erected on bed of river—Temporary alteration & diversion of—Not subject of compensation.]—*TEMPLE PIER CO., LTD. v. METROPOLITAN BOARD OF WORKS* (1865), 34 L. J. Ch. 262; 12 L. T. 369; 11 Jur. N. S. 337; 13 W. R. 535.

*Annotation:—*Refd. *Warr v. L. C. C.* (1903), 88 L. T. 689.

285. Right to light—Obstruction of—Erection of embankment on highway.]—*BECKETT v. MIDLAND RY. CO.*, No. 270, *ante*.

286. ——— Loss of trade—Saleable value of premises not diminished.]—An easement is an interest in land for the invasion of which compensation may be claimed under Lands Act, 1845.

An umpire, to whom was referred a claim for compensation in respect of damage sustained by pltf. in consequence of his premises being injuriously affected by the erection of certain works by defts. under their Act of Parliament, found by his award that the co. had, by the erection of such works, occasioned a diminution of light to pltf.'s premises, whereby they were rendered less convenient & suitable for the requirements of his trade carried on therein, & assessed the amount of compensation due in respect of such damage at £656. He further found that, notwithstanding such diminution of light, the saleable value of pltf.'s interest in the premises was not diminished, the value of property in the neighbourhood generally having become greatly enhanced by reason of the co.'s work; that, except the damage in his trade or business, he had not sustained, & would not sustain, any damage in the premises; & that, except the compensation to which he was or might be by law entitled in respect of his trade or business, he was not entitled to any compensation in the premises. The declaration alleged the appointment of arbitrators by pltf. & defts. & of an umpire, & an agreement whereby the time for making the award was enlarged, but alleged no attempt to appoint a single arbitrator:—*Held*: (1) the diminution of light was an injurious affecting of pltf.'s interest in the premises, which entitled him to compensation under the statute, & it was no answer that, by reason of accidental circumstances, the saleable value of the premises was not diminished; (2) the appointment of a single arbitrator was unnecessary.—*EAGLE v. CHARING CROSS RY. CO.* (1867), L. R. 2 C. P. 638; 36 L. J. C. P. 297; 16 L. T. 593; 15 W. R. 1016.

*Annotations:—*Apld. *R. v. Poulter* (1887), 56 L. J. Q. B. 581. *Refd. Ellis v. Rogers* (1885), 29 Ch. D. 661. *Mentd. Bush v. Trowbridge Water Co.* (1875), 44 L. J. Ch. 235.

287. ——— Ancient & new lights.]—A railway co., by the erection of a warehouse under statutory powers, obstructed the passage of light to a building in which were ancient lights & also new windows:—*Held*: the co. was bound to compensate the owners of the building, not for the obstruction of the passage of light to the old, but also to the new windows.—*Re LONDON, TILBURY & SOUTHEAST RY. CO. & GOWER'S WALK SCHOOLS TRUSTEES* (1889), 24 Q. B. D. 326; 62 L. T. 306; 38 W. R. 343; *sub nom. Re GOWER'S WALK SCHOOLS TRUSTEES & LONDON, TILBURY & SOUTHEAST RY. CO.*, 59 L. J. Q. B. 162; 6 T. L. R. 120, C. A.

*Annotations:—*Consd. *Horton v. Colwyn Bay & Colwyn*

RY. CO. (1887), 14 O. R. 594.—CAN.

y. Loss of view—Not ground for compensation.]—On a traverse for damages caused by a ry. co., the traverser is not entitled to compensation for the deterioration in value of his house by loss of view.—*GOODBODY v. MIDLAND GREAT WESTERN RY. CO.* (1862), *Reserv. Cas.* 20.—IR.

PART III.—PRINCIPLES OF THE LAW OF COMPENSATION.

U. C., [1908] 1 K. B. 327. *Reid. Simmons v. London Joint Stock Bank, Little v. London Joint Stock Bank, [1891] 1 Ch. 270. Mentd. Griffith v. Clay, [1912] 2 Ch. 291.*

— By acts authorised by legislature.]—
See Nos. 233, 237, *ante*.

— By unauthorised acts.]—See No. 251, *ante*.

(f) *Interference with Rights relating to Water, Sewers and Drains.*

See SEWERS & DRAINS; WATER SUPPLY; WATERS & WATERCOURSES.

(g) *Personal Inconvenience, Loss of Amenity and Loss of Trade.*

288. Loss of trade — Public-house trade — Destruction of neighbourhood—Not subject of compensation.]—R. v. VAUGHAN (1868), 1 L. R. 4 Q. B. 190; 9 B. & S. 892; 38 L. J. M. C. 49; 33 J. P. 358; 17 W. R. 115.

— See, also, Nos. 265, 278, *ante*.

— Other trades & businesses.]—See, also, Nos. 271, 272, *ante*.

289. Deterioration in value of property—Premises overlooked.]—Compensation cannot be claimed under Lands & Railways Acts, 1845, for deterioration in the value of property adjoining a railway, by reason of the premises being overlooked by persons on the railway & railway platform.

Actual injury to premises from the vibration caused by ballast trains, etc., on the railway, during the construction of the works, is a ground for compensation under these statutes, but not injury from that cause after the construction of the railway.

Where a jury, summoned under Lands Act, 1815, s. 68, have taken into consideration, in awarding compensation, one claim, among others, as to which they had no jurisdiction, a *certiorari* lies, although such excess of jurisdiction does not appear upon the face of the proceedings. Such excess of jurisdiction may be shown by extrinsic evidence upon affidavit.—*Re PENNY* (1857), 7 E. & B. 660; 26 L. J. Q. B. 225; 3 Jur. N. S. 957; 5 W. R. 612; 119 E. R. 1390; *sub nom.* R. v. SOUTH-EASTERN RY. CO., 29 L. T. O. S. 124.

Annotations:—*Apld.* Chamberlain v. West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605. *Distd.* Horrocks v. Met. Ry. (1863), 4 B. & S. 315. *Consd.* Ricket v. Met. Ry. (1867), 1 L. R. 2 H. L. 175; R. v. Metropolitan Board of Works (1869), 1 L. R. 4 Q. B. 358. *Reid.* Croft v.

L. & N. W. Ry. (1863), 3 B. & S. 436; R. v. Metropolitan Board of Works (1863), 3 B. & S. 710; *Re* Hayward & Met. Ry. (1864), 4 B. & S. 787; R. v. Halifax Corp., acting as L. B. of Health (1866), 14 L. T. 447; Hammer-smith, etc. Ry. v. Brand (1869), 1 L. R. 4 H. L. 171; Buccleuch v. Metropolitan Board of Works (1870), 1 L. R. 5 Exch. 221; Metropolitan Board of Works v. McCarthy (1874), 1 L. R. 7 H. L. 243. *Mentd.* Lyon v. Fishmongers' Co. (1876), 1 App. Cas. 662.

— See, also, Nos. 263, 266, 270, 279, *ante*.

290. Deterioration of stock not on premises—Damage too remote.]—*Re* CLARKE & WANDSWORTH DISTRICT BOARD OF WORKS (1868), 17 L. T. 549.

291. Injuria absque damno—Overflow of canal—Unprecedented rainfall—Not subject of compensation.]—THOMAS v. BIRMINGHAM CANAL CO. (1879), 49 L. J. Q. B. 851; 43 L. T. 435; 45 J. P. 21.

C. Injury must be to Land or Interest therein.

(a) *In General.*

292. General rule.]—CALEDONIAN RY. CO. v. WALKER'S TRUSTEES, No. 259, *ante*.

293. — What are interests in land—Easement.]—EAGLE v. CHARING CROSS RY. CO., No. 286, *ante*.

294. — Ferry.]—R. v. CAMBRIAN RY. CO., No. 310, *post*.

Not mere personal inconvenience—Caused by level crossing.]—See Nos. 261, 262, *ante*.

295. — Though connected with enjoyment of particular land.]—RICKET v. METROPOLITAN RY. CO. (DIRECTORS, ETC.), No. 265, *ante*.

296. —]—R. v. METROPOLITAN BOARD OF WORKS, No. 271, *ante*.

— Obstruction of access.]—See Nos. 259, 276, *ante*.

(b) *Breach of Covenants.*

297. Land subject to restrictive covenants—Acquired by school board with notice of.]—When a school board acquire land, whether by agreement or compulsion, for the purposes of Elementary Education Act, 1870 (c. 75), & purchase with notice of a restrictive covenant to which the land is subject in the hands of the vendor, the covenantee cannot maintain an action against the school board for breach of covenant; his only remedy is compensation under Lands Act, 1845, s. 68.—*KIRBY v. HAEROGATE SCHOOL BOARD*, [1896] 1 Ch. 437; 65 L. J. Ch. 376; 74 L. T. 6; 60 J. P. 182; 12 T. L. R. 175; 40 Sol. Jo. 239, C. A. *Annotations:*—*Folld.* Anderson v. M. S. & L. Ry., M. S. & L.

PART III. SECT. 3, SUB-SECT. 4.— B.

z. Loss of trade.]—Defts. built a subway in front of pltf.'s property, & in so doing lowered the highway so as to cut off access.—*Held:* defts. were liable for all damages sustained, for which an action would lie, such damages being of a two-fold character, involving injury to pltf.'s business.—*WEST v. PARKDALE VILLAGE* (1888), 15 O. R. 319.—**CAN.**

a. — Carried on at another place.]—The owner of property is not entitled to damages because the taking of land injuriously affects a business which he carries on at some other place.—*R. v. STAIRS* (1907), 11 Exch. C. R. 137; 27 C. L. T. 670.—**CAN.**

b. — Public house trade—Subject of compensation.]—CALEDONIAN RY. CO. v. MORRISON (1898), 25 R. (Ct. of Sess.) 1001; 35 Sc. L. R. 774; 6 S. L. T. 70.—**SCOT.**

c. Deterioration in value of property—Loss of access for boating & bathing.]—The Crown expropriated some water lots.—*Held:* the owners were entitled to damages for the depreciation of property not expro-

riated, by the loss of access to the water-front for boating & bathing purposes.—*R. v. BRENTON* (1918), 18 Exch. C. R. 1; 42 D. L. R. 373.—**CAN.**

— *Loss of access for fishing* — *FALLIS v. BELFAST & BALLYMENA RY. CO.* (1849), 12 I. L. R. 233.—**IR.**

e. Temporary obstruction of view during construction.]—Upon an expropriation of land for the enlargement of a canal, compensation will not be allowed to the owner of property not taken for an obstruction of view by earth left piled up in the course of construction, not necessarily incidental to the expropriation.—*R. v. FARLINGER* (1917), 39 D. L. R. 107; 16 Exch. C. R. —**CAN.**

PART III. SECT. 3, SUB-SECT. 4.— C. (a).

292i. General rule.]—Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under Government Railways Act, 1881, unless the injury is an injury to lands or some right or interest therein, & not a personal

injury or an injury to trade.—*R. v. BARRY* (1891), 2 Exch. C. R. 333.—**CAN.**

292 ii. —.]—Under the Dominion Railway Act, 1888, compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the land itself, & not on personal inconvenience or discomfort to the owner or occupant.—*POWELL v. TORONTO, HAMILTON & BUFFALO RY. CO.* (1898), 25 A. R. 209.—**CAN.**

292 iii. —.]—Where no land of the proprietor is taken, but his lands are injuriously affected, causing special damages to the property differing from that to the rest of the public, a claim for damages is let in, but it is restricted to the damages to the land & cannot be extended so as to let in any personal damages or loss of business.—*LEBLANC v. R.* (1917), 16 Exch. C. R. 219; 38 D. L. R. 632.—**CAN.**

292 iv. Not mere personal inconvenience.]—More inconvenience to an individual or loss of trade or business is not the subject of compensation.—*R. v. MACARTHUR* (1904), 34 S. C. R. 570; 24 C. L. T. 201.—**CAN.**

Sect. 3.—Where land injuriously affected: Sub-sect. 4, C. (b) & D.; sub-sect. 5. Sect. 4.]

Ry. v. Anderson (1898), 78 L. T. 251. **Consd. & Follid.** Long Eaton Recreation Grounds Co. v. Mid. Ry., [1902] 2 K. B. 574. **Mentd.** Metropolitan Water Board v. Solomon, [1908] 2 Ch. 214.

298. — Covenant by vendor not to erect any building except dwelling houses—Promoter building embankment.]—The breach of a restrictive covenant may be the ground for a claim for compensation under Lands Act, 1845, s. 68, by the owner of land for the benefit of which the restriction was imposed.—**LONG EATON RECREATION GROUNDS CO. v. MIDLAND RY.**, [1902] 2 K. B. 574; 71 L. J. K. B. 837; 86 L. T. 873; 67 J. P. 1; 50 W. R. 693; 18 T. L. R. 743, C. A.

Annotation:—Mentd. Waite's Exors. v. I. R. Comrs., [1914] 3 K. B. 196.

299. Interest of lessee injuriously affected—Acquisition of freehold by arrangement.]—(1) Where a railway co. acquires by agreement the reversion expectant on the determination of a lease, but does not acquire the lessee's interest, & the lessee is afterwards injuriously affected by the co.'s workings, he has nevertheless no remedy under the covenant for quiet enjoyment in his lease, although that covenant is not extinguished, but must obtain compensation under Lands Act, 1845 & Railways Act, 1845.

(2) A temporary inconvenience which does not interfere with the estate or title or possession, is not a breach of a covenant for quiet enjoyment.—**MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. v. ANDERSON, ANDERSON v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.**, [1898] 2 Ch. 394; 67 L. J. Ch. 568; 78 L. T. 821; 14 T. L. R. 489; 42 Sol. Jo. 609, C. A.

Annotations:—As to (1) Consd. Long Eaton Recreation Grounds Co. v. Mid. Ry., [1902] 2 K. B. 574. **Refd.** Metropolitan Water Board v. Solomon, [1908] 2 Ch. 214. **As to (2) Refd.** Tebb v. Cave, [1900] 1 Ch. 642; Jones v. Consolidated Anthracite Collieries & Dynevor, [1916] 1 K. B. 123; Phelps v. London Corp'n., [1916] 2 Ch. 255.

300. — Right to sink shafts in land not demised by lessor—Promoters taking part of land not demised.]—A lease of a piece of land with colliery shaft, buildings & works thereon, & of the minerals under that & adjoining land of the lessor, the surface of which was not demised by the lease, contained a proviso that the lessee might at any time during the term sink a pit or pits in any part of the land the surface of which was not demised, but so that the position of such pit or pits should be subject to the reasonable approval of the lessor, his heirs or assigns. A railway co. under the powers of a special Act incorporating Lands Act, 1845, purchased from the lessor five acres of the surface which was not demised, & occupied same by their railway & works:—**Held**: the mere fact that the railway co. had under their Act taken the five acres for the purposes of their railway was not a

reasonable ground under the proviso in the lease for disapproval of the position of any pit proposed to be sunk therein, & the lessee had a substantial interest under the proviso which entitled him to compensation for being prevented by the railway co.'s taking the land from exercising therein the right of sinking a pit given to him by the lease.—**Re MASTERS & GREAT WESTERN RY. CO.**, [1901] 2 K. B. 84; 70 L. J. K. B. 516; 84 L. T. 515; 65 J. P. 420; 49 W. R. 499, C. A.

Annotation:—Consd. Long Eaton Recreation Grounds Co. v. Mid. Ry., [1902] 2 K. B. 574.

D. Injury must arise from Construction of Works and not from Subsequent User.

See, generally, NEGLIGENCE; NUISANCE; RAILWAYS & CANALS.

301. General rule.]—CALEDONIAN RY. CO. v. WALKER'S TRUSTEES, No. 259, *ante*.

302. Vibration, noise, smoke, etc., caused by running of trains.]—HAMMERSMITH & CITY RY. CO. v. BRAND, No. 28, *ante*.

303. — Vibration.]—(1) The lessee of an inn & premises situate near the tunnel of a railway, was prevented by the vibration caused by the passing of the trains, from keeping his beer in his cellars in a fit state for consumption, & the value of the house was alleged to be materially lessened by the consequent loss of custom & the impossibility of using it as a public-house. He gave notice to the co. of his claim for compensation under Lands Act, 1845, s. 68, & was prosecuting the remedy given by that sect., when the co. filed a bill & obtained an injunction to restrain him from proceeding further under it:—**Held**: the injunction must be dissolved.

(2) **Seemle**: the sheriff & the jury are authorised to decide, not only the amount of compensation, but the right to it.

(3) Whether an action will lie on behalf of a man who sustains a private injury by the execution of parliamentary powers, exercised judiciously & cautiously, is not an easy question. I entertain a decided opinion that no such action will lie. The ct. has no right, & it is not within its ordinary jurisdiction to say to a man, "You shall not pursue that legal course to try your legal right which you are advised is the proper course, but I will prescribe to you a certain course, which may be wrong or which may be right." This ct. has not the legitimate power finally to decide the legal right, Parliament having chosen to give a certain mode of proceeding for the purpose of trying that right, or to impede the individual & prevent his pursuing that right, even for the purpose to prevent expense, to prevent delay & generally for the benefit of the parties. The party must pursue his remedy, according as he is advised, under the Act, & the co. have full & perfect means of defence (**LORD TRURO, C.**).—**LONDON & NORTH**

PART III. SECT. 3, SUB-SECT. 4.—D.

302i. Vibration, noise, smoke, etc., caused by running of trains.]—Compensation is not recoverable for injurious affection caused by the vibration, noise, & smoke from trains to lands separate & disjointed from those taken.—**HOLDITCH v. CANADIAN NORTHERN ONTARIO RY. CO.**, [1916] 1 A. C. 586; 114 L. T. 475, P. C.—**CAN.**

1. Frightening horses.]—A portion of claimant's property, although not damaged by the construction of the railway, was injuriously affected by its operation, on account of trains emerging suddenly & without warning from a snowshed & frightening claimant's horses:—**Held**: a proper subject for compensation.—**VÉZINA v. R.**

(1888), 2 Exch. C. R. 11; *reversd.* 17 S. C. R.—**CAN.**

g. Owner compelled to make detour.]—The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district & obliged to use a substituted route, which is less convenient.—**R. v. MACARTHUR** (1904), 34 S. C. R. 570; 24 C. L. T. 201.—**CAN.**

h. Damage arising by operation of railway.]—Defts., in constructing their line, crossed pltf.'s land at a point where a watercourse draining it passed, & obstructed the watercourse, flooding pltf.'s land after the act done:—**Held**: as it was to be assumed that defts. constructed their ry. upon pltf.'s land

either upon agreement with pltf. or upon an arbn. under 4 Wm. IV., c. 29, s. 3, & that pltf. had been paid therefor, & the damage resulted from the construction as originally made, no subsequent claim for that damage as a continuing damage could be maintained.—**KNAPP v. GREAT WESTERN RY. CO.** (1855), 6 C. P. 187.—**CAN.**

j. —.]—In enacting that compensation be paid to persons whose lands are injuriously affected by the construction of a ry., not only such damages as result from the actual construction of the embankments tracks & buildings of the railway, but also damages, arising from the operation of the ry., may be recovered.—**R. v. RICHARDS** (1912), 14 Exch. C. R. 365.—**CAN.**

WESTERN RY. CO. v. BRADLEY (1851), 3 Mac. & G. 336; 6 Ry. & Can. Cas. 551; 15 Jur. 639; 42 E. R. 290, L. C.

Annotations:—As to (1) **Consd.** London & Blackwall Ry. v. Cross (1886), 54 L. T. 309. **Refd.** Cale. Ry. v. Ogilvy (1855), 25 L. T. O. S. 106. As to (2) **Consd.** R. v. J. & N. W. Ry. (1854), 3 E. & B. 443. **Refd.** Road v. Victoria Station & Pimlico Ry. (1863), 1 H. & C. 826. As to (3) **Consd.** Hammersmith & City Ry. v. Brand (1869), L. R. 4 H. L. 171. **Refd.** L. & Y. Ry. v. Evans (1851), 15 Beav. 322. **Generally, Mentd.** Bradley v. Southampton L. B. of Health (1855), 3 W. R. 413; *Re* Penny & S. E. Ry. (1857), 3 Jur. N. S. 957; *Goolden v. Thames Conservators* (1887), 4 T. L. R. 187.

304. —.]—*Re* PENNY, No. 289, *ante*.

305. —.]—BUCCLEUCH (DUKE) v. METROPOLITAN BOARD OF WORKS, No. 215, *ante*.

306. — Noise.]—CITY OF GLASGOW UNION RY. CO. v. HUNTER, No. 324, *post*.

307. — Smoke.]—CITY OF GLASGOW UNION RY. CO. v. HUNTER, No. 324, *post*.

308. —.]—BUCCLEUCH (DUKE) v. METROPOLITAN BOARD OF WORKS, No. 215, *ante*.

309. — Enlargement of ventilating shaft.]—Defts., a railway co., were authorised by statute to construct an underground railway. They accordingly constructed part of the railway in a tunnel, & having purchased a piece of ground at the back of a dwelling-house, carried the tunnel through such ground & made an aperture in the ground for the purpose of ventilating the tunnel. Afterwards pltf. became lessee of the house, & then defts. with a view to the better ventilation of their line, enlarged the aperture, the effect of which was that the quantity of smoke, steam & foul air coming from the railway to pltf.'s house was much increased, & the house materially depreciated in value:—*Held*: pltf. had no right to compensation, for the alteration would cause no damage to him if the line was not used, the damage arising, not from the construction, but from the working of the railway.—A.-G. & HARE v. METROPOLITAN RY. CO., [1894] 1 Q. B. 384; 69 L. T. 811; 58 J. P. 318; 42 W. R. 381; 10 T. L. R. 134; 9 R. 598, C. A.

Annotations:—**Refd.** Fielden v. Morley Corpn (1898), 14 T. L. R. 566. **Mentd.** Emsley v. N. E. Ry., [1896] 1 Ch. 418.

310. Injury to ferry—By erection & working of railway bridge & footbridge—Loss of traffic.]—A railway co. under the powers of their special Acts constructed a bridge & footway across a river at a distance of about six hundred yards from the landing-place of an ancient ferry, but without any physical interference with the passage of the ferry-boats. The bridge when completed was opened

to foot-passengers on payment of tolls, & also used for conveyance of merchandise by the co.'s trains, causing a serious diminution in the profits of the ferry:—*Held*: (1) the ferry, as a franchise, was a hereditament within the definition of "lands" given by Lands Act, 1845, s. 3; (2) the ferry was directly & injuriously affected within Railways Act, 1845, ss. 6, 16, by the construction of the bridge.—R. v. CAMBRIAN RY. CO. (1871), L. R. 6 Q. B. 422; 40 L. J. Q. B. 169; 25 L. T. 84; 36 J. P. 4; 19 W. R. 1138.

Annotations:—As to (1) **Consd.** G. W. Ry. v. Swindon & Cheltenham Ry. (1884), 9 App. Cas. 787. As to (2) **Consd.** Jones v. Stanstead, Shefford & Chambly Railroad (1872), L. R. 4 P. C. 98. **Overd.** Hopkins v. G. N. Ry. (1877), 2 Q. B. D. 224. **Consd.** Dibden v. Skirrow, [1908] 1 Ch. 41. **Refd.** Parkdale Corpn. v. West (1887), 12 App. Cas. 602; North Shore Ry. v. Pion (1889), 14 App. Cas. 512. **Generally, Refd.** Hammerton v. Dysart, [1916] 1 A. C. 57.

311. —.]—HOPKINS v. GREAT NORTHERN RY. CO., No. 281, *ante*.

—.]—*See, further*, No. 280, *ante*.

SUB-SECT. 5.—MEASURE OF COMPENSATION.

312. Loss of profit—During period antecedent to passing of Act.]—MANNING v. COMPENSATION COMRS. UNDER THE WEST INDIA DOCK ACT (1807), 9 East, 164; 103 E. R. 536.

313. Damage to goods in premises—Injuri-ously affected by authorised acts.]—Railways Act, 1845, ss. 6, 16, are not confined to structural damage & depreciation in value of the premises, but also entitle a claimant to compensation for damage occasioned to goods therein by reason of the exercise of the powers conferred upon the co. by the Act of Parliament.—KNOCK v. METROPOLITAN RY. CO. (1868), L. R. 4 Q. P. 131; 38 L. J. C. P. 78; 19 L. T. 239; 17 W. R. 10.

314. Depreciation in special value of premises—Closing of street—Effect on hotel & public-house.]—*Re* WADHAM & NORTH EASTERN RY. CO., No. 266, *ante*.

See, also, Nos. 265, 278, *ante*.

SECT. 4.—BETTERMENT.

315. Company not entitled to set-off—Injurious affection—Benefit by construction of works.]—SENIOR v. METROPOLITAN RY. CO. (1863), 2 H. & C. 258; 2 New Rep. 334; 32 L. J. Ex. 225; 8 L. T. 544; 9 Jur. N. S. 802; 11 W. R. 836; 159 E. R. 107. *Annotations*:—**Apld.** Cameron v. Charing Cross Ry. (1864),

works of a corpn. was destroyed by fire not caused by the work, insurance collected, & the building rebuilt during the progress of the work, the damages awarded should include the depreciation caused by the work in the value of the building as rebuilt.—MC CARTHY v. CITY OF REGINA, [1919] 1 W. W. R. 814; 58 S. C. R. 349.—CAN.

PART III. SECT. 4.

q. What "enhancement in value" includes.—Lands Compensation Act, 1869.]—Enhancement in value includes that which arises from use as well as from construction of works.—HARDING v. BOARD OF LAND & WORKS (1886), 11 App. Cas. 208; 55 L. J. P. C. 11.—AUS.

3151. Whether promoters entitled to set-off—Injurious affection.—Lands Compensation Act, 1889.]—In assessing under above Act compensation for land compulsorily taken for a ry., the enhancement in value of the owner's adjoining lands may be set-off against the amount allowed for damage thereto arising from compulsory taking; but

PART III. SECT. 3, SUB-SECT. 5.

k. General rule.]—Compensation for injuriously affecting property by an act authorised by the Legislature is to be assessed in the same way as damages in an action of tort for an injury by the same act if unauthorised.—*Re* AN AWARD OF COMPENSATION MADE BY H. E. THE GOVERNOR TO THE OWNERS OF KOWLOON MARINE LOTS 29, 30, 31, UNDER S. 12 OF ORDINANCE NO. 31 OF 1909 (1912), 7 Hong Kong L. R. 110.—HONG KONG.

l. Depreciation in value of premises.]—Where lands are injuriously affected, the measure of compensation is the depreciation in value of the premises damaged, assessed not only with reference to the injury occasioned by the construction of the authorised works, but also with reference to the loss which may probably result from the nature of the user.—STRAITS OF CANSEAU MARINE RY. CO. v. R. (1889), 2 Exch. C. R. 113.—CAN.

m. Present & future value.]—Compensation payable for lands being injuriously affected by municipal im-

provements should be based upon the present value of the lands so affected, taking into consideration all advantages which the land then possesses present or future.—SECORD v. CITY OF EDMONTON, [1917] 1 W. W. R. 819; 10 Alta. L. R. 463; 32 D. L. R. 698.—CAN.

n. —.]—The cost of acquiring other suitable premises is a fair test of damage.—*Re* BRANTFORD GOLF & COUNTRY CLUB v. LAKE ERIE & NORTHERN RY. CO. (1915), 7 O. W. N. 197; 32 O. L. R. 141.—CAN.

o. — By lowering street—No allowance for rates charged against property for improvements.]—On the assessment of compensation for lowering the grade of a street in front of claimant's property:—*Held*: the arbitrators properly refused to include in the damages an allowance equivalent to the rates charged against the property by the by-laws.—*Re* OKELL & CITY OF VICTORIA CORPN. (1914), 19 B. C. R. 121; 16 D. L. R. 353.—CAN.

p. Buildings destroyed by fire not caused by works.]—Where claimant's building on land injuriously affected by

Sect. 4.—Betterment.

16 C. B. N. S. 430. **Consd.** Ricket v. Met. Ry. (1867), L. R. 2 H. L. 175. **Refd.** Brand v. Hammersmith & City Ry. (1867), L. R. 2 Q. B. 223.

316. — Diminution of light—Value otherwise enhanced.]—EAGLE v. CHARING CROSS RY. CO., No. 286, *ante*.

317. Provision of special Act—Proposed improvement—Possible enhanced value excluded.]—Re LONDON COUNTY COUNCIL & CITY OF LONDON BREWERY CO., [1898] 1 Q. B. 387; 67 L. J. Q. B. 382; 77 L. T. 463; 61 J. P. 808; 46 W. R. 172; 14 T. L. R. 69; 42 Sol. Jo. 81, D. C.

318. — Improvement charge — Part of premises in improvement area—Whole premises subject to charge.]—THE OXFORD, LTD. v. LONDON COUNTY COUNCIL, [1898] 2 Ch. 491; 67 L. J. Ch. 655; 79 L. T. 22; 47 W. R. 297.

SECT. 5.—ANTICIPATED INJURY.

319. Contingent injury—Award may include—Provided injury in existence in some work already done.]—LEE v. MILNER (1837), 2 M. & W. 824; Murp. & H. 275; 6 L. J. Ex. 205; 150 E. R. 990; *subsequent proceedings*, 2 Y. & C. Ex. 611.

Annotations:—**Consd.** Jubb v. Hull Dock Co. (1846), 9 Q. B. 443; Broadbent v. Imperial Gas Co. (1857), 7 De G. M. & G. 436. **Refd.** R. v. Aire & Calder Navigation Undertakers (1861), 30 L. J. Q. B. 337; Chamberlain v. West End of London & Crystal Palace Ry. (1863), 2 New Rep. 182. **Mentd.** R. v. Eastern Counties Ry. (1839), 10 Ad. & El.

may not be allowed against purchase money.—HARDING v. BOARD OF LAND & WORKS (1886), 11 App. Cas. 208; 55 L. J. P. C. 11.—**AUS.**

315 ii. — — — Public Works Act, 1888, s. 24.]—Under s. 24 of above Act, the jury in ascertaining the amount of compensation to be given to the owner of land for land resumed by Govt. have to "take into consideration & give effect to by way of set-off or abatement any enhancement" in the value of the whole of the land belonging to such owner adjoining the land taken, & not merely that part of the land which is contiguous to it.—HARRIS v. LEE (1900), 21 N. S. W. L. R. 173; 17 N. S. W. W. N. 39.—**AUS.**

r. — — — Land resumed separated by strip from other land incapable of enhancement—Public Works Act, 1900, s. 117.]—Where adjoining land is enhanced in value by the resumption it is immaterial, for the purposes of above sect., that it is separated from the land resumed by a strip of land belonging to the claimant which is itself incapable of enhancement in value.—HARRIS v. SYDNEY MUNICIPAL COUNCIL (1910), 10 S. R. N. S. W. 860; 27 N. S. W. W. N. 223.—**AUS.**

s. — — — Closer Settlement (Amendment) Act, 1907.]—Any added value which, at the date of resumption, had accrued to the land by reason of the proposed construction of the ry., should be excluded from the compensation payable to owner.—BOXALL v. SLY (1911), 12 C. L. R. 63; 28 N. S. W. W. N. 52.—**AUS.**

t. — — —]—Arbitrators may take into consideration the increased value to the estate by reason of the construction of the ry., although benefited only in the same way as other farms in the neighbourhood through which the ry. does not pass; as also the increase in value by reason of the probable location of a station at a town in the vicinity, which the co. had bound themselves to place there.—Re CREDIT VALLEY RY. CO. & SPRAGGE (1876), 24 Gr. 231.—**CAN.**

u. — — — Potential advantage of railway making which promoters were not compelled to make.]—CHARLAND v. R. (1887), 1 Exch. C. R. 291; *affd.* 16 S. C. R. 721.—**CAN.**

w. — — — No certainty of demand for particular purposes in future.]—Where there was evidence that the ry. would enhance the value for manufacturing purposes of land upon an expropriation, but it did not appear that there then was, or in the near future would be, any demand for the land for such purposes, the amount of compensation to which claimant is otherwise entitled will not be reduced.—McLEOD v. R. (1889), 2 Exch. C. R. 106.—**CAN.**

y. — — — Probable erection of station.]—The advantage resulting to the owner of a paper town from the Crown making it the terminus of a ry., & constructing within its limits a station & other buildings, should be taken into account by way of set-off under 50 & 51 Vict. c. 16, s. 13.—PAINT v. R. (1890), 2 Exch. C. R. 119; 18 S. C. R. 718.—**CAN.**

z. — — —]—R. v. FRANCIS (1908), 5 E. L. R. 433.—**CAN.**

a. — — —]—R. v. DAY (1908), 5 E. L. R. 434.—**CAN.**

b. — — —]—In estimating the amount of compensation upon the expropriation of water lots by the Crown for harbour improvement purposes, regard will be had to the advantage & benefit accrued to the owners as a result of the undertakings which must be considered by way of set-off.—R. v. BRADBURN (1916), 17 Exch. C. R. 447; 42 D. L. R. 168.—**CAN.**

Exchequer Court Act, s. 50.]—Where owing to a ry. the remaining portion of timber limits was enhanced in value:—**Held:** under above sect. the advantages should be set-off against the damages.—R. v. NEW BRUNSWICK RY. CO. (1913), 14 Exch. C. R. 491.—**CAN.**

d. — — —]—**Re HANNAH**

531; Taylor v. Clemson (1842), 2 Q. B. 978; R. v. Hull Dock Co. (1846), 3 Ry. & Can. Cas. 795; Re Brogden & Llynvi Valley Ry. (1860), 9 C. B. N. S. 229; Cale. Ry. v. Lockhart (1860), 3 L. T. 65; R. v. Poulter (1887), 57 L. J. Q. B. 138.

320. — — —]—A railway co. were empowered by their Act of Parliament to abandon certain tramways which communicated with certain iron-works of A., & they, having given A. notice under Lands Act, 1815, of their intention to take certain of his lands, the amount of compensation was referred to an umpire, who was to ascertain & direct what should be paid for the interest in the lands, & for any damage that might be sustained by reason of the execution of the works. A. made a claim before the arbitrator for compensation in respect of damage which he alleged he would sustain if the tramways were stopped up, & the umpire awarded that a certain sum should be paid by the co. to A. as & for purchase & compensation for & in respect of his interest in the lands & hereditaments, & for damage sustained & which might be sustained by him by reason of the execution of the works of the railway, or the exercise by the co. of the powers of the Act:—**Held:** it did not appear upon the face of the award that the umpire had exceeded his jurisdiction by awarding compensation in respect of a claim for damage not within the reference.

Qu.: whether the award would have been bad if it had appeared that the arbitrator had given compensation for contingent damage which might arise from the exercise of the powers of the Act.—**Re BROGDEN & LLYNVI VALLEY RY. CO.** (1860), 9 C. B. N. S. 229; 30 L. J. C. P. 61; 142 E. R. 90.

& CAMPBELLFORD LAKE ONTARIO & WESTERN RY. CO. (1915), 9 O. W. N. 179; 34 O. L. R. 615.—**CAN.**

e. — — — Expropriation Act, s. 50.]—Any benefit or advantage accruing from the construction of the public work must under Expropriation Act, s. 50, be taken into account & consideration given to it by way of set-off.—R. v. BANNATYNE & VOKES (1915), 18 Exch. C. R. 82.—**CAN.**

f. — — — If limited to particular estate.]—Advantages must be limited to those which are special & direct to such estate, & not construed to include the general benefits shared in common with all the neighbouring estates.—R. v. CARRIER (1888), 2 Exch. C. R. 36.—**CAN.**

g. — — —]—A land owner alleged that lands had been injuriously affected by the construction of a block pavement:—**Held:** that in estimating the land owner's compensation the arbitrator should set off against the land owner's claim for damages sustained, the increase in the value of the land arising from the construction of the pavement, in which this land shared in common with all other lands benefited, & not merely such direct & peculiar benefit as accrued to this particular land.—**Re PRYCE & CITY OF TORONTO** (1889), 20 A. R. 16; 16 O. R. 726.—**CAN.**

h. Provision of special Act—Proposed improvement—Benefit more than detriment—Owner not entitled for detriment.]—A statute provided that any advantage derived from the works should be deducted from the sum estimated for damage done to the land in arriving at the compensation to be paid, & it was found that the detriment to the claimant's property caused by closing streets was more than offset by the advantage accruing to it from the construction of the works:—**Held:** claimant could not recover anything in respect of such detriment.—**Re SHRAGGE & CITY OF WINNIPEG** (1910), 20 Man. L. R. 1.—**CAN.**

Annotation:—**Refd.** *Stone v. Yeovil Corpn.* (1876), 24 W. R. 1073.

321. — — — & landowner's indemnity to tenants.]—L. entered into a submission with the C. Ry. Co. to refer all claims for land of L. taken & injured by reason of their works, the arbn. to be in strict conformity with Lands Act, 1845, & Railways Act, 1845. Objections being made to the award on various grounds:—*Held*: (1) the submission was a common law submission, incorporating the incidents of the statutory submission, & did not expire at the death of the landowner; (2) the provision in Lands Act, whereby the award must be made within three months from the date of the submission, was introduced for the benefit of the parties, & might be waived so as to extend the time to suit their convenience; (3) an arbitrator might employ an expert to assist him & in general might consult men of science if necessary; (4) the arbitrator might award prospective & contingent damages; (5) he might include damages likely to be caused to the landowner's tenants; (6) the right to compensation under Lands Act depends on cause & effect, & not on distance or proximity of the lands affected.—**CALEDONIAN RY. CO. v. LOCKHART** (1860), 3 L. T. 65; 6 Jur. N. S. 1311; 8 W. R. 373; 3 Macq. 808, H. L.

Annotations:—*As to* (2) **Consd.** *Palmer v. Met. Ry.* (1862), 31 L. J. Q. B. 259. **Refd.** *Ringland v. Lowndes* (1864), 17 C. B. N. S. 514; *R. v. Manley-Smith* (1893), 63 L. J. Q. B. 171. *Generally, Consd.* *Bagnall v. L. & N. W. Ry.* (1862), 1 H. & C. 544. **Refd.** *Stone v. Yeovil Corpn.* (1876), 1 C. P. D. 691; *Holliday v. Wakefield Corpn.*, [1891] A. C. 81. **Mentd.** *Bottonley v. Ambler* (1877), 38 L. T. R. v. *Poulter* (1887), 20 Q. B. D. 132.

322. Power of promoters to reduce compensation by releasing their future powers.] **LYR HARBOUR TRUSTEES v. OSWALD**, No. 4, *ante*.

323. — — — Not existing at time of making claim.]—A railway co. commenced to build warehouses which were intended to be 100 feet in height. The lessee of a warehouse the light of which would be affected when the buildings were completed gave notice to the railway co. that he held on a lease for an unexpired term of fourteen years, which could be determined by six months' notice, to expire on Nov. 11 then next, & required the co. to determine whether they would take over the lease, or whether he should give the requisite notice. The co. declined to interfere, & the lessee on May 6 gave notice to determine his tenancy. There was no evidence that at that time the building had progressed so far as to affect the light to the warehouse. Afterwards the lessee gave notice to the co. of his claim for compensation for injuriously affecting his lands, & an inquiry was held before the sheriff & a jury:—*Held*: (1) the act of the lessee in giving notice to terminate his lease, not being the natural result of the acts of the railway co. but a free exercise of will on his

part, he could not recover compensation on the footing that he was entitled to a fourteen years' lease; (2) claimant could not recover compensation in respect of an injury which was merely prospective & which did not exist at the time of making the claim.—**R. v. POULTER** (1887), 20 Q. B. D. 132; 57 L. J. Q. B. 138; 58 L. T. 534; 52 J. P. 244; 36 W. R. 117; 4 T. L. R. 76, C. A.

— — — **Subsequent discovery of mine—Claim for further compensation for injury to mine.]**—*See* Part IV., Sect. 2, sub-sect. 3, *post*.

324. — — — From smoke & vibration—Not proper subject in estimating compensation.]—(1) No claim can be made in respect of a damage for which claimant would not have had an action supposing the Railway Act had never been passed. (2) The damage must be done by the construction of the works, & not afterwards, when the works have been completed:—*Held*: statutory compensation cannot be claimed by reason of the noise or smoke of trains, whether part of claimant's lands be taken or not.

(3) Anticipated damage from the noise & smoke of trains does not appear to be a proper subject of estimate for compensation under Railway Acts (**LORD HATHERLEY, C.**).

(4) The Legislature having given the promoters no power to annoy the occupiers of neighbouring property with smoke, an injury from this cause is not the subject of compensation but a ground of action. A man may have a right of action & a right of indictment where he cannot claim statutory compensation (**LORD CHELMSFORD**).—**CITY OF GLASGOW UNION RY. CO. v. HUNTER** (1870), L. R. 2 Sc. & Div. 78; 34 J. P. 612, H. L.

Annotations:—*As to* (1) **Refd.** *R. v. Sheward* (1880), 9 Q. B. D. 741; *R. v. Mountford, Ex p. London United Tramways*, [1906] 2 K. B. 814. *As to* (2) **Consd.** *Buccleuch v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418; *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153. **Refd.** *Jones v. Stanstead, Sheffield & Chambly Railroad* (1872), L. R. 4 P. C. 98; *Horton v. Colwyn Bay & Colwyn U. C.*, [1908] 1 K. B. 327. *As to* (3) **Refd.** *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153.

325. Injury unforeseen at time of first award.]—**LANCASHIRE & YORKSHIRE RY. CO. v. EVANS**, No. 21, *ante*.

326. — — — Damage arising from mode of construction at other places—Right to second award.]—**LAWRENCE v. GREAT NORTHERN RY. CO.** (1851), 16 Q. B. 643; 6 Ry. & Can. Cas. 656; 20 L. J. Q. B. 293; 17 L. T. O. S. 39; 15 Jur. 652; 117 E. R. 1026.

Annotations:—**Expld.** *Cale. Ry. v. Lockhart* (1860), 3 L. T. 65. **Consd.** *Clothier v. Webster* (1862), 12 C. B. N. S. 790. **Expld.** *Mason v. Shrewsbury & Hereford Ry.* (1871), 25 L. T. 239. **Expld. & Distd.** *Todd v. Met. Dist. Ry.* (1871), 24 L. T. 435. **Expld.** *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125. **Expld. & Distd.** *Maxey Drainage Board v. G. N. Ry.* (1902), 106 L. T. 429. **Refd.** *Broadbent v. Imperial Gas Co.* (1857), 7 De G. M. & G. 436; *Re Brogden & Llynvi Valley Ry.* (1860), 9 C. B. N. S. 229; *Coe v. Wise* (1866), L. R. 1 Q. B. 711.

PART III. SECT. 5.

323 i. Contingent injury—Not existing at time of making claim.]—Where a drain has been made under the powers of Local Government Act, 1874, s. 384, an owner or occupier injuriously affected is entitled to have the compensation for prospective damages to his land assessed once for all, & the assessment is to be made irrespective of whether the powers have been negligently or properly exercised.—**COLAC (PRESIDENT, ETC.) v. SUMMERFIELD**, [1893] A. C. 187, P. C.—**AUS.**

323 ii. — — —.]—Possible damage to bush land from greater exposure to winds & storms, & the greater liability to injury by fire by reason of the working of the ry., were contingencies

too remote to be considered in estimating the amount of compensation where there were no buildings to be endangered.—**Re ONTARIO & QUEBEC RY. CO. & TAYLOR** (1884), 6 O. R. 338.—**CAN.**

323 iii. — — —.]—The promoter of a railway had power to expropriate land making compensation "for all damages to land injuriously affected by the construction of the railway":—*Held*: compensation might be allowed for depreciation occasioned by the anticipation of the subsequent operation & user of the railway on the land taken.—**Re SCOTT & RAILWAY COMR.** (1889), 6 Man. L. R. 193.—**CAN.**

323 iv. — — —.]—Loss of business not attributable to the taking or loss

of profits in connection with a business in anticipation but not actually embarked on, are not elements of compensation.—**MAXWELL v. R.** (1917), 17 Exch. C. R. 97; 40 D. L. R. 715.—**CAN.**

j. — — — Loss of annuity—Vis major.]—T. devised his estate to M. M.'s grandmother directed her exors. to pay him an annuity so long as he should remain the owner & actual occupant of the estate, to enable him the better to keep up, decorate, & beautify the property; the estate was expropriated:—*Held*: a contemplated loss of the annuity could not be considered in awarding M. compensation.—**Re MACKLEM & NIAGARA FALLS PARK COMRS.** (1887), 14 A. R. 20.—**CAN.**

Sect. 5.—Anticipated injury. Part IV. Sect. 1: Sub-sect. 1.]

327. — But which might have been foreseen—No right to second award.]—A railway co. having power under an Act of Parliament to construct a tunnel under buildings & premises of which pltf. was owner in fee, the parties in 1848, by voluntary agreement, referred to arbn. the amount to be paid by defts. to pltf. for the right to construct & for ever maintain the tunnel under the premises, & for the purchase of the site of the tunnel, & in full compensation for all damage or injury to be sustained by him by reason of the construction of the tunnel underneath the premises; & the arbitrator awarded a certain sum to pltf. as compensation for the right to construct, etc. on the terms of the submission, & for all damage & injury sustained by him by reason of the construction of the tunnel. A deed was afterwards executed by pltf., by which, after reciting the submission & award, in consideration of the sum awarded, which he acknowledged to be in full for the purchase of the site of, & the right to construct, maintain & use the tunnel underneath the premises, he granted to defts. the site of, & full & free liberty power & authority to bore, dig, excavate, make & construct the tunnel underneath the premises, together with the full & exclusive & uninterrupted right at all times thereafter to use, maintain & repair the tunnel; to hold same for the purposes of their Act of Parliament, freed & discharged

from all claims whatsoever of the pltf. The stratum through which the tunnel passed consisted of clay & loose earth; it was opened for traffic in 1849, & after 1853, serious injuries arose to the buildings over the tunnel, which were caused by the subsequent subsidence of the surface consequent upon the construction of the tunnel in such a soil & by the vibration resulting from the passing of trains, or by one of such causes. On a special case, raising the questions, whether pltf. could maintain an action for the damage, or recover compensation under Lands Act, 1845, s. 68:—*Held*: (1) the damage, which was likely to accrue from subsidence & vibration, & might have been foreseen, was matter which might & ought to have been taken into consideration by the arbitrator & assessed prospectively, & pltf. could not afterwards recover compensation for the damage by action or otherwise; (2) whether the question turned on the construction of the submission, award & deed of conveyance, or of the statute, pltf. was equally precluded from claiming any further compensation.—*CROFT v. LONDON & NORTH WESTERN RY. CO.* (1863), 3 B. & S. 436; 1 New Rep. 318; 32 L. J. Q. B. 113; 7 L. T. 741; 27 J. P. 484; 9 Jur. N. S. 962; 11 W. R. 360; 122 E. R. 164.

Annotations:—As to (1) Consd. Todd v. Met. Dist. Ry. (1871), 24 L. T. 435; *Stone v. Yeovil Corpn.* (1876), 24 W. R. 1073; *Mercer v. Liverpool, St. Helens & South Lancashire Ry.*, [1903] 1 K. B. 652. *As to (2) Consd. R. v. Poulter* (1887), 20 Q. B. D. 132.

Part IV.—Compensation for Mines and Minerals.

See Railways Act, 1845, 77–85; Waterworks Act, 1847, ss. 18–27.

SECT. 1.—UNDER GENERAL STATUTORY CODES.

SUB-SECT. 1.—MEANING OF “MINES AND MINERALS.”

328. Under Railways Act, 1845, s. 77—“Mines” include all beds or strata of minerals—Irrespective of method of working.]—(1) The word “mines” in the above sect. is to be interpreted in the widest sense that can properly be given to it, & does not apply only to those minerals which, according to the custom of the district where they are situate, would ordinarily be won by underground workings, but comprehends all beds or strata of minerals, without any reference to the method of working them.

(2) The owner of minerals lying under or near a railway may give notice, under Railways Act, 1845, s. 78, of his intention to work them, though his intention is not to work them himself, but only by his lessees or licensees, provided that he has a *bond fide* intention of so working them.—*MIDLAND RY. CO. & KETTERING, THRAPSTON & HUNTINGDON RY. CO. v. ROBINSON* (1889), 15 App. Cas. 19; 59 L. J. Ch. 442; 62 L. T. 194; 54 J. P. 580; 38 W. R. 577; 6 T. L. R. 100, II. L.

3271. — Injury which could have foreseen.]—Where, by the construction of a ry., the claimant is put to greater trouble & expense in carrying off surface water from his lands through boundary ditches he is entitled to compensation.—*SIMONEAU v. R.* (1890), 2 Exch. C. R. 391.—**CAN.**

k. — Denial of intention to commit—Injunction.]—Where a party

complained of injurious operations intended by a co., the ct., as the co. had done other illegal acts also complained of, & against which interdict was granted, interdicted those also said to be intended, although the co. denied any intention or statutory power to carry them on.—*HOYLE v. SHAW'S WATER CO.* (1854), 17 Dunl. (Cl. of Sess.) 83; 27 Sc. Jur. 11.—**SCOT.**

Annotations:—As to (1) Consd. Ruabon Brick & Terra Cotta Co. v. G. W. Ry., [1893] 1 Ch. 427; *G. W. Ry. v. Blades*, [1901] 2 Ch. 624. *Re Todd, Birleston & N. E. Ry.*, [1903] 1 K. B. 603; *G. W. Ry. v. Carpalla United China Clay Co.* (1908), 73 J. P. 23. *Generally Rejd. Bradford Corpn. v. Pickles*, [1894] 3 Ch. 53; *Re Gerard & L. & N. W. Ry.*, [1895] 1 Q. B. 459; *N. B. Ry. v. Budhill Coal & Sandstone Co.*, [1910] A. C. 116. *Mentd. Eden v. N. E. Ry.*, [1907] A. C. 400; *L. & N. W. Ry. v. Howley Park Coal & Cannel Co.*, [1911] 2 Ch. 97.

329. — Clay—Procurable by open working—Within Act.]—*MIDLAND RY. CO. v. HAUNCHWOOD BRICK & TILE CO.* (1882), 20 Ch. D. 552; 51 L. J. Ch. 778; 46 L. T. 301; 30 W. R. 640.

Annotations:—Consd. Mid. Ry. v. Miles (1885), 30 Ch. D. 634; *Mid. Ry. v. Robinson* (1887), 37 Ch. D. 386; *Glasgow Corpn. v. Farie* (1888), 13 App. Cas. 657; *G. W. Ry. v. Blades*, [1901] 2 Ch. 624. *Rejd. Mid. Ry. v. Miles* (1886), 33 Ch. D. 632; *Ruabon Brick & Terra Cotta Co. v. G. W. Ry.*, [1893] 1 Ch. 427.

330. — Removed and used on other land—Within Act.]—*TIVERTON & NORTH DEVON RY. CO. v. LOOSEMORE*, No. 1035, *post*.

331. — Constituting “land” taken—Not within Act.]—*GREAT WESTERN RY. CO. v. BLADES*, [1901] 2 Ch. 624; 70 L. J. Ch. 847; 85 L. T. 308; 65 J. P. 791; 17 T. L. R. 693; 45 Sol. Jo. 707.

Annotations:—Rejd. Re Todd, Birleston & N. E. Ry., [1903] 1 K. B. 603; *Skey v. Parsons* (1909), 101 L. T. 103. *Mentd. Greville v. Hemingway* (1902), 87 L. T. 443; *G. W. Ry. v. Carpalla United China Clay Co.*, [1909] 1 Ch. 218; *N. B. Ry. v. Budhill Coal & Sandstone Co.*, [1910] A. C. 116.

332. — — — — —.]—Clay forming the

PART IV. SECT. 1, SUB-SECT. 1.

1. Under Railways (Scot.) Act, 1845—How determined—A question of fact.]—Whether a certain substance is or is not in a particular locality a “mineral” within the above Act, is a question of fact.—*SYMINGTON v. CALEDONIAN RY.*, [1912] A. C. 97.—**SCOT.**

surface or subsoil, & constituting the "land" compulsorily taken for the purposes of an undertaking, is not a mineral within Railways Act, 1845, ss. 77-79.—*Re TODD, BIRLESTON & Co. & NORTH EASTERN RY. Co.*, [1903] 1 K. B. 603; 72 L. J. K. B. 337; 88 L. T. 366; 19 T. L. R. 249; *sub nom.*, *Re NORTH EASTERN RY. Co. & TODD, BIRLESTON & Co.*, 67 J. P. 105, C. A.

Annotations:—*Consd.* G. W. Ry. v. Carpalla United China Clay Co. (1908), 99 L. T. 869. *Refd.* N. B. Ry. v. Budhill Coal & Sandstone Co., [1910] A. C. 116. *Mentd.* Bishop Auckland Industrial Co.-op. Soc. v. Butterknowle Colliery Co. (1904), 73 L. J. Ch. 335.

333. — *China-clay—Within Act.*—China-clay underlying land in C. purchased by a railway co. for the purposes of its undertaking & occupying only a small fraction of the sub-soil is a "mineral" within Railways Act, 1845, s. 77.—*GREAT WESTERN RY. Co. v. CARPALLA UNITED CHINA CLAY Co.*, [1910] A. C. 83; 79 L. J. Ch. 117; 101 L. T. 785; 74 J. P. 57; 26 T. L. R. 190; 54 Sol. Jo. 150, H. L.

Annotations:—*Distd.* Cale. Ry. v. Glenboig Union Fireclay Co., [1911] A. C. 290. *Refd.* Skey v. Parsons (1909), 101 L. T. 103; N. B. Ry. v. Budhill Coal & Sandstone Co., [1910] A. C. 116; *Amalgamated Properties of Rhodesia v. Globe & Phoenix Co.* (1916), 116 L. T. 111.

334. — *Fire-clay—Within Act.*—"Minerals," which, under Railways (Scotland) Act, 1845, s. 70, were excepted from the conveyance of lands purchased by railway cos.:—*Held*: to include seams of fire-clay, distinguished from ordinary clay by containing a large proportion of refractory substances, which make it valuable for the manufacture of bricks capable of resisting high temperatures.—*CALEDONIAN RY. Co. v. GLENBOIG UNION FIRECLAY Co.*, [1911] A. C. 290; 80 L. J. P. C. 128; 104 L. T. 657; 75 J. P. 377, H. L.

Annotations:—*Refd.* Symington v. Cale. Ry., [1912] A. C. 87. *Mentd.* Barnard-Argue-Roth-Stearns Oil Co. v. Farquharson (1912), 107 L. T. 332; Commonwealth of Australia v. Hazeldell, [1921] 2 A. C. 373.

335. — *Sandstone—Not within Act.*—By Railways (Scotland) Act, 1845, s. 70, the co. was not entitled to any mines of coal, ironstone, slate or other minerals under any land purchased by them, except only such parts thereof as should be necessary to be dug or carried away, or used in the construction of the works, unless same should have been expressly purchased; & all such mines—excepting as aforesaid, should be deemed to be excepted out of the conveyance of such lands unless they should have been expressly named therein & conveyed thereby":—*Held*: sandstone was

not a mineral within the sect.—*NORTH BRITISH RY. Co. v. BUDHILL COAL & SANDSTONE Co.*, [1910] A. C. 116; 79 L. J. P. C. 31; 101 L. T. 609; 26 T. L. R. 79; 54 Sol. Jo. 79, H. L.

Annotations:—*Consd.* Cale. Ry. v. Glenboig Union Fireclay Co., [1911] A. C. 290; A.-G. v. Salt Union, [1917] 2 K. B. 488. *Refd.* Symington v. Cale. Ry., [1912] A. C. 87. *Mentd.* Barnard-Argue-Roth-Stearns Oil Co. v. Farquharson (1912), 107 L. T. 332; Commonwealth of Australia v. Hazeldell, [1921] 2 A. C. 373.

336. — *Limestone.*—*DIXON v. CALEDONIAN & GLASGOW & SOUTH WESTERN RY. COS.*, No. 366, *post*.

337. *Waterworks Act, 1847—Clay subsoil—Not within Act.*—On a compulsory purchase of lands by undertakers under a special Act of Parliament which incorporated Waterworks Act, 1847, the conveyance reserved to the vendor the whole coal & other minerals in the lands in terms of the clauses relating to mines in Waterworks Act, 1847:—*Held*: clay subsoil was not included in the exception by Waterworks Act, 1845, s. 18 of mines of coal, ironstone, slate or other minerals, & such subsoil passed by the conveyance to the undertakers.—*GLASGOW CORPN. v. FARIN* (1888), 13 App. Cas. 657; 58 L. J. P. C. 33; 60 L. T. 274; 37 W. R. 627; 4 T. L. R. 781, H. L.

Annotations:—*Consd.* Jersey v. Neath Poor Law Grdms. (1889), 22 Q. B. D. 555; Mid. Ry. & Kettering, Thrapston & Huntingdon Ry. v. Robinson (1889), 15 App. Cas. 19; Johnstone v. Crompton, [1899] 2 Ch. 190; *Re Todd, Birlestone & N. E. Ry.*, [1903] 1 K. B. 603; Manchester Corp'n. v. New Moss Colliery, [1906] 1 Ch. 278; G. W. Ry. v. Carpalla United China Clay Co., [1909] 1 Ch. 218; Barnard-Argue-Roth-Stearns Oil & Gas Co. v. Farquharson, [1912] A. C. 864. *Refd.* G. W. Ry. v. Blades, [1901] 2 Ch. 624; Scott v. Mid. Ry., [1901] 1 K. B. 317; Greville v. Hemingway (1902), 87 L. T. 443; Eden v. N. E. Ry., [1907] A. C. 400; Skey v. Parsons (1909), 101 L. T. 103; N. B. Ry. v. Budhill Coal & Sandstone Co., [1910] A. C. 116. *Mentd.* Bishop Auckland Co-op. Soc. v. Butterknowle Colliery Co. (1904), 73 L. J. Ch. 335; Rugby Portland Cement Co. v. L. & N. W. Ry., [1908] 2 K. B. 606.

338. *Special Act—Stone obtained by quarrying—Within Act.*—*MIDLAND RY. Co. v. CHECKLEY* (1867), L. R. 4 Eq. 19; 36 L. J. Ch. 380; 16 L. T. 260; 31 J. P. 500; 15 W. R. 671.

Annotations:—*Refd.* Robinson v. Milne (1884), 53 L. J. Ch. 1070; Jersey v. Neath Poor Law Union Grdms. (1889), 22 Q. B. D. 555; N. B. Ry. v. Budhill Coal & Sandstone Co., [1910] A. C. 116. *Mentd.* Hext v. Gill (1872), 7 Ch. App. 705, n.; G. W. Ry. v. Smith (1876), 2 Ch. D. 235; Mid. Ry. v. Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; Tucker v. Linger (1882), 21 Ch. D. 18; Manchester Corp'n. v. New Moss Colliery (1905), 75 L. J. Ch. 145.

See, generally, MINES, MINERALS & QUARRIES.

337 i. — *Clay—Subsoil of land purchased—Not within Act.*—Clay, forming the subsoil of land purchased, is not a "mineral" within above Act.—*NORTH BRITISH RY. v. TURNERS* (1904), 6 F. (Ct. of Sess.) 900.—*SCOT.*

m. — *Freestone—Within Act.*—*JAMIESON v. NORTH BRITISH RY. Co.* (1868), 6 Sc. L. R. 188.—*SCOT.*

n. — — — — — *GLASGOW & SOUTH WESTERN RY. Co. v. BAIN* (1893), 21 R. (Ct. of Sess.) 134; 31 Sc. L. R. 98.—*SCOT.*

o. — *Stone not merchantable—Obtained by quarrying—Not within Act.*—In 1846 a ry. co. constructed a line on lands which they had acquired under compulsory powers: part of the line ran through a rock cutting. In 1870 the co. removed the stone left on the side of the line within the limits of the lands taken:—*Held*: the stone was not merchantable, & did not fall under the term "mines & minerals."—*NISBET HAMILTON v. NORTH BRITISH RY. Co.* (1886), 13 R. (Ct. of Sess.) 454; 23 Sc. L. R. 295.—*SCOT.*

p. — *Whinstone—Not within Act.*—*FORTH BRIDGE RY. v. DUNFERMLINE GUILDRY*, [1910] S. C. 316.—*SCOT.*

q. — *Averment that "substance" is mineral—Pleading.*—*Aver-*

ments that the substance in question is a mineral in the vernacular of the mining & commercial worlds & the world of landowners, exceptional in use, value, & character, & not the common rock of the district or substratum of the soil, are sufficiently specific to justify a proof.—*SYMINGTON v. CALEDONIAN RY.*, [1912] A. C. 87; 81 L. J. P. C. 155; 56 Sol. Jo. 87.—*SCOT.*

r. *Under R. S. Ont.*, 1914, c. 185, s. 133—*Ordinary rock of district—Not within Act.*—The ordinary rock of a district is not a "mineral," within above sect.—*Re McALLISTER & TORONTO SUBURBAN RY. Co.* (1917), 40 O. L. R. 252; 39 D. L. R. 207; 22 Can. Ry. Cas. 272.—*CAN.*

s. *Special Act—Shale above railway level—Within Act.*—A special Act in 1838 authorising the making of E. Ry. enacted that the price of the lands to be purchased by the ry. co., from H. was to include the value of the whole stone, lime, coal, ironstone, silver, tin, lead, or slate which might require to be excavated in the formation of the ry. through the land purchased. H. afterwards conveyed the lands to the co. excepting & reserving "all freestone, coal, ironstone, limestone, slate, or other mines or minerals

under the land":—*Held*: "shale," above the formation level of the ry. & forming part of the sides of cuttings through which the ry. ran, & within the ry. co.'s fences, was a mineral.—*HORTOWN (EARL) v. NORTH BRITISH RY. Co.* (1893), 30 Sc. L. R. 622.—*SCOT.*

t. — *Oil shale—When vendee took possession of land—Not within Act.*—A private Act passed in 1817, authorising the construction of a canal, reserved to the owners of lands through which the canal should be made "the mines & minerals lying within or under the lands." In 1909 the representative of the vendor of the lands brought an action against the proprietors of the canal in which he sought declarator of his right of property in a seam of oil shale subjacent & adjacent to the canal within the lands in question:—*Held*: (1) what was denoted by the term "mineral" fell to be ascertained as at 1818, the date when possession of the lands passed to defenders, & not at 1862, the date of the conveyance; (2) in 1818 oil shale was not described as a mineral in the vernacular of the mining world, the commercial world & land-owners.—*LINLITHGOW (MARQUIS) v. NORTH BRITISH RY. Co.* [1912] S. C. 1327.—*SCOT.*

Sect. 1.—Under general statutory codes: Sub-sects. 2 & 3, A. & B. (a) & (b).]

SUB-SECT. 2.—PURCHASE OF MINERALS.

See Railways Act, 1845, s. 77; Waterworks Act, 1847, s. 18.

339. Railways Act, 1845, ss. 75–85—Rights of vendor & purchaser governed by—To exclusion of common law.]—Where a railway co. purchase under their statutory powers the underlying minerals as well as the surface of land, the rights which arise from the purchase as between the co. & the vendor are determined by the above sects., & not on the common law; & their mutual rights are not altered by the fact that the co. has taken some of the underground strata as well as surface, & the landowner cannot recover compensation for ungotten coal until the time arrives for working the pits.—*Re GERARD (LORD) & LONDON & NORTH WESTERN RY. CO.*, [1895] 1 Q. B. 459; 64 L. J. Q. B. 260; 72 L. T. 142; 43 W. R. 374; 11 T. L. R. 170; 14 R. 201, C. A.

Annotations:—Expld. Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co. (1901), 85 L. T. 53. *Consd.* *Re* Carlisle & Northumberland County Council (1911), 10 L. G. R. 50; L. & N. W. Ry. v. Howley Park Coal & Cannel Co., [1911] 2 Ch. 97. *Refd.* Manchester Corpn. v. New Moss Colliery, [1906] 1 Ch. 278.

340. ——— Governs incorporating Act—Minerals under works constructed by virtue of incorporating Act can be acquired.]—BIRMINGHAM CANAL CO. v. CARTWRIGHT (1879), 11 Ch. D. 421; 48 L. J. Ch. 552; 40 L. T. 784; 27 W. R. 597.

Annotations:—Dbtd. L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562. *Mentd.* *Re* Blight, Blight v. Hartnell (1881), 45 L. T. 524.

341. Option of purchasing minerals given by—Power to purchase land under special Act.] ERRINGTON v. METROPOLITAN DISTRICT RY. CO., No. 39, *ante*.

342. ——— Time limit for purchase under—Land already acquired.]—ERRINGTON v. METROPOLITAN DISTRICT RY. CO., No. 39, *ante*.

343. ——— After expiry of statutory powers —If purchase incident to business.]—THOMPSON v. HICKMAN, [1907] 1 Ch. 550; 76 L. J. Ch. 254; 96 L. T. 454; 23 T. L. R. 311.

Annotations:—Mentd. Glyn v. Howell, [1909] 1 Ch. 666; Fowler v. Sugden (1916), 85 L. J. K. B. 1090.

344. ——— Partial purchase—Owner's rights as to residue.]—*Re* GERARD (LORD) & LONDON & NORTH WESTERN RY. CO., No. 339, *ante*.

345. ——— Purchase of stratum within statutory limit—No right to support from subjacent or adjacent minerals.]—A railway co. cannot avoid the provisions of the statutory mining code by purchasing a stratum of minerals below the surface within a limit & claiming a common law right of support for that stratum from subjacent or adjacent minerals.—LONDON & NORTH WESTERN RY. CO. v. HOWLEY PARK COAL & CANNEL CO., [1911] 2 Ch. 97; 80 L. J. Ch. 537; 104 L. T. 546; 27 T. L. R. 389; 55 Sol. Jo. 459, C. A.; *affd. sub nom.* HOWLEY PARK COAL & CANNEL CO. v. LONDON & NORTH WESTERN RY. CO., [1913] A. C. 11, H. L.

Annotations:—Mentd. St. John Peerage Claim, [1915] A. C. 282; Davies v. Powell Duffryn Steam Coal Co. (1920), 36 T. L. R. 358.

PART IV. SECT. 1, SUB-SECT. 3.—A.

*a. No right to conveyance of minerals—On payment of compensation for leaving minerals unworked.]—*A ry. co. which has given notice to a landowner under Railways (Scot.) Act, 1845, requiring him to leave unworked minerals lying under or near the ry. line, is not entitled, on payment to the landowner of the compensation due to him for leaving the minerals

unworked, to demand a conveyance of these minerals.—HAMILTON'S (DUKE) TRUSTEES v. CALEDONIAN RY. CO. (1905), 7 F. (Ct. of Sess.) 847.—SCOT.

PART IV. SECT. 1, SUB-SECT. 3.—B. (a).

347i. None without compensation—Statutory code applies.]—A ry. co. purchased under Railways (Scot.) Act,

SUB-SECT. 3.—MINERALS NOT PURCHASED.

A. In General.

346. No right to conveyance of minerals—Unless expressly purchased—Though land valued as building land.]—A railway co. compulsorily purchasing land is not entitled to a conveyance of the mines & minerals, unless they have been expressly purchased, even where the land has been valued & taken at a large price as building land.—*Re* METROPOLITAN DISTRICT RY. CO. & COTTON'S TRUSTEES (1881), 45 L. T. 103, C. A.

Annotation:—Mentd. Errington v. Met. Dist. Ry. (1882), 46 L. T. 443.

B. Right to Support.

(a) Under Railways Clauses Act, 1845.

347. None without compensation—Statutory code applies—Excluding common law right.]—A railway co. had taken certain land for the purposes of their railway by compulsory conveyance, & in the form as given by Railways Act, 1845, Schedule A., over & upon which land the co. made their railway. The owners of the mines below continued to work the mines:—*Held*: the railway co. was not entitled to prevent the owners of the mines from working them without paying compensation, notwithstanding that the railway was made upon the lands, & the mines could not be further worked without the probability of letting down the surface.—GREAT WESTERN RY. CO. v. FLETCHER (1860), 5 H. & N. 689; 2 L. T. 803; 6 Jur. N. S. 961; 8 W. R. 501; 157 E. R. 1355; *sub nom.* FLETCHER v. GREAT WESTERN RY. CO. 29 L. J. Ex. 253; 24 J. P. 516, Ex. Ch.; *affg.* S. C. *sub nom.* FLETCHER v. GREAT WESTERN RY. CO. (1859), 4 H. & N. 242.

Annotations:—Distd. R. v. Aire & Calder Navigation Undertakers (1861), 30 L. J. Q. B. 337. *Expld.* L. & N. W. Ry. v. Ackroyd (1862), 31 L. J. Ch. 588. *Folld.* G. W. Ry. v. Bennett (1867), L. R. 2 H. L. 27. *Distd.* Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613. *Consd.* Dunn v. Birmingham Canal Co. (1872), 41 L. J. Q. B. 121; Mid. Ry. v. Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; Pountney v. Clayton (1883), 11 Q. B. D. 820; Manchester Corpn. v. New Moss Colliery Ltd. (1905), 75 L. J. Ch. 145; L. & N. W. Ry. v. Howley Park Coal & Cannel Co., [1911] 2 Ch. 97. *Refd.* N. E. Ry. v. Elliott (1860), 2 De G. F. & J. 423; Stourbridge Navigation Co. v. Dudley (1860), 3 E. & E. 409; Bagnall v. L. & N. W. Ry. (1861), 5 L. T. 621; Consett Waterworks v. Ritson (1889), 22 Q. B. D. 318; L. & N. W. Ry. v. Evans, [1892] 2 Ch. 432; Manchester Corpn. v. New Moss Colliery, [1906] 2 Ch. 564.

348. ——— Support of tunnel.]—LONDON & NORTH WESTERN RY. CO. v. ACKROYD (1862), 31 L. J. Ch. 588; 6 L. T. 124; 8 Jur. N. S. 911; 10 W. R. 367.

Annotation:—Refd. L. & N. W. Ry. v. Howley Park Coal & Cannel Co., [1911] 2 Ch. 97.

349. ——— Though minerals necessary for support of railway.]—(1) A railway co. which had taken lands for the purposes of their railway, under Lands Act, 1845, & Railways Act, 1845, & had them conveyed to them by a conveyance in the usual form, are not entitled to prevent the owner of the mines, subjacent or adjacent, from working & winning away same without making compensation. It makes no difference that the mines & minerals are necessary for the support of the railway.

(2) If the co., after notice of intention to work,

1845, the rights of a vassal in whose feu-contract the minerals were reserved by the superior:—*Held*: the co. was not entitled, as proprietor of the surface or otherwise, to excavate minerals down to the formation level of the railway without compensating the superior.—DAVIDSON'S TRUSTEE v. CALEDONIAN RY. CO. (1899), 37 Sc. L. R. 150.—SCOT.

refuse to make compensation for the mines requisite for the support of their railway, they can only compel the mineowner to work his mines in a proper manner according to the custom of the district.—**GREAT WESTERN RY. CO. v. BENNETT** (1867), L. R. 2 H. L. 27; 36 L. J. Q. B. 133; 16 L. T. 186; 15 W. R. 647, H. L.

Annotations:—As to (1) **Distd.** Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613. **Consd.** Mid. Ry. v. Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; Pountney v. Clayton (1883), 11 Q. B. D. 820; Mid. Ry. v. Miles (1886), Ch. D. 632; Glasgow Corpn. v. Farie (1888), 13 App. Cas. 657; Mid. Ry. v. Robinson (1889), 15 App. Cas. 19. **Expld. & Distd.** L. & N. W. Ry. v. Evans, [1892] 2 Ch. 432. **Consd.** Ruabon Brick & Terra Cotta Co. v. G. W. Ry., [1893] 1 Ch. 427; New Moss Colliery v. Manchester Corpn., [1908] A. C. 117; Howley Park Coal & Cannel Co. v. L. & N. W. Ry., [1913] A. C. 11. **Refd.** Dunn v. Birmingham Canal Navigation (1872), L. R. 7 Q. B. 244; Hooper v. Bourne (1877), 2 Q. B. D. 339; Hooper v. Bourne (1880), 5 App. Cas. 1; Consett Waterworks Co. v. Ritson (1889), 22 Q. B. D. 318; Re Gerard & L. & N. W. Ry., [1895] 1 Q. B. 459; G. W. Ry. v. Blades, [1901] 2 Ch. 624; Eden v. N. E. Ry., [1907] A. C. 400; Carlisle v. Northumberland County Council (1911), 105 L. T. 797. *Generally, Mentd.* G. W. Ry. v. Carpalla United China Clay Co. (1908), 78 L. J. Ch. 105.

350. No implied right as against owners—Sale of superfluous land—Purchaser not entitled to subjacent support.]—POUNTNEY v. CLAYTON, No. 2174, *post*.

351. Prior special Act giving right—Subsequent adoption of general Act—Right not affected.]—In 1835 the L. Ry. Co., constituted under an Act, which excepted mines from land purchased, & allowed the landowners to work them, provided they did no damage to the railway, bought land for their railway. In 1836, the Y. Ry. Co. was constituted under an Act containing provisions as to mines similar to those of Railways Act, 1845. Afterwards the Y. co. purchased the L. railway under the powers of an Act of 1844, which provided, by s. 4, that on completion of the purchase, the L. Railway Act should be repealed, provided that the repeal should not affect anything done under the Act, but that all acts done under it should remain as valid as if there had been no repeal. S. 9 provided that all the provisions of the Y. Railway Act, so far as they were not repealed, altered or otherwise provided for by the Act of 1844, or by any Statute, should apply to the L. Railway:—*Held:* the provisions as to mines in the Y. Railway Act were not, by the Act of 1844, made applicable to the L. railway, so as to give the owners of the mines under the lands purchased by the L. co. a right to work them to the injury of the railway if the Y. Ry. Co. did not choose to purchase them, but that the unqualified right to support, which was incident to the grant of the lands for the purpose of the railway, remained unaffected.—**NORTH EASTERN RY. CO. v. CROSLAND** (1862), 4 De G. F. & J. 550; 1 New Rep. 72; 32 L. J. Ch. 353; 7 L. T. 765; 11 W. R. 83; 45 E. R. 1297, L. J.

Annotations:—Distd. R. v. L. & N. W. Ry., [1899] 1 Q. B. 921. **Apld.** L. & N. W. Ry. v. Walker, [1903] A. C. 289. **Mentd.** Elliot v. N. E. Ry. (1863), 10 H. L. Cas. 333.

352. ——— ——— ———.]—**GREAT WESTERN RY. CO. v. CEFN CRIBBWR BRICK CO.**, [1894] 2 Ch. 157; 63 L. J. Ch. 500; 70 L. T. 279; 42 W. R. 493; 8 R. 178.

350 i. Implied right as against owners—Or subsequent vendee.]—A grant of land, made under Railways (Scot.) Act, 1845, for the construction & use of a ry., in the absence of any contrary intention appearing *ex facie*, carries with it by implication a right to reasonable & necessary support by the subjacent strata or adjacent lands of the grantor, whether such strata or lands continue to belong to the grantor, or are conveyed by him, subsequent to the date of the grant, to another

person. — **NORTH BRITISH RY. v. TURNERS** (1904), 6 F. (Ct. of Sess.) 900.—**SCOT.**

PART IV. SECT. 1, SUB-SECT. 3.— B. (b).

w. R. S. Can. 1906, c. 37 — *right to support—Subjacent & adjacent minerals—Compensation to owner.]—*The effect of R. S. Can. 1906, c. 37, with regard to the expropriation of land by a ry. co. differs from that

Annotation:—Refd. R. v. L. & N. W. Ry., [1899] 1 Q. B. 921.

353. From minerals outside statutory or prescribed limit.]—As between vendor & vendee Railways Act, 1845, ss. 77–85, so far as support is concerned, do not apply to mines outside the forty yards or other the prescribed limit mentioned in s. 78; consequently, as between a vendor of land to a railway co. & the railway co., upon a purchase subject to those sects. the railway co. enjoys a natural right of support for its railway, from minerals belonging to the vendor lying under the other lands outside the statutory limit.—**HOWLEY PARK COAL & CANNEL CO. v. LONDON & NORTH WESTERN RY. CO.**, [1913] A. C. 11; 82 L. J. Ch. 76; 107 L. T. 625; 29 T. L. R. 35; 57 Sol. Jo. 42, H. L.; *affg.* S. C. *sub nom.* LONDON & NORTH WESTERN RY. CO. v. HOWLEY PARK COAL & CANNEL CO., [1911] 2 Ch. 97, C. A.

Annotations:—Refd. St. John Peccage Claim, [1916] A. C. 282. **Mentd.** Davies v. Powell Duffryn Steam Coal Co. (1920), 36 T. L. R. 358.

Under private Acts.]—See Sect. 2, sub-sect. 1, *post*.

(b) Under other Statutory Codes.

354. Waterworks Act, 1847—Condition precedent to enforce—Plans must be deposited.]—The deposit of plans of their underground works, pursuant to Waterworks Act, 1847, ss. 19, 20, is a condition precedent to the right of a co. incorporated under that Act to recover for injuries caused to their pipes by the ordinary & usual workings of a subjacent mine.—**SOUTH STAFFORDSHIRE WATERWORKS CO. v. MASON (R.) & SONS** (1886), 56 L. J. Q. B. 255; 57 L. T. 116; 3 T. L. R. 217, D. C.

355. ——— Land allotted under Inclosure Act—Subject to right of lord of manor to minerals—Promoters not entitled to support.]—By an inclosure Act the common lands of a manor, the fee simple of which, with the mines & minerals thereunder, & power to work same, had previously been vested in the lord of the manor, subject to certain rights of common of pasture, were inclosed & divided into allotments. The Act provided that the lord of the manor should enjoy all mines & minerals as fully & freely as if the Act had not passed, without paying damages or making satisfaction for so doing, & empowered him to make all convenient ways, & for that purpose to remove fences, trees or other obstructions. The Act further provided that the annual rental of 500 acres, out of about 20,000, should be set apart to provide for the compensation to which the allottees might thereafter be entitled, any deficiency to be made up by means of a rate levied upon the allottees. Afterwards plffs., a waterworks co. incorporated under an Act of Parliament, which incorporated lands Act, 1845, & Waterworks Act, 1847, purchased compulsorily from the representative of the allottee land forming part of one of such allotments, & constructed a reservoir thereon. Deft., claiming title under the lord of the manor, gave notice to plffs. of his intention to work the coal under such land within forty yards of the reservoir.

of Railways Act, 1845, in that under the former Act the co. acquiring the surface has a right of support from minerals subjacent & adjacent to the line, & the mineral owner is entitled to compensation for the loss arising from the restriction of his rights, without waiting until he wishes to work the minerals; this compensation is to be ascertained as at the date of the deposit of plans, & once for all.—**DAVIES v. JAMES BAY RY. CO.**, [1914] A. C. 1043; 26 D. L. R. 450 P. C.—**CAN.**

Sect. 1.—Under general statutory codes: Sub-sect. 3, B. (b) & C

Pltfs. did not offer to purchase the minerals, & deft. worked the coal according to the usual course & practice of mining, & thereby caused damage to the reservoir. Pltfs. sued in respect of such damage:—*Held*: the inclosure Act empowered the lord of the manor & his representatives to work the minerals in such a manner as to let down the surface of the land without paying damages or making compensation to the allottees.—*CONSETT WATERWORKS CO. v. RITSON* (1889), 22 Q. B. D. 702; 64 L. J. Ch. 293, n.; 124 L. T. 818, n.; 59 J. P. 199; 43 W. R. 122, n.; 5 T. L. R. 435; 13 R. 123, n., C. A.

Annotations:—*Appld.* *Thompson v. Mein*, [1893] W. N. 202. *Consd.* *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305; L. & N. W. Ry. v. *Howley Park Coal & Cannel Co.*, [1911] 2 Ch. 97; *Consett Industrial & Provident Soc. v. Consett Iron Co.* (1921), 124 L. T. 809. *Refd.* L. & N. W. Ry. v. *Evans*, [1892] 2 Ch. 432; *Bell v. Dudley*, [1895] 1 Ch. 182; *Manchester Corp'n. v. New Moss Colliery*, [1906] 2 Ch. 564. *Mentd.* *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614.

356. ——— Land purchased by agreement—Direct & lateral support.—Under a special Act, which gave resps. power to purchase land by agreement, but not compulsorily, & incorporated Waterworks Act, 1847, resps. bought land from T., including all mines & minerals underneath, & also bought adjacent land from S., who reserved the right to work the coal underneath without making any compensation. Resps. constructed waterworks upon both pieces of land. Applts., who were lessees of the coal from S., gave resps. notice, under Waterworks Act, 1847, s. 22, of their intention to work the coal under the land bought from S. Resps. gave no counter-notice:—*Held*: the land bought from T. having been bought by agreement enjoyed the common law right it had always possessed to lateral support from the land bought from S., this right not being affected by Waterworks Act, 1847, & applts. were entitled to an injunction restraining the lessees from working the coal either within or beyond the forty yards belt round the waterworks so as to damage the land bought from T.—*NEW MOSS COLLIERY, LTD. v. MANCHESTER CORPN.*, [1908] A. C. 117; 77 L. J. Ch. 392; 98 L. T. 467; 72 J. P. 169; 24 T. L. R. 386; 6 L. G. R. 809; *sub nom.* *MANCHESTER CORPN. v. NEW MOSS COLLIERY, LTD.* 52 Sol. Jo. 334, H. L.; *affg.* S. C. *sub nom.* *MANCHESTER CORPN. v. NEW MOSS COLLIERY, LTD.*, [1906] 2 Ch. 564, C. A.

Annotations:—*Distd.* *Howley Park Coal & Cannel Co. v. L. & N. W. Ry.*, [1913] A. C. 11. *Refd.* *Joicey v. N. E. Ry.*

PART IV. SECT. 1, SUB-SECT. 3.—C.

360 i. Notice of intention to work—Bonâ fide intention to work minerals—As condition precedent—Working may be by owner or lessee.—The owner or lessee of minerals under a railway is justified in giving the railway co. notice under Railways (Scot.) Act, 1845 of his intention to work the minerals only if he has a real & bona fide desire to work the minerals by himself or by his licensees.—*NORTH BRITISH RY. v. BUDHILL COAL & SANDSTONE CO.*, [1909] S. C. 277.—*SCOT.*

360 ii. ——— Pleading.—A quarry-master gave notice to a ry. co., under Railways (Scot.) Act, 1845, that he intended to work freestone belonging to him under the co.'s line: the co. brought a note of suspension & interdict, averring, *inter alia*, that in the ordinary course of working the quarry the freestone in question would not be worked for many years, & that the notice had not been bonâ fide given,

but was merely intended to raise up a fictitious claim against the co.:—*Held*: these averments were relevant.—*GLASGOW & SOUTH WESTERN RY. CO. v. BAIN* (1893), 21 R. (Ct. of Sess.) 134; 31 Sc. L. R. 98.—*SCOT.*

y. Counter notice—What amounts to notice.—S. 112 of a private Act of 1817, under which a co. acquired lands for construction of a canal, reserved to the vendors the mines & minerals lying within or under such lands, & permitted them to work the minerals subject to an obligation not to injure the canal. Sect. 113 of the same Act empowered the co., in case they should find it necessary for the safety of the canal, "to stop the working" of the minerals on making satisfaction for their value to the owners:—*Held*: (1) the two sects. were independent sects.; (2) the co. had not exercised the right of "stopping the working" of the shale conferred on them by sect. 113, but had merely intimated that they held the pursuer bound by the obliga-

(1906), 76 L. J. K. B. 253; *Jary v. Barnsley Corp'n.*, [1907] 2 Ch. 600.

357. Public Health Act, 1875 (c. 55)—Sewer—Subjacent support.—*Re DUDLEY CORPN.*, No. 381, *post*.

358. ——— Subjacent & adjacent minerals—Promoters entitled to support from.—*JARY v. BARNSELY CORPN.*, [1907] 2 Ch. 600; 76 L. J. Ch. 593; 97 L. T. 507; 71 J. P. 468; 23 T. L. R. 689; 5 L. G. R. 1145.

359. Gasworks Act, 1847—Pipes laid prior to Act—Right after Act adopted.—Defts. were entitled to work the minerals under the surface of a road which had been laid down under an inclosure Act. In 1874 a gas co., with the consent of the surveyors of highways, but without the consent of the lord of the manor, laid down mains & gas pipes under the soil of the road. In 1878 the gas co. was dissolved by a local Act of Parliament, which incorporated the Gasworks Clauses Acts, 1847 & 1871, & the proprietors of the undertaking were incorporated by the name of the N. Gas Co. & the property of the dissolved co. was vested in the incorporated co., & power was given to them to maintain or extend the existing gasworks, & to do such acts as they might think fit for making, stowing & supplying gas. The working of the minerals under the road by defts. caused damage to the mains & gas pipes:—*Held*: (1) the Act of incorporation had given pltfs. a right of support for all their gas pipes, including those laid down before the Act, & they were entitled to recover for the damage occasioned by all workings carried on after the date of the Act; (2) defts., having been deprived of their right to work the minerals to the extent to which it became necessary to leave them for the support of the gas pipes, were entitled to compensation under Gasworks Act, 1847, s. 6, but that such compensation could not be recovered by action or counter-claim, but must be assessed by arbn.—*NORMANTON GAS CO. v. POPE & PEARSON, LTD.* (1883), 52 L. J. Q. B. 629; 49 L. T. 798; 32 W. R. 134, C. A.

Annotations:—*As to* (2) *Consd.* *Truman v. L. B. & S. C. Ry.* (1883), 25 Ch. D. 423. *Distd.* *South Staffordshire Waterworks Co. v. Mason* (1886), 56 L. J. Q. B. 255. *Refd.* *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614. *Generally, Mentd.* *Schweder v. Worthing Gas Light & Coke Co.* (1912), 77 J. P. 41.

C. Notice of Intention to Work and Counter-notice.

See Railways Act, 1845, s. 78; Waterworks Act, 1847, s. 22.

360. Notice of intention to work—Bonâ fide intention to work minerals—As condition precedent—Working may be by lessees or licensees.—*MID-*

tion not to injure the canal imposed on him by s. 112.—*LINLITHGOW (MARQUIS) v. NORTH BRITISH RY. CO.*, [1914] S. C. (H. L.) 38.—*SCOT.*

z. ——— Effect of—Whether an estoppel.—A quarry master served a notice on a ry. co. under Railways (Scot.) Act, 1845, intimating his intention of working the freestone underneath the railway, & the co. sent a counter notice, requiring the quarry master to leave the freestone unworked, & intimating their willingness to pay compensation:—*Held*: the notice did not preclude the co. from subsequently maintaining that they were the owners of the freestone, & did not bind them to pay compensation in the event of it being found that they were the owners.—*CALEDONIAN RY. CO. v. SYMINGTON*, [1911] S. C. 552; 48 Sc. L. R. 539.—*SCOT.*

a. ——— Owner entitled to compensation.—Under Waterworks Clauses Act, 1847, a corp'n. placed an

Collieries & Pontypridd Waterworks Co., [1901] 2 K. B. 798.

363. — Effect of omission to give—Right of owner to work minerals—According to custom & in proper manner.]—GREAT WESTERN RY. CO. v. BENNETT, No. 349, *ante*.

Annotations :-—**Consd.** *Re Gerard & L. & N. W. Ry.*, [1805] 1 Q. B. 459. **Refd.** *G. W. Ry. v. Blades*, [1901] 2 Ch. 624; *Re Todd, Birleston & N. E. Ry.*, [1903] 1 K. 1 603. **Mentd.** *G. W. Ry. v. Carpalla United China Co.*, [1909] 1 Ch. 218.

366. — May be given at any time.—For security of works.]—Though a mine owner may give notice under Railways Act, 1845, & Railways (Scotland) Act, 1845, of his intention to work out the minerals under a railway, the railway proprietors are not bound to any fixed period after that notice within which they must give a counter-notice. They can stop the working at any time thereafter that they fear danger to the line, by a notice of their willingness to pay compensation for the minerals they desire left standing. A. & B. were the lessees of the minerals, *viz.*, limestone, under a railway passing through C. They, on July 8, 1878, gave notice in terms of Railways (Scotland) Act, 1845, ss. 70–72, to the proprietors of the railway that they were desirous of working, & intended to work, the mines & minerals including limestone lying under the railway. The proprietors of the railway did not, before the expiration of thirty days, give notice to A. & B. of their desire to have such mines & minerals left unworked, but they did give such notice on Feb. 20, 1879, offering compensation for the limestone unworked. A. & B. contended that the notice of Feb. 20, 1879, was too late to prevent them working out the limestone; such notice to be valid required to be given before the expiration of thirty days from the date of their notice of July 8, 1878:—*Held*: the notice of the railway proprietors was valid.—*DIXON v. CALEDONIAN & GLASGOW & SOUTH WESTERN RY. COS.* (1880), 5 App. Cas. 820; 43 L. T. 518; 45 J. P. 108; 19 W. R. 249, H. L.

Annotations:—**Consd.** Howley Park Coal & Cannel Co. v. L. & N. W. Ry., [1913] A. C. 11. **Refd.** Mid. Ry. v. Haunehood Brick & Tile Co. (1882), 20 Ch. D. 552; Pountney v. Clayton (1883), 11 Q. B. D. 820; Ruabon Brick & Terra Cotta Co. v. G. W. Ry., [1893] 1 Ch. 427. **Mentd.** Mid.

1 K. B. 68. **Consd.** *Re* Richard & G. W. Ry.,
Refd. *Re* Iwllfa & Merthyr Duro Steam

absolute property. In a question with the next heirs:--*Held*: the petitioner was entitled to payment as craved, in respect that the sum consigned represented fruits or profits of the estate of which the petitioner had been deprived by the embargo.—*FAIRIE v. FAIRIE'S TUTOR*, [1920] S. C. 276.—**SCOT.**

b. — second notice limiting restriction—Effect of second notice.]— Notice was given by the owners of their intention "to work the mines &

minerals " under land expropriated for a ry. line. A notice not to proceed with mining operations under the land was given. The matter was referred & during the progress of the arbitration an amended notice was given limiting the restriction to "upper seams" only:—*Held*: giving a second notice after commencement of the arbitration, could not limit its subject matter & the first notice was binding.—PACIFIC CO-OPERATIVE STEAM COAL CO., LTD. v. RAILWAY COMRS. (1902), 2 S. R. N. S. W. 281.—AUS.

Sect. 1.—Under general statutory codes: Sub-sect. 3, C., D. & E. (a) &

Ry. & Kettering, Thrapston & Huntingdon Ry. v. Robinson (1889), 15 App. Cas. 19; N. B. Ry. v. Budhill Coal & Sandstone Co., [1910] A. C. 116.

367. Interest on sum awarded—Not payable from date of counter-notice.]—Where an owner, lessee or occupier of mines or minerals lying under or near a railway, gives notice to the railway co., under Railways Act, 1845, s. 78, of his intention to work same, & the co. give notice of their willingness to make compensation, & the amount of compensation is determined by arbn. under Lands Act, 1845, the arbitrator has no power to award interest, in respect of the time between the giving of notice by the co. & the making of the award, upon the sum awarded as compensation.—*Re RICHARD & GREAT WESTERN RY. Co.*, [1905] 1 K. B. 68; 74 L. J. K. B. 9; 91 L. T. 724; 69 J. P. 17; 53 W. R. 83; 21 T. L. R. 37; 49 Sol. Jo. 53, C. A.

Annotation:—Mentd. Borthwick v. Elderslie S.S. Co. (1905), 74 L. J. K. B. 772.

Notice to treat generally.]—See Part VI., post.

368. Notice by lessee—Counter-notice to lessee—Rights of assignee of reversioner.]—In claims for compensation for not working mines adjoining a railway & railway works, Railways Act, 1845, ss. 6, 78, must be read together. S. 6 gives a general right to compensation to "owners & occupiers of, & all other parties interested in, lands taken or injuriously affected by the construction" of the railway.—In s. 78 the person entitled to give notice to the directors of a railway co of his intention, within thirty days, to work a mine is the "owner, lessee or occupier," who has the right & the power to work it—the directors are entitled to have an inspection of the mine, & to offer compensation to him for not working, which compensation may be settled as therein mentioned. The compensation thus settled is that to which he is individually entitled, according to the extent of his interest. If the lessee is the person thus giving notice, & receiving compensation, the owner, if he can show a right of his own beyond that of his lessee who has been compensated, is also entitled to compensation under s. 6. The words "he" & "his" in two of the parts of s. 78 refer to the person entitled to compensation, whether owner, lessee or occupier.—The word "lands" in s. 6 includes mines; & the sect., in regard to the compensation thereby provided, is to be read with reference to the Lands Act, 1845. After compensation agreed on, & obtained or tendered, a perpetual injunction may be granted against the working of the mines.

R. was the owner of lands with coal & ironstone under them. The surface of a portion of the lands, about $4\frac{1}{2}$ acres, had already been conveyed to a railway co., & a railway & railway works had been constructed thereon. The mines had not been conveyed. R., by a verbal agreement, afterwards converted into a lease, let into possession H., who was to work the mines, & under the name of an acreage royalty or rent, was to pay a sum of £150 an acre for each of the $4\frac{1}{2}$ acres until the money paid reached an amount which was the calculated value of the minerals in that part of the mine. Had this lease been, in fact, duly followed, there was time enough for the tenant to work out all the minerals in the $4\frac{1}{2}$ acres. It was not followed. H. gave notice, under Railways Act, s. 78, to the railway directors of his intention to work the mine under the $4\frac{1}{2}$ acres. The directors, though not within the time mentioned in the statute, gave a counter-notice, obtained an inspection of the mine,

& agreed with H. as to his compensation. In the agreement H. covenanted to pay the \$150 acreage royalty, & to use his best endeavours to facilitate the settlement of his lessor's compensation. He did neither, & died insolvent, having received from the directors different portions of his compensation. His exors. at first worked the mine, but were accused by the lessors of repeated breaches of covenant, & on a bill being filed against them compromised the matter by surrendering the lease of the whole colliery, the $4\frac{1}{2}$ acres being therein included. The minerals under the $4\frac{1}{2}$ had not then been fully worked out. The lessors sold the fee of the whole mine to S. Both they & S. were ignorant of the dealings which had taken place between the directors & H.; S. gave notice to the directors of his intention to work the mine under the $4\frac{1}{2}$ acres; they gave a counter-notice, & offered to pay him such compensation as he might be found entitled to, having regard to that which had already been paid to H. S. refused to treat with them on that footing. They filed a bill to restrain him from working & in the bill made the same qualified offer of compensation:—*Held*: (1) on these terms they were entitled to a perpetual injunction; (2) as in their bill they had made this offer of compensation, they were entitled to the costs of the appeal.—*SMITH v. GREAT WESTERN RY. Co.* (1877), 3 App. Cas. 165; 47 L. J. Ch. 97; 37 L. T. 645; 42 J. P. 404; *sub nom.* *WESTERN RY. Co. v. SMITH*, 26 W. R. 130, II. L.; *affg.* S. C. *sub nom.* *GREAT WESTERN RY. Co. v. SMITH* (1876), 2 Ch. D. 235, C. A.

Annotations:—As to (1) Consd. Consett Waterworks Co. v. Ritson (1889), 22 Q. B. D. 318; G. N. Ry. v. I. R. Comrs., [1899] 2 Q. B. 652; L. & N. W. Ry. v. Howley Park Coal & Cannel Co., [1911] 2 Ch. 97. *Refd.* Dixon v. Cale, & Glasgow & S. W. Iry. (1880), 5 App. Cas. 820; Holliday v. Wakefield Corpn., [1891] A. C. 81; R. v. L. & N. W. Ry., [1894] 2 Q. B. 512; Bwlfa v. Merthyr Dare Steam Collieries v. Pontypridd Waterworks Co., [1903] A. C. 426; Eden v. N. E. Ry., [1907] A. C. 400. *Generally, Mentd.* Manchester Corpn. v. New Moss Colliery, [1906] 1 Ch. 278; Parker v. Jones, [1910] 2 K. B. 32.

Under private Acts.]—See Sect. 2, sub-sect. 2, post.

D. Mining Communications.

See Railways Act, 1845, ss. 80, 81; Waterworks Act, 1847, ss. 24, 25.

369. Railways Act, 1845—Mineral property surrounded by railways—Right of access by underground ways—Owner entitled to extra cost of working.]—*MIDLAND RY. Co. v. MILES* (1886), 33 Ch. D. 632; 55 L. J. Ch. 745; 55 L. T. 428; 35 W. R. 76; 2 T. L. R. 775.

Annotations:—Consd. Ruabon Brick & Terra Cotta Co. v. G. W. Ry., [1893] 1 Ch. 427. *Refd.* L. & N. W. Ry. v. Howley Park Coal & Cannel Co., [1911] 2 Ch. 97. *Mentd.* G. W. Ry. v. Blades, [1901] 2 Ch. 624.

370. — Loss of right to sink shaft—Lessee entitled to compensation.]—*Re MASTERS & GREAT WESTERN RY. Co.*, No. 300, *ante*.

E. Compensation when Working stopped.

(a) *Under Railways Clauses Act, 1845.*

See Railways Act, 1845, s. 78.

371. By what statute right regulated—Claim under s. 78—Provisions of Lands Act, 1845, applicable.]—*R. v. LONDON & NORTH WESTERN RY. Co.*, [1894] 2 Q. B. 512; 63 L. J. Q. B. 695; 58 J. P. 719; 10 R. 359.

Annotations:—Refd. R. v. St. Giles, Camberwell (1897), 66 L. J. Q. B. 337; *Smith v. Chorley District Council*, [1897] 1 Q. B. 532.

372. — Subsequent Act incorporating Railways Act, 1845, & repealing prior Act—Proviso in repealing Act saving rights under repealed Act.]—Land was bought by a railway co. in 1839, the conveyance being expressed to be in accordance

with a special Act by which minerals were to be deemed to be excepted out of the purchase & the mining rights were defined. A special Act of 1846 repealed the prior Act with a proviso that the repeal should not affect any conveyance, contract or thing executed made or done under the repealed Act. Railways Act, 1845, & Lands Act, 1845, were incorporated in the Act of 1846. The owner of minerals under the land gave the co. notice of his intention to work the minerals & claimed that the mining rights were regulated by the Acts of 1845 & 1846 & required an arbn. under Lands Act, 1845. The co. attended the arbn. under protest, & the umpire made an award giving the owner of the minerals purchase-money & compensation under Lands Act, 1845. The owner having sued the co. on the award to recover the sum awarded & the costs of the arbn.:—*Held*: (1) the effect of the proviso in the Act of 1846 was that the mining rights were regulated by the repealed Act & not by Railways Act, 1845; (2) the arbn. & award were *ultra vires*; (3) the owner of the minerals was not entitled to the sum awarded or to the costs of the arbn., & the co. was entitled to the costs of the arbn. & award.—*LONDON & NORTH WESTERN RY. CO. v. WALKER*, [1903] A. C. 289; 72 L. J. K. B. 578; 88 L. T. 705; 19 T. L. R. 519, H. L.

Annotation:—*Generally, Mentd.* Rugby Portland Cement Co. v. L. & N. W. Ry. (1908), 98 L. T. 880.

373. Basis of assessment—Prospective damage—Capable of immediate ascertainment.—*WHITEHOUSE v. WOLVERHAMPTON & WALSALL RY. CO.* (1869), L. R. 5 Exch. 6; 39 L. J. Ex. 1; 21 L. T. 558; 18 W. R. 147, Ex. Ch.

Annotation:—*Consd.* Holliday v. Wakefield Corpn., [1891] A. C. 81.

374. — Full value of minerals required to be left unworked—Less cost of working them.—The compensation payable by a railway co. under Railways Act, 1845, s. 78, in respect of such mines as they require to be left unworked is a full value of the minerals required to be left unworked, namely, what the minerals would have sold for if worked, less the cost of working them.—*EDEN v. NORTH EASTERN RY. CO.*, [1907] A. C. 400; 76 L. J. K. B. 940; 97 L. T. 254; 71 J. P. 450; 23 T. L. R. 685; 51 Sol. Jo. 623, H. L.; *revsq.* S. C. *sub nom.* JOICEY (JAMES) & CO., LTD. & EDEN'S EXECUTORS v. NORTH EASTERN RY. CO., [1907] 1 K. B. 402.

Annotation:—*Consd.* Rugby Portland Cement Co. v. L. & N. W. Ry., [1908] 2 K. B. 606.

375. — Lessee who may exhaust mines—Treated as absolute owner—Compensation to reversioner limited to loss on royalties.—*SMITH v. GREAT WESTERN RY. CO.*, No. 368, *ante*.

376. — Lessee's right to sink shaft—Lessee tenant of surface.—*Re MASTERS & GREAT WESTERN RY. CO.*, No. 300, *ante*.

Under private Acts.—*See* Sect. 2, sub-sect. 3, *post*.

PART IV. SECT. 1, SUB-SECT. 3.— E. (b).

c. Land in lease containing coal taken for railway—Principles of assessing compensation to be paid lessors & lessees, where coal not to be worked.—Coal bearing land was leased by the owners to a colliery co. for a term of which about 30 years had still to run. The lessees were at liberty to mine under any part of the land, & to pay a "fixed rent" of £700, & "rent or royalty" at a specified rate on all coal, etc., over & above such quantity as might be worked in respect of the fixed rent, & might work such quantity of coal, etc., as should, at the specified

rate of royalty, produce £700 without paying rent or royalty in respect of it, with permission to make up any deficiency in the amount worked in an year in the succeeding year. A strip of the land was resumed by the Railway Commissioners, & the lessors & lessees gave notice of their intention to work the coal under & within forty yards of the boundary of the strip. The Commissioners forbade such working except so far as might be necessary to connect the workings on either side of the strip. The lessors brought an action for the assessment of compensation for loss & injury caused by the prohibition:—*Held*: lessors were en-

titled to compensation as for a present interference with a present proprietary right; & the present value should be calculated as at the date when the notice not to work was given; & a deduction made from each annual instalment of a sum bearing the same proportion to £700, as the probable output from the inhibited area would have borne to the total output from the mine; & interest should not be awarded in respect of the period between the giving of the notice & the making of the assessment.—*NEW SOUTH WALES RAILWAY COMRS. v. PERPETUAL TRUSTEE CO., LTD.* (1905), 3 C. L. R. 27.—*AUS.*

(b) Under other Statutory Codes.

See Waterworks Act, 1847, s. 22.

377. Waterworks Act, 1847—Damage by severance of minerals—Promoters not required to purchase.—*Re HUDDERSFIELD CORPN. & JACOMB*, No. 85, *ante*.

378. — Compensation for prospective prevention.—(1) Under Waterworks Act, 1847, compensation for the prospective prevention of the working of the mine by reason of leakage from a reservoir cannot be awarded at any time before the working has approached the limits mentioned in s. 22.

(2) *Qu.*: whether the mine owner could on reaching those limits recover compensation under s. 25 if the undertaker refused to take the mine under s. 22.—*HOLLIDAY v. WAKEFIELD CORPN.*, [1891] A. C. 81; 60 L. J. Q. B. 361; 64 L. T. 1; 40 W. R. 129; 7 T. L. R. 153, H. L.

Annotations:—*As to* (2) *Refd.* *Re* Gerard & L. & N. W. Ry., [1895] 1 Q. B. 459; *Fletcher v. Birkenhead Corpn.*, [1906] 1 K. B. 605. *Generally, Mentd.* *Re* Gonty & M. S. & L. Ry., [1896] 2 Q. B. 439; *G. E. Ry. v. L. C. C.* (1906), 51 Sol. Jo. 132; *Joicey v. N. E. Ry.* (1906), 76 L. J. K. B. 253; *Manchester Corpn. v. New Moss Colliery*, [1906] 2 Ch. 564.

379. — Basis of assessment—Right of support allunde.—Appls. were the owners of two water pipes called the C. pipe & the M. pipe. The pipes were laid so close together that support from subjacent minerals could not be removed from one pipe without affecting the support of the other. The C. pipe was laid under a local Act, & for it applts. had a common law right of support. The M. pipe was laid under an Act which incorporated Waterworks Act, 1847. Resps., who were the owners of the subjacent minerals, gave notice under Waterworks Act, 1847, s. 22, of their intention to work the minerals under the M. pipe. Appls. thereupon gave a counter-notice under the Act intimating their willingness to pay compensation under the Act so far as resps. were entitled thereto, & requiring them to leave the minerals unworked. Resps. accordingly left the minerals unworked, & the amount of compensation was referred to arbn. in the usual course under the Act. Appls. reserved all their right of support to the C. pipe. The arbitrator awarded a sum as compensation for the non-working of the minerals under the M. pipe, but applts. refused to pay it, on the ground that the right of support for the C. pipe necessarily involved abstention from working the minerals under the M. pipe, & that there was no damage to resps. for which they were entitled to compensation:—*Held*: applts. having elected to put in force the procedure provided by the statute, were bound to pay the compensation fixed by the arbitrator in accordance with it, it not appearing that the arbitrator had in any way exceeded his jurisdiction.—*EDINBURGH & DISTRICT WATER TRUSTEES v. CLIPPENS OIL CO.* (1902), 87 L. T. 275, H. L.

380. — Rise in value of coal after

Sect. 1.—Under general statutory codes: Sub-sect. 3, E. (b). Sect. 2: Sub-sect. 1, A. & B.; sub-sect. 2.]

counter-notice.]—BWLLEA & MERTHYR DARE STEAM COLLIERIES (1891), LTD. v. PONTYPRIDD WATERWORKS CO., No. 186, ante.

381. Public Health Act, 1875 (c. 55)—Sewer—Compensation for leaving mines unworked—Not for risk of percolation.]—Public Health Act, 1875, imposes on landowners, through whose land a sewer is run under that Act, an obligation to preserve to such sewer subjacent support, & gives them a right to immediate compensation for being deprived of free power to work subjacent mines, but not for the risk of percolation of sewage into the subjacent mines.—*Re DUDLEY CORPN.* (1881), 8 Q. B. D. 86; 51 L. J. Q. B. 121; 45 L. T. 733; 46 J. P. 340, C. A.

Annotations:—Consd. Normanton Gas Co. v. Pope & Pearson (1883), 52 L. J. Q. B. 629; *South Staffordshire Waterworks Co. v. Mason* (1886), 56 L. J. Q. B. 255; *L. & N. W. Ry. v. Evans*, [1893] 1 Ch. 16; *Jary v. Barnsley Corp.*, [1907] 2 Ch. 600. *Reid. Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53; *Manchester Corp. v. New Moss Colliery*, [1906] 1 Ch. 278.

Under private Acts.]—See Sect. 2, sub-sect. 3, post.

SECT. 2.—UNDER PRIVATE ACTS.

SUB-SECT. 1.—RIGHT TO SUPPORT.

A. Canal Acts.

382. From minerals outside statutory limits—Promoters entitled to on making compensation.]—MIDLAND RY. CO. v. CHECKLEY (1867), L. R. 4 Eq. 19; 36 L. J. Ch. 380; 16 L. T. 260; 31 J. P. 500; 15 W. R. 671.

Annotations:—Consd. G. W. Ry. v. Smith (1876), 2 Ch. D. 235. *Mentd. Hext v. Gill* (1872), 7 Ch. App. 705, n.; *Mid. Ry. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552; *Tucker v. Linger* (1882), 21 Ch. D. 18; *Robinson v. Milne* (1884), 53 L. J. Ch. 1070; *Jersey v. Neath Poor Law Union Grdms.* (1889), 22 Q. B. D. 555; *Manchester Corp. v. New Moss Colliery* (1905), 75 L. J. Ch. 145; *N. B. Ry. v. Budhill Coal & Sandstone Co.*, [1910] A. C. 116.

383. Implied right—Compensation barred after lapse of time.]—A private Act passed in 1754 empowered the undertakers to make & maintain a canal for the use of the public, the undertakers first giving satisfaction to the owners of such lands as should be digged, cut, removed or otherwise made use of, or that in anywise should be diminished, prejudiced or damaged by or for the carrying on, effecting or preserving the navigation. The Act contained no compulsory powers for the purchase of land, & no express provision as to mines or minerals, & the minerals were not taken into account in assessing the actual compensation exacted. Pltfs., in whom the canal was now vested, sought to restrain defts., who were owners of coal subjacent to the canal, from working their coal so as to damage the canal:—*Held*: the statutory authority to make & maintain the canal involved a right of subjacent support, & the compensation clause was wide enough to include compensation for minerals, but, having regard to the lapse of time, it must be assumed that all compensation had been paid, which the adjacent owners had intended to claim.—*LONDON & NORTH WESTERN RY. CO. v. EVANS*, [1893] 1 Ch. 16; 62 L. J. Ch. 1; 67 L. T. 630; 41 W. R. 149; 9 T. L. R. 50; 2 R. 120, C. A.

Annotations:—Apld. G. W. Ry. v. Cefn Cribbwr Brick Co. (1894), 63 L. J. Ch. 500. *Consd. Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53. *Reid. Bradford Corp. v. Pickles*, [1894] 3 Ch. 53; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.* (1898), 67 L. J. Ch. 666; *Bishop Auckland Industrial Co-op. Flour & Provision Soc. v. Butterknowle Colliery Co.* (1904), 73 L. J. Ch. 635; *Clippens Oil Co. v. Edinburgh & District Water Trustees*, [1904] A. C. 64; *Cannon Brewery Co. v.*

Central Control Board (Liquor Traffic), [1918] 2 Ch. 101; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508; *Re Ellis & Ruislip-Northwood U. D. C.*, [1920] 1 K. B. 343; *Newcastle Breweries v. R.*, [1920] 1 K. B. 854.

384. ———.]—By a private Act pltfs. were incorporated as a co. for carrying on & maintaining a navigable canal & it was enacted that they should for that purpose have power to purchase lands for making the canal & the several works thereby authorised to be made, & to enter into & upon the lands of any person or persons, & to construct & do all other matters which the co. should think necessary & convenient for making & using the canal & other works, the co. doing as little damage as might be in the execution of the several powers thereby granted, & making satisfaction in manner mentioned for all damages to be sustained by the owners of, & persons interested in, such lands as should be taken, used or prejudiced in or by the execution of the Act; but nothing in the Act should entitle the co., on purchasing any lands for making the canal, or for any other purposes aforesaid, to any mines of coal, ironstone or other minerals which should be found in cutting or making the canal & other works or that should be under same, but that all such mines should appertain & belong to such person or persons as would have been entitled to same in case the Act had not been made. Pltfs. duly acquired the lands necessary, & constructed & completed the canal & works under the powers of the Act. The purchase-money & compensation properly payable upon taking the lands were duly ascertained, & there had been no default in payment. Defts. were the owners of a colliery which they were working, & the land under which their mines were situate was traversed for a considerable distance by the canal. Defts. in the ordinary course of working their mines were desirous of working the coal subjacent or adjacent to the canal:—*Held*: defts. were entitled to get so much of the subjacent & adjacent coal as they could get without destroying or injuring the proper support of the canal & works; but they were not entitled to get the coal to the destruction or injury of that support; & the whole compensation having been assessed at once at the time of the purchase by pltfs., i.e., compensation for the right of support as well as for the conveyance of the surface of the land, defts. could not now be entitled to compensation for that in respect of which they had already been compensated.—*GLAMORGANSHIRE CANAL NAVIGATION CO. v. NIXON'S NAVIGATION CO., LTD.* (1901), 85 L. T. 53; 17 T. L. R. 617, C. A.

385. When promoters waive their right & indemnify owner against it.]—Rochdale Canal Act, 1894, s. 39, provided that nothing in the Act contained should prejudicially affect the ownership of the mines & minerals lying & being within or under the land, in, upon or through which the canal should be made, but that it should be left for the lords of the manor & the owners of such lands to work for their own use such mines & minerals, not thereby injuring, prejudicing or obstructing the canal. By s. 40 it was provided that if the owners or workers of the mines should work them so near to or under the canal as in the opinion of the canal proprietors to endanger or damage it, or in the opinion of the mine owners to endanger or damage the further working of the mines, it should be lawful for the canal proprietors to agree with the mine owners for all coals or other minerals as might be near or under the canal, as should be thought proper to be left for the security or preservation of the canal; & in case the canal proprietors & the mine owners

should disagree, a jury was to assess the compensation to be paid for such coals or other minerals, & on payment of such compensation the mine owners were to be restrained from the further working of same. The mine owners gave notice to the canal proprietors that the further working for coal in land adjacent to the canal would endanger the canal. The proprietors declining to treat for the coal, the mine owners brought the action to ascertain the amount of compensation to be paid for the unworked coal. The action was referred to, & the value of the coal assessed by, the arbitrator, who found that there was no danger to the mines, but that the effect of the further working would be to cause a subsidence of the canal, which would not interfere with the navigation, but would necessitate occasional repairs. The canal proprietors offered themselves to bear the cost of such repairs & to allow the further working of the mines:—*Held*: as no danger was to be apprehended to the mines, the mine owners were not entitled to insist upon the purchase of the unworked coal by the canal proprietors, since by s. 40 there was no statutory prohibition of working adjacent mines so as to injure the canal, such as was enacted by s. 39 against the working of subjacent mines.—*CHAMBER COLLIERY CO. v. ROCHDALE CANAL CO.*, [1895] A. C. 564; 64 L. J. Q. B. 645; 11 T. L. R. 544; 11 R. 264, H. L.

Annotations:—*Consd.* *New Moss Colliery Co. v. M. S. & L. Ry.*, [1897] 1 Ch. 725. *Mentd.* *R. v. L. & N. W. Ry.* (1899), 68 L. J. Q. B. 685; *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.* (1915), 112 L. T. 826.

386. ————.]—*NEW MOSS COLLIERY CO. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, [1897] 1 Ch. 725; 66 L. J. Ch. 381; 76 L. T. 231; 45 W. R. 493.

B. Railways, Waterworks and Tramways Acts.

387. Railways—Implied right—From subjacent & adjacent soil.]—*CALEDONIAN RY. CO. v. SPROT*, No. 403, *post*.

388. ———— To vertical & lateral support of adjoining lands.]—*NORTH EASTERN RY. CO. v. CROSLAND*, No. 351, *ante*.

389. ———— Common law right to adjacent support—Attaches beyond limits of purchased land.]—A vendor of land, having sold it under an Act of Parliament for the particular purposes of a railway, cannot afterwards work the minerals under the surface, though they have been expressly reserved to him, either by his grant or by the provisions of the co.'s own Act, in such a manner as to prejudice the use of the land for the purposes for which it has been purchased. The common law right to adjacent support from the vendor's land attaches upon such a sale even beyond the limits of the purchased land.—*ELLIOT v. NORTH EASTERN RY. CO.* (1863), 10 H. L. Cas. 333; 2 New Rep. 87; 32 L. J. Ch. 402; 8 L. T. 337; 27 J. P. 564; 9 Jur. N. S. 555; 11 W. R. 604; 11 E. R. 1055, H. L.; *affg.* *S. C. sub nom.* *NORTH EASTERN RY. CO. v. ELLIOTT* (1860), 2 De G. F. & J. 423, L. C.

Annotations:—*Consd.* *Stourbridge Navigation Co. v. Dudley* (1860), 3 E. & E. 409. *Distd.* *Goold v. Great Western Deep Coal Co.*, *Great Western Deep Coal Co. v. Goold* (1865), 6 New Rep. 86; *G. W. Ry. v. Bennett* (1867), L. R. 2 H. L. 27; *Mid. Ry. v. Checkley* (1867), L. R. 4 Eq. 19. *Consd.* *Poppell v. Hodgkinson* (1869), L. R. 4 Exch. 248. *Distd.* *Mid. Ry. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552. *Consd.* *L. & N. W. Ry. v. Evans*, [1892] 2 Ch. 432; *Aldin v. Latimer Clark, Muirhead*, [1894] 2 Ch. 437; *R. v. L. & N. W. Ry.*, [1899] 1 Q. B. 921. *Foll.* *L. & N. W. Ry. v. Walker*, [1903] A. C. 289. *Appl.* *Manchester Corp'n. v. New Moss Colliery*, [1906] 1 Ch. 278. *Refd.* *Colebeck v. Girdlers' Co.* (1876), 45 L. J. Q. B. 225; *Pountney v. Clayton* (1882), 47 L. T. 731; *L. & N. W. Ry. v. Evans*, [1893] 1 Ch. 16; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *L. & N. W. Ry. v. Howley Park Coal*

& Cannel Co., [1911] 2 Ch. 97. *Mentd.* *N. E. Ry. v. Crosland* (1862), 32 L. J. Ch. 353; *Richards v. Jenkins* (1868), 18 L. T. 437; *Bradford Corp'n. v. Pickles* (1894), 64 L. J. Ch. 101; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53.

390. ———— Right conferred by private Act—Effect of incorporating general Act.]—*NORTH EASTERN RY. CO. v. CROSLAND*, No. 351, *ante*.

391. ————.]—*LONDON & NORTH WESTERN RY. CO. v. WALKER*, No. 372, *ante*.

392. Horse-tramway—Incorporation of general Act after conveyance—Right to support without compensation.]—*GREAT WESTERN RY. CO. v. CEFN CRIBBWR BRICK CO.*, [1894] 2 Ch. 157; 63 L. J. Ch. 500; 70 L. T. 279; 42 W. R. 493; 8 R. 178.

Annotation:—*Refd.* *R. v. L. & N. W. Ry.*, [1899] 1 Q. B. 921.

393. Water-pipes—Presumption of right—Long enjoyment.]—By Edinburgh Water Act, 1819, the E. co. were empowered to lay pipes for conducting water to the city. By s. 38 the co. were authorised to take & use grounds & premises for the purpose of forming reservoirs, & to make the necessary cuts for conducting water to the city, & to lay the necessary pipes for that purpose, giving one month's notice of their intention to the owners & occupiers of such grounds & premises, & making satisfaction to such owners & occupiers. In 1823 a strip of ground was opened & a pipe laid, part of which passed through the lands of applts. & their predecessors. The pipe was continuously used without question down to the commencement of this action in 1898, when it was threatened with injury by applts. working certain minerals lying under the pipe. The co. having raised an action for an interdict to restrain applts. from working the minerals adjacent to the pipe so as to injure it, it did not appear that any payment or satisfaction had been made by the co. in respect of laying the pipe:—*Held*: after nearly eighty years' enjoyment of the wayleave it must be presumed that whatever was necessary to obtain the right to support for the pipe had been done.—*CLIPPENS OIL CO. v. EDINBURGH & DISTRICT WATER TRUSTEES*, [1904] A. C. 61; 73 L. J. P. C. 32; 89 L. T. 589, H. L.

SUB-SECT. 2.—NOTICE OF INTENTION TO WORK AND COUNTER-NOTICE.

394. Notice by owner of intention to work—Rights not purchased on receipt of—Owner not liable for injury caused by working.]—*WYRLEY CANAL CO. v. BRADLEY* (1806), 7 East, 368; 103 E. R. 143.

Annotations:—*Consd.* *Stourbridge Navigation Proprietors v. Ward* (1860), 7 Jur. N. S. 329; *Mid. Ry. v. Checkley* (1867), L. R. 4 Eq. 19. *Refd.* *Hilton v. Grauville* (1844), 5 Q. B. 701; *L. & N. W. Ry. v. Evans*, [1892] 2 Ch. 432.

395. ———— In ordinary course of working.]—By a canal Act, the co. were empowered to purchase land for the use of their navigation; the minerals beneath to remain in the owners. Whenever the owner was desirous of getting the minerals, he was to give notice to the co. They, within a limited time, were to have the option of purchasing. If they did not purchase, the owner was to be at liberty to work his mines, doing no injury to the navigation. An owner, who was desirous to work his mines, gave notice to the co. They did not purchase within the limited time. The owner then proceeded to work the mines, & his doing so produced an injury to the navigation; but it did not appear that he had worked them in an improper manner:—*Held*: as the co. had not availed themselves of their right to purchase, the

Sect. 2.—Under private Acts: Sub-sects. 2 & 3.]

proviso, that the owner must do no injury to the navigation, required to be so far qualified as to mean, that he was not to work them so as to do any injury beyond that which was necessary in the ordinary course of working, & the co. were not entitled to maintain an action against the owner for the amount of the damage sustained by the ordinary course of the working.—**DUDLEY CANAL NAVIGATION CO. v. GRAZEBROOK** (1830), 1 B. & Ad. 59; 8 L. J. O. S. K. B. 361; 109 E. R. 709.

Annotations:—**Expld.** R. v. Trafford (1831), 1 B. & Ad. 874. **Distd.** N. E. Ry. v. Elliott (1860), 2 De G. F. & J. 423. **Apprvd. & Follid.** Stourbridge Navigation Co. v. Dudley (1860), 3 E. & E. 409. **Consd.** Mid. Ry. v. Checkley (1867), L. R. 4 Eq. 19; Dunn v. Birmingham Canal Co., (1872), L. R. 7 Q. B. 244; Knowles v. L. & Y. Ry. (1889), 14 App. Cas. 248; L. & N. W. Ry. v. Evans, [1892] 2 Ch. 432. **Refd.** L. & N. W. Ry. v. Ackroyd (1862), 31 L. J. Ch. 588; G. W. Ry. v. Bennett (1867), L. R. 2 H. L. 27; M. S. & L. Ry. v. Johnson (1887), 36 Ch. D. 629, n.; A.-(G. v. Conduit Colliery Co., [1895] 1 Q. B. 301. **Mentd.** Birmingham Canal Co. v. Swindell (1856), 7 H. & N. 980, n.

396. In reasonable & proper manner.]—By a canal Act it was provided that no owner of any mine should work same under the reservoir of the canal co., except as mentioned, without the consent of the co., & that when the owner of any mine under the canal works should be desirous of working it, he should give notice in writing of such intention to the co. before beginning to work; that the co. might then inspect the mine, & upon failure or neglect of the co. to inspect within thirty days after notice, the owner might work & get such part of the mine as lay under the canal & works; & that, if upon inspection the canal co. should refuse to permit the owner of the mine to work such part of the mine, the co. should within three calendar months after refusal, purchase same. It was further provided that nothing in the Act should be construed to prejudice the right of the lord of the manor or waste, or any owner of any ground through which the canal co.'s works should be made, to the mines under such ground, such lord or owner being empowered to work same, subject to the conditions therein contained; provided that no injury were done in working to the navigation:—**Held:** this last proviso was not to be construed as rendering futile all the previous provisions of the Act, & when the owner of mines had given notice of his intention to work them, & the co. had neglected to purchase the mines as prescribed by the Act, the owner of the mine might work same under the co.'s works, & the co.'s works having been damaged in consequence of such working, the co. could not maintain an action against the mine owner to recover compensation for such damage.—**STOURBRIDGE NAVIGATION CO. v. DUDLEY (EARL)** (1860), 3 E. & E. 409; 30 L. J. Q. B. 108; 3 L. T. 449; 7 Jur. N. S. 329; 9 W. R. 158; 121 E. R. 496, Ex. Ch.

Annotations:—**Consd.** Dunn v. Birmingham Canal Co. (1872), L. R. 7 Q. B. 244. **Refd.** Mid. Ry. v. Checkley (1867), L. R. 4 Eq. 19. **Mentd.** Bagnall v. L. & N. W. Ry. (1861), 7 H. & N. 423; L. & Y. Ry. v. Knowles (1887), 20 Q. B. D. 391.

397. Right to compensation for unworked minerals left in support.]—By an old Act of Parliament giving a co. power to make a canal, it was provided that nothing therein contained should affect the right of the owners of land to the mines & minerals lying within or under the lands to be made use of for the canal, & it should be lawful for such owners to work such mines, not thereby injuring, prejudicing or obstructing the canal; & further, that if the owner or worker of any coal or mine should, in pursuing such mine,

work near or under the canal, so as, in the opinion of the co., to endanger or damage same, or in the opinion of the owner or worker of the mine, to endanger, or damage the further working thereof, then it should be lawful for the co. to treat & agree with the owner; & in case of disagreement, certain comrs. were appointed to assess the amount of compensation. The comrs. never having exercised their powers, it was thought expedient for more easily settling claims for compensation, to incorporate Lands Act, 1845, with the canal Act, & an Act was passed for that purpose. Defts., in working their mine, approached so near, as in their opinion, to endanger the canal, & negotiations were commenced between plffs. & defts. as to the coals necessary to be left, but no terms were agreed on. Defts. then gave notice of their intention to proceed to arbn. under Lands Act, 1845, whereupon the co. filed their bill, & applied for an injunction:—**Held:** defts. were justified in proceeding before the proper tribunal to ascertain how much compensation they were entitled to.

If the coal owner sustains injury, by getting less coal, or by working in a less beneficial manner, for the sake of not injuring the canal, he will, in the same manner as if he be under notice to leave a third of the coal or a pillar, have a right to compensation (**LORD COTTENHAM, C.**).

Semble: a ct. of equity has jurisdiction, if it be satisfied that no injury will ensue from working the coal, to restrain a party from proceeding to arbn. under their Act.—**CROMFORD CANAL CO. v. CURTIS** (1848), 5 Ry. & Can. Cas. 442; 12 L. T. O. S. 325.

Annotations:—**Follid.** Whitehouse v. Wolverhampton & Walsall Ry. (1869), L. R. 5 Exch. 6. **Consd.** Knowles v. L. & Y. Ry. (1889), 14 App. Cas. 248; Chamber Colliery Co. v. Rochdale Canal Co. of Proprietors, [1894] 2 Q. B. 632. **Expld.** Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co. (1901), 85 L. T. 53. **Refd.** Chamber Colliery Co. v. Rochdale Canal Co., [1895] A. C. 564; New Moss Colliery Co. v. M. S. & L. Ry., [1897] 1 Ch. 725.

398. Private Act.]—By an Act of incorporation of a canal co., it was provided that no owner or proprietor of any mines or minerals, their workmen, etc., should open or carry on any work for digging, etc., any such mines, etc., under any tunnel, or within twenty yards of same, without the consent of the co., etc.; & also that no owner, etc., of any mines, etc. should on any account whatever open, dig, etc. any work for the getting of coal, limestone, etc. within the distance of twelve yards from the intended canal, etc., without the consent of the co. in writing under their common seal. A proprietor of mines, etc., lying under twenty yards on each side of a tunnel of the co. on the canal gave notice to the co. of his intention to work the mines, etc. under the tunnel, & twenty yards on each side of it. The co. refused their consent, & he then brought an action to recover compensation for the minerals he had been obliged to leave ungoten:—**Held:** the co. were bound to pay compensation.—**BIRMINGHAM CANAL NAVIGATION CO. v. DUDLEY (EARL)** (1862), 7 H. & N. 969; 9 Jur. N. S. 24; 158 E. R. 764, Ex. Ch.

Annotation:—**Refd.** Mid. Ry. v. Checkley (1867), L. R. 4 Eq. 19.

399. Duty not to injure, prejudice or obstruct undertaking.]—By a sect. of an Act empowering a co. to make a canal it was provided that nothing therein contained should affect the right of any owners of lands to the mines & minerals under the lands to be made use of for the canal, & that it should be lawful for such owners to work such mines & minerals, not thereby injuring, prejudicing or obstructing the canal. By

another sect. it was provided that if the owners should in pursuing such mines work near or under the canal, so as in the opinion of the canal co. to endanger or damage same, or in the opinion of the owners of the mines to endanger or damage the further working thereof, it should be lawful for the canal co. to treat & agree with the owners for all such minerals as might be near or under the canal as should be thought proper to be left for the security of the canal or mines; & in case they should disagree then it should be lawful for certain comrs. at the request of the canal co. or of such owners to summon a jury to assess what satisfaction such owners ought to receive from the canal co.; & upon payment of such satisfaction such owners should be perpetually restrained from working such mines within the limits for which satisfaction should by the jury be declared to extend. Owners of a coal mine under & near the canal having given the canal co. notice that they were going to work the coal, the co. declined to purchase or pay compensation for leaving the coal, & the owners then worked the coal & thereby damaged the canal. The working was in the usual mode, without negligence & without doing unnecessary damage save in not leaving sufficient support:—*Held*: the owners of the mine had a right under the Act to initiate proceedings & to receive satisfaction for such minerals as should be thought proper to be left for the security of the canal or the mine, but were liable in damages for working the mine to the injury of the canal.—*KNOWLES & SONS v. LANCASHIRE & YORKSHIRE RY. CO.* (1889), 14 App. Cas. 248; 59 L. J. Q. B. 39; 61 L. T. 91; 54 J. P. 103, H. L.; *affg.* S. C. *sub nom.* LANCASHIRE & YORKSHIRE RY. CO. *v.* *KNOWLES* (1887), 20 Q. B. D. 391, C. A.

Annotations:—*Expld.* L. & N. W. Ry. *v.* Evans, [1892] 2 Ch. 432. *Expld. & Distd.* Chamber Colliery Co. *v.* Rochdale Canal Co., [1895] A. C. 564. *Expld.* Glamorganshire Canal Navigation Co. *v.* Nixon's Navigation Co. (1901), 85 L. T. 53. *Refd.* A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301; New Moss Colliery Co. *v.* M. S. & L. Ry., [1897] 1 Ch. 725. *Mentd.* R. *v.* L. & N. W. Ry. (1899), 68 L. J. Q. B. 685.

400. ——— Rights of lessees of mines—Permission in lease to leave pillars—Does not exonerate promoters from liability to compensate.]—*SWINDELL v. BIRMINGHAM CANAL CO.* (1860), 9 C. B. N. S. 241; 29 L. J. C. P. 364; 7 Jur. N. S. 190; 142 E. R. 95.

Notice to treat generally.]—*See* Part VI., *post*.

SUB-SECT. 3.—COMPENSATION WHEN WORKING STOPPED.

401. Whether working stopped—Question of fact.]—In an action by a mineral owner & his tenants for compensation in respect of a seam of oil shale which they alleged they had been stopped from working by the proprietors of the canal, under the powers of a private Act, to ensure the safety of the canal:—*Held*: upon the construction of the correspondence between the parties & of the private Act, defenders had not stopped the working of the seam.—*LINLITHGOW (MARQUESS) v. NORTH BRITISH RY. CO.*, [1914] A. C. 820, H. L.

402. Right to compensation—Claim not included in original demand—Subsequent discovery of mine—Not subject of further compensation.]—*R. v. LEEDS & SELBY RY. CO.* (1835), 3 Ad. & El. 683; 5 Nev. & M. K. B. 246; 111 E. R. 573.

Annotations:—*Distd.* R. *v.* Aire & Calder Navigation Undertakers (1861), 30 L. J. Q. B. 337. *Mentd.* Calc. Ry. *v.* Lockhart (1860), 3 L. T. 65.

403. ——— ——— ———.]—A railway Act empowered the owner, in conveying his lands to

the co., to reserve his minerals, but in the event of his afterwards working these it ordered him to find security against endangering the railway. The owner was also to be compensated for all lands taken or prejudiced. S. in bargaining with the co. reserved his minerals, but in claiming compensation omitted to include any demand for loss which might arise by reason of his not being able to work his minerals in the soil below or near the railway. Ten years afterwards, on discovering a valuable mine under the railway, he called upon the co. either to purchase same, or pay him compensation for the loss sustained in his not being able to work it:—*Held*: S. was precluded from demanding any compensation for loss in not being able to work the mine, as such claim ought to have been included in the original demand: & whether he had reserved his mines or not, the conveyance gave an implied right of support, not only from the mines subjacent to the line, but also from those in the lands of S. adjacent, & S. could not work either of these so as to endanger the railway.—*CALEDONIAN RY. CO. v. SPROT* (1856), 27 L. T. O. S. 264; 2 Jur. N. S. 623; 4 W. R. 659; 2 Macq. 449, H. L.

Annotations:—*Distd.* Calc. Ry. *v.* Belhaven (1857), 29 L. T. O. S. 286; *Aspdon v. Seddon* (1875), 10 Ch. App. 394. *Appld.* G. W. Ry. *v.* Cefn Cribbwr Brick Co., [1894] 2 Ch. 157. *Refd.* G. W. Ry. *v.* Fletcher (1860), 5 H. & N. 689; *Elliot v. N. E. Ry.* (1863), 10 H. L. Cas. 334; *Shafte v. Johnson* (1863), 8 B. & S. 252, n.; *Wakefield v. Buccleuch* (1866-7), L. R. 4 Eq. 613; *G. W. Ry. v. Bennett* (1867), L. R. 2 H. L. 27; *Metropolitan Board of Works v. Met. Ry.* (1868), L. R. 3 C. P. 612; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Pountney v. Clayton* (1882), 47 L. T. 731; *Rigby v. Bennett* (1882), 21 Ch. D. 559; *Birmingham, Dudley & District Banking Co. v. Ross* (1888), 38 Ch. D. 295; *L. & N. W. Ry. v. Evans*, [1893] 1 Ch. 16; *Aldin v. Latimer Clark, Muirhead*, [1894] 2 Ch. 437; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53. *Mentd.* *Roberts v. Haines* (1856), 2 Jur. N. S. 999; *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Bonomi v. Backhouse* (1859), 28 L. J. Q. B. 378; *Stourbridge Canal Co. v. Dudley* (1860), 30 L. J. Q. B. 108; *Mid. Ry. v. Checkley* (1867), L. R. 4 Eq. 19; *Richards v. Jenkins* (1868), 18 L. T. 437; *Hammersmith, etc. Ry. v. Brand* (1869), L. R. 4 H. L. 171; *Robinson v. Grave* (1873), 29 L. T. 7; *Colebeck v. Girdlers' Co.* (1876), 45 L. J. Q. B. 225; *Mid. Ry. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552; *Pountney v. Clayton* (1883), 11 Q. B. D. 820; *Russell v. Watts* (1885), 10 App. Cas. 590; *Manchester Corp'n. v. New Moss Colliery*, [1906] 1 Ch. 278; *L. & N. W. Ry. v. Howley Park Coal & Cannel Co.*, [1911] 2 Ch. 97.

404. ——— Mine subsequently worked—Promoters not obliged to purchase mines.]—*R. v. AIRE & CALDER NAVIGATION UNDERTAKERS* (1861), 30 L. J. Q. B. 337; 26 J. P. 677; 8 Jur. N. S. 115; 10 W. R. 40.

Anticipated injury generally.]—*See* Part III., Sect. 5, *ante*.

405. ——— Undertaking by promoters not to sue for injury.]—*CHAMBER COLLIERY CO. v. ROCHDALE CANAL CO.*, No. 385, *ante*.

406. ——— & to repair damage at own expense.]—*NEW MOSS COLLIERY CO. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, [1897] 1 Ch. 725; 66 L. J. Ch. 381; 76 L. T. 231; 45 W. R. 493.

407. ——— Compensation for land paid to predecessor of claimant—Presumption that minerals included—Lapse of time.]—*GLAMORGANSHIRE CANAL NAVIGATION CO. v. NIXON'S NAVIGATION CO., LTD.*, No. 384, *ante*.

408. Whether compensation proper remedy—Negligent user of compulsory powers—Action of tort maintainable.]—A railway co., to whose rights & obligations debts succeeded, purchased from a former owner the surface of land lying over a mine belonging to pl'tfs., & thereon constructed their railway. In order to obtain the level of their line, the co. cut through & removed upwards of twenty

2. *Under private Acts: Sub-sect. 3. Part V.*
1: *Sub-sects. 1*

feet in depth of the surface clay lying over plths.' mine, which was impervious to water, leaving exposed a surface of porous rock. The soil was similarly cut away by the railway co., along the line to the place where a brook flowed, over which the line was carried by a flat bridge at about the natural level of the ground. Between this brook & the surface of plths.' mine there was originally a bank, or rising ground, through which the co. made a cutting for their line of rails, sloping downwards from the bridge to the part over the mine. The mine at this part was unworked when the railway was being constructed. Plths. in their subsequent working of their mine, came to within forty yards of the railway, & gave defts. notice under the Act, but they did not purchase the mine. Plths., therefore, worked on in a proper manner, & as a consequence, the railway began to sink. The co. raised it up from time to time by placing materials of a porous nature over the surface. The railway was made with drains at the side, which the co. were bound to keep up; after the line began to sink they did not do so, but filled up the openings with the porous materials. In Aug. 1860 a flood happened & the brook overflowing the girders of the flat bridge, the water was carried down the cutting to the part of the line overlying plths.' mine, & there percolating through the porous rock, the mine was drowned & the work stopped:—*Held*: defts. were liable in an action for the damage sustained by plths. caused by the flooding of the mine, & the claim was not one which could have been enforced under the compensation clauses of Railway Act, 1845.—*BAGNALL v. LONDON & NORTH WESTERN RY. CO.* (1862), 1 H. & C. 544; 31 L. J. Ex. 480; 9 L. T. 419; 9 Jur. N. S. 254; 10 W. R. 802; 158 E. R. 1000, Ex. Ch.

Annotations:—*Consd. R. v. Fisher* (1862), 3 B. & S. 191; *Dunn v. Birmingham Canal Co.* (1872), L. R. 7 Q. B. 244. *Refd. Croft v. L. & N. W. Ry.* (1863), 32 L. J. Q. B. 113; *Fletcher v. Rylands* (1868), L. R. 1 Exch. 265; *Cracknell v. Thetford Corpn.* (1869), L. R. 3 C. P. 629. *Mentd. Mid. Ry. v. Checkley* (1867), L. R. 4 Eq. 19.

409. — **Mines damaged by improper management of canal—Action of tort not maintainable.**—Defts.' canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defts. were authorised to take land compulsorily & construct the canal, doing as little damage as might be, & to do all things necessary for making & preserving & using the canal, making satisfaction for all damages to be sustained by the owners of lands & hereditaments taken or prejudiced by the execution of the powers of the Act. Comrs. were appointed, who were to determine from time to time what sum should be paid for the purchase of lands, & also to determine what other distinct sum should be paid by defts. as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals, provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months' notice to defts., who might inspect the mines, & might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defts. to inspect the mines, the owners were authorised to work them. The canal having been constructed & used for many years, pltf., who was

owner of coal mines under the canal, gave defts. proper notice of his intention to work them; defts. did not inspect, & refused to purchase. Pltf. proceeded to work the mines, without regard to the surface, & without attempting to support it, & knowing that the effect would be to let down the surface, & probably disturb the strata, & that there was danger of the water escaping from the canal into the mines; but, except as above, pltf. did not work his mines in any negligent or unskilful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, & without doing so he could not have obtained the full benefit of his coal. The canal was in good order when pltf. commenced working his coal; & defts. did all they could to keep the canal watertight, by puddling, etc. During part of the time, while pltf.'s working was going on, they had dammed back the water, & so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for pltf. to work out his coal. Defts. were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated, & the water of the canal escaped through the cracks & flooded the workings, & pltf. was obliged to abandon his coal. Pltf. thereupon brought an action, charging that defts., having brought water into the canal, so carelessly & improperly managed the canal & the water, that the water escaped & flooded pltf.'s mine:—*Held*: an action of tort could not be maintained.

Semble: pltf. was entitled to compensation under the Act.—*DUNN v. BIRMINGHAM CANAL CO.* (1872), L. R. 8 Q. B. 42; 42 L. J. Q. B. 34; 27 L. T. 683; 21 W. R. 266, Ex. Ch.

Annotations:—*Refd. Green v. Chelsea Waterworks Co.* (1894), 70 L. T. 547. *Mentd. Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Evans v. M. S. & L. Ry.* (1887), 36 W. R. 328.

410. **Basis of assessment—Value of minerals—Working profits.**—(1) A canal co. were authorised by their Act of incorporation to require the workers of any mines under the canal to leave so much coal on each side of the canal as they might require for the safety of it; & the co. were to make compensation, to be assessed, if the parties differed, by a jury:—*Held*: the co. were bound to make compensation, not only for the value of the coal in the bed, but also for the additional profit which could only be made by getting it.

(2) Where the Legislature has provided a competent tribunal, & has given to it a certain jurisdiction, & made its decision final, no equity can be founded on an allegation that such tribunal is incompetent to decide questions properly within its jurisdiction. If any inconvenience arise from the legal exercise of that jurisdiction, the Legislature alone can supply a remedy.—*BARNSELY CANAL CO. v. TWIBELL* (1844), 7 Beav. 19; 3 Ry. & Can. Cas. 471; 13 L. J. Ch. 434; 3 L. T. O. S. 258; 49 E. R. 969, L. C.

Annotation:—*Refd. Jolcey v. N. E. Ry.*, [1907] 1 K. B. 402.

411. — **Value to owner—Profits likely to be made by conversion of limestone into cement—Value not affected by claimants owning other quantities of limestone.**—By a private Act, passed prior to the Railways Act, 1845, authorising the construction of a railway & containing the usual provisions for the acquisition of lands, mines & minerals, including by name limestone, were excepted out of the purchase of lands, but it was provided that, upon receipt of twenty-one days' notice from the proprietor of any mines or minerals

lying under or within forty yards of the railway of his desire to work them, the railway co. might purchase them or any part of them. Claimants were the owners in fee of land on both sides of the railway & of limestone lying under their land & under the railway; they had a cement manufactory on their land, in which they used & turned into cement the limestone which they quarried. Owing to the cost of carriage the limestone when quarried had no market value as an article of commerce other than its value to claimants for use in the adjacent manufactory. Claimants having in the ordinary course of quarrying approached close to the forty yards limit, gave notice to the railway co. of their intention to work the limestone within that limit, & the railway co. gave separate notices to treat in respect of the limestone within that limit, but not under the railway, & of the limestone actually under the railway, & the amount of compensation was referred to arbitration:—*Held*: (1) as the limestone had no market value in the strict sense of that term, its value to claimants was what they might

fairly be expected to have made out of it by working it in the ordinary & reasonable manner in which it would have been worked but for the notice to treat; (2) the profits which claimants would have made by turning it into cement might properly be taken into consideration by the arbitrator as an indication, though not as a measure, of that value; (3) the value was not affected by the fact that claimants owned large quantities of other limestone which they might have worked instead of the stone in question.—*RUGBY PORTLAND CEMENT CO. v. LONDON & NORTH WESTERN RY. CO.*, [1908] 2 K. B. 606; 77 L. J. K. B. 1096; 98 L. T. 880; 72 J. P. 245; 24 T. L. R. 561, C. A.

412. Interest on purchase-money & compensation—Payable from date when working stopped.—*FLETCHER v. LANCASHIRE & YORKSHIRE RY. CO.*, [1902] 1 Ch. 901; 71 L. J. Ch. 590; 66 J. P. 631; 50 W. R. 423; 18 T. L. R. 417.

Annotation:—*Consd. Re Richard & G. W. Ry.*, [1905] 1 K. B. 68.

Part V.—Procedure to acquire Land by Agreement.

See Lands Act, 1845, ss. 6–15.

SECT. 1.—WHO MAY SELL.

See Lands Act, 1845, s. 7.

SUB-SECT. 1.—TENANTS FOR LIFE AND TENANTS IN TAIL.

413. Tenant for life—Equitable—Cannot convey legal estate.—*LIPPINCOTT v. SMYTH* (1860), 29 L. J. Ch. 520; 2 L. T. 79; 6 Jur. N. S. 311; 8 W. R. 336.

414. — Power of sale under Settled Land Acts & Lands Act, 1845—Sale under Act incorporating Lands Act—Subject to provisions of Lands Act.—*Re BENTINCK (LADY) & LONDON & NORTH-WESTERN RY. CO.* (1895), 12 T. L. R. 100; 40 Sol. Jo. 130.

415. — Lunatic not so found by inquisition—Power of sale not exercisable by quasi-committee.—(1) Where persons are appointed under Lunacy Act, 1890 (c. 5), s. 116, to exercise as regards a person of unsound mind not so found by inquisition the powers of the Act exercisable by a committee of the estate under order of the judge, & the person of unsound mind is tenant for life of land for which notice to treat has been given by a railway co., the judge in lunacy has no power under Lunacy

Act, 1890, ss. 116, 120, 128, to authorise the quasi-committee to exercise on behalf of the person of unsound mind the power of sale conferred on a tenant for life by Lands Act, 1845, s. 7, or that conferred by Settled Land Act, 1882 (c. 38), in respect of the land so required by the railway co.

(2) The power of sale given to a tenant for life by Settled Land Act, 1882, is not a power vested in him in the character of trustee within the meaning of Lunacy Act, 1890, s. 128.—*Re S. S. B. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION)*, [1906] 1 Ch. 712; 75 L. J. Ch. 522; 94 L. T. 599; 54 W. R. 429; 22 T. L. R. 461, C. A.

See, now, Lunacy Act, 1908 (c. 47), s. 1.

416. Tenant in tail—Disabled by statute from barring entail—Has power to sell.—*Re CUCKFIELD BURIAL BOARD* (1854), 19 Beav. 153; 24 L. J. Ch. 585; 3 W. R. 142; 52 E. R. 307.

Annotation:—*Reid. Abergavenny v. Brace* (1872), L. R. 7 Exch. 145.

SUB-SECT. 2.—TRUSTEES AND EXECUTORS.

417. Trustees—Of charity.—(1) Where persons under disability are served with a notice under Lands Act, 1845, to take part of a house & premises, they are able to sell under s. 92 & may require the co. to take the whole house, etc., although it may not fall within the limits of deviation of the railway.

PART V. SECT. 1, SUB-SECT. 1.

413i. Tenant for life—Can convey fee simple.—*C. S. C. c. 66*; 24 Vict. c. 17.]—A tenant for life may under above Acts, sell & convey the fee simple of land required for a ry.—*CAMERON v. WIGLE* (1876), 24 Gr. 8.—CAN.

413ii. — — — — —.—*MIDLAND RY. OF CANADA v. YOUNG* (1893), 22 J. C. R. 190.—CAN.

a. — Cannot pass whole fee.—When a co. takes by purchase, under an agreement, a tenant for life cannot pass the whole fee.—*M'NAGHTEN v. MIDLAND GREAT WESTERN RY. CO.* (1861), 13 Ir. Jur. 138.—IR.

b. — Cannot sell—Without order

of judge—51 Vict. c. 20.]—Land was conveyed to C. for life, remainder to her children, & C. during their minority agreed to sell the land to a ry. co. for their purposes:—*Held*: C., notwithstanding above Act, could not sell without a judge's order.—*Re IOLSEN* (1889), 13 P. R. 84.—CAN.

c. — Infant remainderman—Order of judge.—Where a widow entitled to a life estate in lands & her infant children to the remainder in fee, made an agreement with a ry. co. to sell such part as they required at a reasonable price, approved by the official guardian of the infants, an order made by a Judge under Railway Act, R. S. C. 1906, c. 37, s. 184, would enable her to sell & convey the fee.—

Re CANADIAN PACIFIC RY. CO. & BYRNE (1907), 15 O. L. R. 45; 10 O. W. R. 278.—CAN.

d. Tenant in tail—Cannot sell for feu-duty.—An arrangement between a ry. co., & the proprietor of an entailed estate through which the line was to pass, fixed compensation on the footing of an annual feu-duty to be paid by the co.; & a valuation was made for this purpose. The proprietor died:—*Held*: the heir of entail not bound, the Lands (Scot.) Act, 1845, not authorising settlement of compensation by way of a feu-duty.—*SCOTTISH MIDLAND JUNCTION RY. CO. v. GRAY* (1850), 13 Dunl. (Ct. of Sess.) 410; 23 Sc. Jur. 175.—SCOT.

Sect. 1.—Who may sell: Sub-sects. 2, 3 & 4. Sects. 2 & 3: Sub-sects. 1 & 2.]

(2) The word "house" in Lands Act, 1845, s. 92, comprises all that would pass by the grant of a messuage, which includes not only the curtilage but also the garden & all that is necessary to the enjoyment of the house.—**ST. THOMAS'S HOSPITAL (GOVERNORS) v. CHARING CROSS RY. CO.** (1861), 1 John. & H. 400; 30 L. J. Ch. 395; 25 J. P. 771; 7 Jur. N. S. 256; 9 W. R. 411; 70 E. R. 802.

Annotations:—As to (1) Refd. Giles v. L. C. & D. Ry. (1861), 1 Drew. & Sm. 406; **Gibson v. Hammersmith & City Ry.** (1862), 2 Drew. & Sm. 603. **As to (2) Consd. Richards v. Swansea Improvement & Tram. Co.** (1878), 9 Ch. D. 425. **Generally, Mentd. Horne v. Lymington Ry.** (1874), 38 J. P. 788.

418. — Holding property on trust for married woman absolutely—For her separate use.]—(1) A trustee holding property upon trust for a married woman absolutely for her separate use is a person enabled to sell & convey under Lands Act, 1845, s. 7.

(2) *Qu.*: whether a co. can safely accept a title from such a trustee in a case where the *cestui que trust* objects to the sale & is herself desirous to contract.

(3) Where trustees selling to a railway co. under Lands Act, 1845, s. 7, appointed one of themselves, who was an able practical surveyor, to act as surveyor on their behalf to make the valuation required to be made under s. 9 of the Act:—**Held**: such appointment was a fatal irregularity which invalidated the proceedings.

(4) *Semle*: the above sects. do not empower trustees to sell for a price to be fixed by valuation, but only to sell for a price fixed by agreement, & afterwards to ascertain by valuation whether such price is sufficient.—**PETERS v. LEWES & EAST GRINSTEAD RY. CO.** (1881), 18 Ch. D. 429; 50 L. J. Ch. 839; 45 L. T. 234; 29 W. R. 874, C. A.

Annotations:—Generally, Mentd. Re Cotton's Trustees & School Board for London (1882), 19 Ch. D. 624; **Biggs v. Peacock** (1882), 31 W. R. 148; **Re Henzell, Holgate v. Humphris**, [1887] W. N. 240; **Goodier v. Edmunds**, [1893] 3 Ch. 455; **Re Sudeley & Baines**, [1894] 1 Ch. 334; **Re Dyson & Fowke**, [1896] 2 Ch. 720; **Re Wilton's Settled Estates**, [1907] 1 Ch. 50; **Re Kaye & Hoyle's Contract, Re Vendor & Purchaser Act, 1874** (1909), 53 Sol. Jo. 520.

419. Of city ward—Without consent of Charity Commissioners—Or Lords of the Treasury.]—FINNIS & YOUNG TO FORBES & POCHIN (No. 1) (1883), 24 Ch. D. 587; 53 L. J. Ch. 140; 48 L. T. 813; 32 W. R. 55.

See, further, CHARITIES, Vol. VIII., pp. 356 et seq.

420. Executor—Not unless "seised, possessed of or entitled to" land or interest therein.]—Re BARROW-IN-FURNESS CORPN. & RAWLINSON'S CONTRACT, [1903] 1 Ch. 339; 72 L. J. Ch. 233; 87 L. T. 724; 51 W. R. 248.

SUB-SECT. 3.—MARRIED WOMEN.

421. Land devised to husband & wife—Conveyance by deed not acknowledged—Passes interest of wife.]—COOPER v. GOSTLING (1863), 4 Giff. 449; 9 L. T. 77; 9 Jur. N. S. 1006; 11 W. R. 931; 66 E. R. 783.

Trustees of, holding for separate use.]—See Sub-sect. 2, ante.

SUB-SECT. 4.—LUNATICS.

422. Under Lands Act, 1845, s. 7—Committee of lunatic may sell—Not lunatic.]—Re TUGWELL

(1884), 27 Ch. D. 309; 53 L. J. Ch. 1006; 51 L. T. 83; 33 W. R. 132.

Annotation:—Refd. Re S. S. B., [1906] 1 Ch. 712.

423. — Rentcharge in favour of lunatic—Committee authorised to release.]—Lands which were subject to a rentcharge in favour of a lunatic during his life were taken by a corpn. acting under Lands Act, 1845. The ct. authorised the committee of the lunatic to release the lands from the rentcharge upon the corpn. purchasing in the name of the lunatic a Government annuity of same yearly amount for his life.—Re BREWER (1875), 1 Ch. D. 409; 34 L. T. 466; 24 W. R. 465, C. A.

— Lunatic tenant for life—Powers of quasi-committee.]—See Sub-sect. 1, ante.

SECT. 2.—LIMIT OF TIME.

See Lands Act, 1845, s. 123.

424. Within reasonable time—Not extreme period allowed.]—(1) A railway co. contracted for the purchase of lands:—Held: they must complete within a reasonable time & they were not entitled to insist that they might complete whenever, within the limit of their compulsory powers, they wanted the land.

(2) A railway co. entered into a contract with a tenant for life of property within their line, who appointed a surveyor under Lands Act, 1845, s. 9. The co. would neither appoint their valuer nor complete the contract. An inquiry having been directed whether the price agreed upon was reasonable & proper:—*Semle*: decree was incorrect in form & the Act of Parliament must be strictly pursued in order to enable the tenant for life to give a good statutory title to the co., & mandamus lay to compel the co. to appoint a surveyor (**LORD WESTBURY, C.**).

(3) *Qu.*: whether a contract for the purchase of lands by a railway co. from a person under disability can be enforced against the co. before the valuation required by Lands Act, 1845, s. 9, has been made.—**BAKER v. METROPOLITAN RY. CO.** (1862), 31 Beav. 504; 1 New Rep. 8; 32 L. J. Ch. 7; 7 L. T. 494; 27 J. P. 20; 9 Jur. N. S. 61; 11 W. R. 18; 54 E. R. 12.

Annotation:—As to (2) Consd. Bridgend Gas & Water Co. v. Dunraven (1885), 31 Ch. D. 219.

425. Option to purchase additional land—Within time for completion of work—Expiration of compulsory powers.]—An agreement between a railway co. & a landowner provided that in case the co. should require additional land for the purposes of their railway & works, they should pay for it at the rate of £200 per acre, without further payment in respect of severance or other damages:—Held: the co. were authorised to take land for the purpose of diverting a footway, within the time for completing their works which had not expired, although the time for compulsory taking of land had expired.—RANGELEY v. MIDLAND RY. CO. (1868), 3 Ch. App. 306; 37 L. J. Ch. 313; 18 L. T. 69; 16 W. R. 547, L. JJ.

Annotations:—Consd. Beauchamp v. G. W. Ry. (1868), 3 Ch. App. 745; **Dowling v. Pontypool, Caerleon & Newport Ry.** (1874), L. R. 18 Eq. 714. **Distd. Wilkinson v. Hull, Barnsley & West Riding Junction Ry. & Dock Co.** (1882), 46 L. T. 455. **Consd. Macfie v. Callander & Oban Ry.**, [1898] A. C. 270. **Refd. Pugh v. Golden Valley Ry.** (1879), 41 L. T. 30; **Loosemore v. Tiverton & North Devon Ry.** (1882), 22 Ch. D. 25; **Simpson v. Godmanchester Corpn.** (1895), 64 L. J. Ch. 837; **A.-G. v. Copeland**, [1901] 2 K. B. 101; **Schweder v. Worthing Gas Light & Coke Co.**, [1913] 1 Ch. 118.

426. — Notice to treat given by mistake—Whether waiver of agreement.]—KEMP v. SOUTH-EASTERN RY. CO., No. 93, *ante*.

427. — Co-extensive with compulsory powers under Act.]—KEMP v. SOUTH-EASTERN RY. Co., No. 93, ante.

SECT. 3.—CONSIDERATION FOR SALE.

SUB-SECT. 1.—MODE OF ASCERTAINMENT.

See Lands Act, 1845, s. 9.

428. Under Lands Act, 1845, s. 9—Valuation by two surveyors on purchase from person under disability—When no valuation—Whether contract enforceable against promoters.]—BAKER v. METROPOLITAN RY. Co., No. 424, ante.

429. ————.]—(1) Where a railway co. had agreed with a charitable corpn., having no power to sell except under Lands Act, 1845, for the purchase of a piece of land, & no certificate had been obtained from two surveyors of the adequacy of the price:—Held: specific performance of the agreement must be refused.

(2) Semble: where one of the parties to a contract proves that he understood the agreement in a different sense from the other, the ct. will refuse to decree specific performance of the agreement, without considering whether deft.'s construction be reasonable or not. —WYCOMBE RY. Co. v. DONNINGTON HOSPITAL (1866), 1 Ch. App. 268; 14 L. T. 179; 12 Jur. N. S. 347; 14 W. R. 359, L. J.J.

Annotation:—As to (1) Consd. Bridgend Gas & Water Co. v. Dunraven (1885), 31 Ch. D. 219.

430. ——— Company refusing to nominate surveyor—Mandamus.]—BAKER v. METROPOLITAN RY. Co., No. 424, ante.

431. ——— Valuation by one—Supported by valuation of independent surveyor.]—Re NANTWICH & MARKET DRAYTON RY. Co., Ex p. ADDERLEY (RECTOR) (1863), 10 L. T. 131; 12 W. R. 243.

432. ——— Trustees appointing one of themselves as surveyor—Proceedings invalidated.]—PETERS v. LEWIS & EAST GRINSTEAD RY. Co., No. 418, ante.

433. ——— Declaration in writing must be annexed to valuation—Though surveyors not formally appointed.]—BRIDGEND GAS & WATER Co. v. DUNRAVEN (1885), 31 Ch. D. 219; 55 L. J. Ch. 91; 53 L. T. 714; 34 W. R. 119.

——— When specific performance decreed.]—See Part X., post.

434. Compensation for injurious affection of land not taken—May be awarded.]—STONE v. YEOVIL CORPN., No. 266, ante.

435. Surveyor's error as to price—Parties bound by agreement.]—SMITH v. IPSWICH & BURY RY. Co. (1847), 9 L. T. O. S. 371.

SUB-SECT. 2.—BY WAY OF RENTCHARGE.

See Lands Act, 1845, ss. 10, 11.

See, generally, RENTCHARGES & ANNUITIES.

436. Not presumed—Where annual rent paid for forty years—Possession taken under invalid award.]—A canal co., having power to purchase lands for gross sums or for annual rentcharges, to be determined by comrs. in cases of disability, took possession of the lands of an infant, on an agreement with his steward, & after an award by the comrs. of the gross sum or annual rent-

charge which ought to be paid, but which award was invalid, no one being party to it who had power to bind the infant's interest, the awarded gross sum was paid by the co. to the steward, on an agreement for its return if the land was not conveyed to the co. on the infant attaining his majority. No conveyance was executed & the purchase-money was returned, but the co. continued in the use of the land for their canal, paying to the landowner, for forty years after he attained his majority, a rent of nearly the amount awarded by the comrs. The co. also with his knowledge purchased the interests of leaseholders in the lands:—Held: (1) an agreement could not be presumed to have been entered into or ratified by the landowner for a sale of the fee in consideration of a rentcharge; (2) an action of ejectment brought by the landowner & the intended erection of a bridge by him ought to be restrained by injunction, on the ground of acquiescence, the co. undertaking to put in force their parliamentary powers to acquire the land.—SOMERSETSHIRE COAL CANAL Co. LTD. v. HARCOURT (1858), 2 De G. & J. 596; 27 L. J. Ch. 625; 31 L. T. O. S. 259; 4 Jur. N. S. 671; 6 W. R. 670; 44 E. R. 1120, L. C.

Annotations:—As to (1) Distd. Martin v. L. C. & D. Ry. (1866), 1 Ch. App. 501. Refd. River Lee Navigation Conservators v. Button (1881), 6 App. Cas. 685. As to (2) Consd. Mold v. Wheatecroft (1859), 27 Beav. 510. Distd. Martin v. L. C. & D. Ry. (1866), 1 Ch. App. 501.

437. Power of limited owner to sell for—Sale of easement for—Extension of Lands Act, 1845, by Special Act.]—A special Act empowered undertakers to purchase for the purposes of their undertaking certain lands or any easements in or over same & gave to the persons empowered by Lands Act, 1845, to convey land full power to convey or grant in perpetuity at an annual or other rent any lands or any easement in or over same:—Held: (1) the effect of the special Act was to extend the powers conferred by Lands Act, 1845, s. 10, so as to enable limited owners to convey land in consideration of a rent reserved, & both absolute & limited owners to convey easements for a like consideration; (2) Lands Act, 1845, s. 11, applied to s. 10 as so extended, & charged the rent reserved on the tolls payable under the special Act, & rents reserved on the conveyance (a) of land, & (b) of an easement, under the special Act by a limited owner, were properly described in particulars of sale as rentcharges.—Re GERARD (LORD) & BEECHAM'S CONTRACT, [1891] 3 Ch. 295; 63 L. J. Ch. 695; 71 L. T. 272; 42 W. R. 678; 7 R. 519, C. A.

438. Right of holder of—His right to distrain.]—EYTON v. DENBIGH, RUTHIN, & CORWEN RY. Co., RICKMAN v. JOHNS (1868), L. R. 6 Eq. 488; 16 W. R. 928.

439. ——— First charge on land comprised in deeds of charge—Payment out of net earnings of undertaking—In priority to debenture-holders.]—The holders of rentcharges created by a railway co. under Lands Act, 1845, ss. 10, 11, & charged on the undertaking of the co., have a first charge on the lands of the co. comprised in the deeds of charge, & are entitled to have their rentcharges paid out of the net earnings of the undertaking in priority to debenture holders.—EYTON v. DENBIGH, RUTHIN, & CORWEN RY. Co. (1869), L. R. 7 Eq. 439; 38 L. J. Ch. 74; 20 L. T. 388; 17 W. R. 546.

Annotation:—Refd. Re Crosbie, Johnson & Hughes v. Crosbie (1909), 74 J. P. 25.

PART V. SECT. 3, SUB-SECT. 1.

e. Under private Act—Agreement as to mode of compensation.]—A co. was authorised by their Act to enter on

property on making compensation to the owners, & on disagreement as to the amount, the sum to be assessed by a jury. The parties agreed on the

mode of compensation:—Held: the statutory remedy did not apply.—RYAN v. LOCKHART (1872), 14 N. B. R. (1 Pug.) 127.—CAN.

Sect. 3.—Consideration for sale: Sub-sect. 2. Sect. 4.]

440. Vendors not entitled to lien for unpaid arrears.]—JERSEY (EARL) *v.* BRITON FERRY FLOATING DOCK CO. (1869), L. R. 7 Eq. 409.

*Annotations:—*Reid. *Re* Gerard, & Boccham's Contract, [1894] 3 Ch. 295. *Mentd.* Barker *v.* Stickney, [1919] 1 K. B. 121.

441. — Secured by power of entry—Power to enter notwithstanding appointment of receiver.]—FORSTER *v.* MANCHESTER & MILFORD RY. CO., *Re* MANCHESTER & MILFORD RY. CO., *Re* RAILWAY COMPANIES ACT, 1867 (1880), 49 L. J. Ch. 454.

Purchase by burial board—Consideration payable in gross sum.]—See BURIAL & CREMATION, Vol. VII., p. 543, No. 226.

SECT. 4.—VALIDITY AND CONSTRUCTION OF AGREEMENT.

See generally, CONTRACT; CORPORATIONS; RAILWAYS & CANALS; SPECIFIC PERFORMANCE.

442. Validity of agreement—Agreement to purchase lands on landowners withholding opposition to bill—Valid—Notwithstanding want of legal power to make contract at time when entered into.]—(1) Where an Act creating a railway co., or giving new powers to an existing co., authorises the purchase of lands for extraordinary purposes, a person who agrees to sell his land to the co. is not bound to see that it is strictly required for such purposes: if he does not know of any intention to misapply the funds of the co., but acts *bonâ fide* in the matter, he may enforce performance of the contract.

(2) Where a contract for the purchase of land is made by the projectors of a proposed line of railway, though an action at law may be maintained upon the contract, a ct. of equity will not, simply on that account, refuse its interference to compel specific performance.

(3) In a contract for the sale of land for the purposes of a projected railway, the vendor was described as having, so far as regarded one part of the land, no more than a mere life estate, & the projectors of the railway undertook to obtain from Parliament powers to enable him to make a good title:—*Held*: where they did not fulfil this stipulation, or but for their own default the title might have been perfected, they could not set up his deficiency of title as an answer to a bill for specific performance.

(4) The directors of an existing railway co. applied to Parliament for an Act to make a branch line & a diverging line, one of which would touch the property of a landowner, & the other pass through his house & garden. He opposed their bill. They entered into an agreement with him to buy his land at a certain price, & on this consideration he withdrew his opposition to the bill, which then passed, but did not give the power to make the diverging line, but only empowered them to make the branch line. The landowner executed his part of the agreement, the directors did not execute theirs, but after some time determined not to make the branch line, & gave the landowner notice that they should not want his land. He filed a bill for specific performance:—*Held*: as the contract was one in furtherance of the general objects of the co., although the co. was not at the time of making

it empowered to execute the works for which the land was wanted, it was not a contract *ultra vires* of the directors, & the person who had contracted to sell the land was entitled to specific performance. —EASTERN COUNTIES RY. CO. *v.* HAWKES (1855), 5 H. L. Cas. 331; 24 L. J. Ch. 601; 25 L. T. O. S. 318; 3 W. R. 609; 10 E. R. 928, H. L.; *affg.* S. C. *sub nom.* HAWKES *v.* EASTERN COUNTIES RY. CO. (1852), 1 De G. M. & G. 737, L. C.

*Annotations:—*As to (2) *Consd.* Haynes *v.* Haynes (1861), 1 Drew. & Sm. 426. As to (4) *Consd.* Lindsey *v.* G. N. Ry. (1853), 10 Hare. 664. *Distd.* Caledonian & Dumbartonshire Junction Co. *v.* Helensburgh Harbour Trustees (1856), 27 L. T. O. S. 241. *Consd.* Preston *v.* Liverpool, Manchester etc. Ry. (1856), 5 H. L. Cas. 605. *Distd.* Bedford & Cambridge Ry. *v.* Stanley (1862), 2 John. & H. 746. *Consd.* Taylor *v.* Chichester & Midhurst Ry. (1870), L. R. 4 H. L. 628. *Distd.* Sun Permanent Benefit Bldg. Soc. *v.* Western Suburban & Harrow Road Permanent Bldg. Soc., [1921] 2 Ch. 438. *Reid.* Stuart *v.* L. & N. W. Ry. (1852), 15 Beav. 513; *Ffooks v.* South Western Ry. (1853), 1 Sm. & G. 142; Shrewsbury & Birmingham Ry. *v.* L. & N. W. Ry. (1853), 4 De G. M. & G. 115. *Reid.* South Yorkshire Ry. & River Dun Co. *v.* G. N. Ry. (1854), 7 Ry. & Can. Cas. 744; Norwich Corpn. *v.* Norfolk Ry. (1855), 4 E. & B. 397; Bateman *v.* Ashton-under-Lyne Corpn. (1858), 3 H. & N. 323; Maunsell *v.* Mid. G. W. Ry. of Ireland & G. N. & W. Ry. of Ireland (1863), 8 L. T. 347; Steele *v.* North Met. Ry. (1867), 2 Ch. App. 238, n.; Ashbury Ry. Carriage & Iron Co. *v.* Riche (1875), L. R. 7 H. L. 653; A.-G. *v.* E. Ry. (1879), 11 Ch. D. 449; Sun Permanent Benefit Bldg. Soc. *v.* Western Suburban & Harrow Road Permanent Bldg. Soc., [1920] 2 Ch. 144.

443. — — — — — If contract could be lawfully entered into by company after incorporation.]

(1) Where the projectors of a railway co., in order to induce a landowner to withdraw his opposition to their bill, enter into a contract with him, in which the stipulation is that the contract is to be performed by the co. after the co. shall have obtained an Act of incorporation, such contract to be valid ought to be one which might be lawfully made by the co. after incorporation.

(2) It is *ultra vires* of a corpn. for the purpose of making a railway, to enter into a covenant to pay a large sum of money to a man for not opposing the passing of the co.'s bill in Parliament.

C. was a landowner, a railway co. was projected, & for the intended railway some of his land would be required. He threatened to oppose the bill. The projectors entered into an agreement with him, that in case the co. should obtain an Act of incorporation, the co. should pay to C. £1,000 for all lands required by the co. for the due making of the railway, & £4,000 for residential injury to the estate & hall of C., also that a tunnel should be constructed in a particular manner through a part of his property, & a passenger station should be made, etc.; C. withdrew his opposition, & the bill passed: the railway was not made nor were the lands required:—*Held*: this was not a contract which on the mere passing of the bill entitled C. to claim from the co. payment of the money.—PRESTON *v.* LIVERPOOL, MANCHESTER & NEWCASTLE-UPON-TYNE JUNCTION RY. CO. (1856), 5 H. L. Cas. 605; 25 L. J. Ch. 421; 27 L. T. O. S. 2; 2 Jur. N. S. 241; 4 W. R. 383; 10 E. R. 1037, H. L.

*Annotations:—*As to (1) *Consd.* Taylor *v.* Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356. *Reid.* Shrewsbury *v.* North Staffordshire Ry. (1865), L. R. 1 Eq. 593; Mann *v.* Edinburgh Northern Tram. Co., [1893] A. C. 69. As to (2) *Consd.* Caledonian & Dumbartonshire Junction Co. *v.* Helensburgh Harbour Trustees (1856), 27 L. T. O. S. 241; Taylor *v.* Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356. *Reid.* Scottish North-Eastern Ry. *v.* Stewart (1859), 33 L. T. O. S. 307, H. L.

PART V. SECT. 4.

1. Validity of agreement—Whether bye-law & notice essential—*British Columbia Highway Act.*—Although a bye-law & notice thereof are necessary to compulsory expropriation under the

above Act, they are not essential where the expropriation is voluntary.—HOPE *v.* SURREY & V. V. & L. RY. (1914), 29 W. L. R. 525; 7 W. W. R. 175; 20 D. L. R. 540; 20 B. C. R. 434.—CAN. g. — *Necessity for resolution of council or subsequent confirmation.]—*

An agreement as to compensation for lands taken by a municipality must either be authorised by a resolution of the council or afterwards confirmed by it.—SWIFT CURRENT (CITY OF) *v.* LESLIE, [1917] 1 W. W. R. 1089; 10 Sask. L. R. 126.—CAN.

444. Personal compensation.]

By articles of agreement under seal between defts. of the one part & pltf. of the other part, after reciting that pltf. was the owner of a certain estate, & that defts. had given notice of their intention to apply, in the then session of Parliament for an Act enabling them to construct a certain extension line of railway in the agreement described, & that, inasmuch as the line of the railway would pass through pltf.'s estate in such manner as to intersect & damage same, pltf. had intimated to defts. his intention to oppose the passing of the bill, but had agreed to withhold his intended opposition upon the terms thereafter contained; it was agreed, *inter alia*, between pltf. & defts., first, that in the event of the bill being passed into an Act during the then session of Parliament, defts. would construct the line of railway so as to enter & pass through the estate of the pltf. within certain specified limits; & secondly, in the like event that defts. would purchase from pltf. at the price of £2,000, certain land of his required for the construction of such railway; & thirdly, in the like event defts. would pay to pltf., in addition to the sum of £2,000, & within three calendar months after the passing of the bill, the further sum of £2,000, as & for a personal compensation for the annoyance, disturbance, inconvenience, damage, loss & injury which he had sustained, & might or would sustain in respect of the sporting & preservation of game upon his estate, by or in consequence of the construction of the intended railway, & of the Parliamentary & other surveys, & other works constructed therewith & incidental thereto; & by the last clause of the agreement, it was provided that the agreement should be void if defts. failed to obtain the Act in the present session of parliament:—*Held*: the agreement was perfectly valid & the payment of the purchase-money into ct. was a fulfilment of the contract to pay it to a tenant for life.

By Lands Act, 1845, sect. 73, a tenant for life may not take for his own use money which may be contracted to be paid, either in consideration of his not opposing a bill, or for any special damage to be done to himself with reference to the severance of the estate; & it is for the Ch. Ct. to determine what portion of such money is to be assigned to the tenant for life, in respect of his own personal grievance. But the tenant for life is still perfectly competent at law to enter into a contract for the whole estate, for the whole damage by severance, & for the withdrawal of opposition to a bill as the condition of the contract that may be entered into.—*TAYLOR v. CHICHESTER & MIDHURST RY. CO. (DIRECTORS, ETC.)* (1870), L. R. 4 H. L. 628; 39 L. J. Ex. 217; 23 L. T. 657; 35 J. P. 228, H. L.

Annotations:—*Consd.* *Guest v. Poole & Bournemouth Ry.* (1870), L. R. 5 C. P. 553; *A.-G. v. G. E. Ry.* (1879), 11 Ch. D. 449. *Refd.* *Riche v. Ashbury Ry. Carriage Co.* (1874), L. R. 9 Exch. 224. *Mentl. Driver v. Kingston Highway Board* (1871), 20 W. R. 20.

445. — Agreement to purchase lands required if Act obtained—Valid.]—*SCOTTISH NORTH-EASTERN RY. CO. v. STEWART*, No. 1, *ante*.

446. — Though company not in existence at time of contract.]—*BEDFORD & CAMBRIDGE RY. CO. v. STANLEY* (1862), 2 John. & H. 746; 1 New Rep. 162; 32 L. J. Ch. 60; 7 L. T. 477; 9 Jur. N. S. 152; 11 W. R. 139; 70 E. R. 1260.

h. Construction of Agreement to pay on making railway.]—A ry. co., obtained an Act for making a branch within 7 years. They agreed beforehand to purchase land, on conditions that the contract should not be

enforced against the co. within that time, & that the purchase-money should be paid when they "began to execute the branch." The branch was never executed or begun. The 7 years expired:—*Held*: obligation to pay

the purchase-money did not arise.—*EDINBURGH, PERTH & DUNDEE RY. CO. v. PHILLIP* (1857), 2 Macq. 514, H. L.—*SCOT*.

Annotation:—*Distd. Kemp v. S. E. Ry.* (1872), 7 Ch. App. 364.

447. Construction of agreement—Agreement to pay on passing of Act—Covenant absolute—Though undertaking not constructed or damage done.]—By an agreement under seal between pltf. & defts. promoters of a bill in Parliament for making a railway, after reciting that the line of railway was proposed to be carried close to pltf.'s park, & through some of his land, & that he had opposed the bill, but in consideration of the covenants therein had acceded thereto, it was witnessed, that, in consideration of the covenants on defts.' part, pltf. did covenant that he would accede to the bill, provided it passed in the present or ensuing session of Parliament; & in consideration of the assent given to the bill by pltf., defts. covenanted, that, in the event of the bill passing, the co. should pay him for so much land intersected by the line as might be required, at the rate of £120 per acre; & that they should pay him £3,000 in full compensation for the general damage which the line should or might do to the mansion, park & estate, including therein the crossing of the road near the entrance of the park, the obstruction of views, etc., the expense of temporary residence during the progress of the works, the depreciation in value as a residence, the additional expense in the cultivation of the farms, by the alteration of the road, & all other damage to be done to the mansion & park. Pltf. agreed, on tender of £120 per acre, & £3,000, that he would convey:—*Held*: defts. had thereby bound themselves that the co. should pay the £3,000 on the passing of the Act, although the railway should not be constructed, or any actual damage be done to pltf.—*BLAND v. CROWLEY* (1851), 6 Exch. 522; 6 Ry. & Can. Cas. 756; 20 L. J. Ex. 218; 17 L. T. O. S. 267; 155 E. R. 650.

Annotations:—*Consd.* *Preston v. Liverpool, Manchester & Newcastle-upon-Tyne Junction Ry.* (1851), 1 Sim. N. S. 586. *Distd.* *Gage v. Newmarket Ry.* (1852), 18 Q. B. 457. *Refd.* *South Yorkshire Ry. & River Dun Co. v. G. N. Ry.* (1853), 9 Exch. 55.

448. — Contract conditional on entry.]—*GAGE v. NEWMARKET RY. CO.* (1852), 18 Q. B. 457; 7 Ry. & Can. Cas. 168; 21 L. J. Q. B. 398; 19 L. T. O. S. 155; 16 Jur. 1136; 118 E. R. 173.

Annotations:—*Consd.* *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331; *Scottish North-Eastern Ry. v. Stewart* (1859), 33 L. T. O. S. 307. *Refd.* *Norwich Corp'n. v. Norfolk Ry.* (1855), 4 E. & B. 397; *Preston v. Liverpool, Manchester, etc. Ry.* (1856), 5 H. L. Cas. 605; *Taylor v. Chichester, & Midhurst Ry.* (1867), L. R. 2 Exch. 356; *Hammer Smith, etc. Ry. v. Brand* (1869), L. R. 4 H. L. 171.

449. — Landowner not entitled on abandonment of undertaking—Contract conditional on making of railway.]—*PRESTON v. LIVERPOOL, MANCHESTER & NEWCASTLE-UPON-TYNE JUNCTION RY. CO.*, No. 443, *ante*.

450. — Contract conditional on beginning to execute works.]—An incorporated railway co. obtained an Act for making a branch within seven years. They gave the usual notices. While their bill was before Parliament they agreed to purchase the land of a certain owner. It was a term of this contract that it should not be enforced against the co. within the seven years, & the purchase-money was to be paid when the co. on obtaining their Act should have begun to execute the branch. The co. obtained their Act, but never executed or began to execute the branch. The seven years expired:—*Held*: (1)

Sect. 4.—Validity and construction of agreement.
Sects. 5 & 6. Part VI. Sect. 1: Sub-sect. 1,
A. & B.; sub-sect. 2, A.]

permissive words in an Act of Parliament are not obligatory; (2) the co. were not bound to execute or begin to execute the branch; (3) as they had not executed or begun to execute the branch their obligation to pay the purchase-money did not arise; (4) although this might appear hard on the vendor, inasmuch as he was kept for seven years in suspense without the power of dealing with his property, yet that very inconvenience might have formed an ingredient in the price contracted for. — *EDINBURGH, PERTH & DUNDEE RY. CO. v. PHILLIP* (1857), 28 L. T. O. S. 345; 3 Jur. N. S. 249; 5 W. R. 377; 2 Macq. 514, H. L.

Annotations:—As to (1) Consd. Scottish North-Eastern Ry. v. Stewart (1859), 33 L. T. O. S. 307; *Darlaston L. B. v. L. & N. W. Ry.*, [1894] 2 Q. B. 694. *Refd. R. v. French* (1878), 3 Q. B. D. 187. *As to (2) Consd. R. v. G. W. Ry.* (1893), 62 L. J. Q. B. 572.

451. ——— Contract conditional on breaking of ground.]—SCOTTISH NORTH-EASTERN RY. CO. v. STEWART, No. 1, ante.

Specific performance of agreements.]—See Part X., post.

SECT. 5.—PAYMENT AND COMPLETION.

452. Conveyance or contract must be in writing—Special Act.]—DOE d. ROBINS v. WARWICK CANAL CO. (1836), 2 Bing. N. C. 483; 2 Scott, 717; 132 E. R. 189.

Annotation:—Consd. Harborough v. Shardlow (1840), 7 M. & W. 87.

453. ———.]—HARBOROUGH (EARL) v. SHARDLOW (1840), 7 M. & W. 87; 2 Ry. & Can. Cas. 253; 10 L. J. Ex. 245; 151 E. R. 690.

Annotation:—Mentd. Rochdale Canal Co. v. King (1849), 14 Jur. 16.

454. Condition precedent to payment or right to sue—Consent of Court of Chancery.]—PORCHER v. GARDNER (1849), 8 C. B. 461; 19 L. J. C. P. 63; 14 L. T. O. S. 221; 14 Jur. 43; 137 E. R. 588.

455. ——— Not taking of land nor damage done—Covenant for payment absolute.]—BLAND v. CROWLEY (1851), 6 Exch. 522; 6 Ry. & Can. Cas. 756; 20 L. J. Ex. 218; 17 L. T. O. S. 267; 155 E. R. 650.

Annotations:—Consd. Gage v. Newmarket Ry. (1852), 18 Q. B. 457; *Preston v. Liverpool, Manchester & Newcastle-upon-Tyne Junction Ry.* (1853), 7 Ry. & Can. Cas. 1. *Refd. South Yorkshire Ry. & River Don Co. v. G. N. Ry.* (1853), 9 Exch. 55.

456. Delay in completion—Default of vendor in possession—Deterioration by permissive waste—Purchaser entitled to compensation.]—REGENT'S CANAL CO. v. WARE (1857), 23 Beav. 575; 26 J. Ch. 566; 29 L. T. O. S. 274; 3 Jur. N. S. 924; 5 W. R. 617; 53 E. R. 226; *subsequent proceedings, sub nom. WARE v. REGENT'S CANAL CO.* (1858), 3 De G. & J. 212, L. C.

PART V. SECT. 5.

1. Where tenant for life has sold.]
 The full amount of compensation

agreed on should not be paid to a tenant for life notwithstanding that the Railway Act omits to provide for its application. If it so does the person in

remainder may recover from the expropriator the amount of his interest.—*CAMERON v. WIGLE* (1876), 24 Gr. 8.—**CAN.**

Annotations:—Refd. Re Pigott & G. W. Ry. (1881), 18 Ch. D. 146; *Re Cary-Elwes' Contract*, [1906] 2 Ch. 143. *Mentd. Mason v. Stokes Bay Ry. & Pier Co.* (1862), 1 New Rep. 84; *Harding v. Met. Ry.* (1872), 7 Ch. App. 154; *Clarke v. Ramuz* (1891), 60 L. J. Q. B. 679.

457. Money deposited in bank by agreement—Bankruptcy of bankers before completion—Loss borne by vendors.]—ST. PAUL v. BIRMINGHAM, WOLVERHAMPTON & STOUR VALLEY RY. CO. (1853), 11 Hare, 305; 1 Eq. Rep. 274; 21 L. T. O. S. 226; 17 Jur. 1176; 1 W. R. 494; 68 E. R. 1291.

Specific performance.]—See Part X., post.

Lien of unpaid vendor—Enforcement of.]—See Part X., post.

Interest on purchase-money.]—See Part X., post.

SECT. 6.—COSTS OF ARBITRATION.

See Lands (Clauses (Taxation of Costs) Act, 1895 (c. 11), s. 1 (1).

458. Liability for—Lands Act, 1845, not applicable—No provision as to costs in award—Promoters not liable.]—C., a lessee under a building lease, agreed, in 1866, to sell part of the demised premises to a railway co., the price, in case of difference, to be referred to a surveyor, to be agreed upon between the parties in the usual manner. The co. had, at the date of the agreement, a bill before Parliament to enable them to take C.'s land, but it had not then become law. The surveyor made his award in 1868, but made no provision as to the costs of the reference:—*Held: Lands Act, 1845, did not apply & C. could not get such costs from the co.; (2) the relation of vendor & purchaser was not established till the price was ascertained & C. must pay the outgoings from the land until the date of the award & was not entitled to interest on the purchase-money up to that date.* —*CATLING v. GREAT NORTHERN RY. CO.* (1869), 21 L. T. 769; 18 W. R. 121, C. A.

Annotation:—Refd. Rhys v. Dare Valley Ry. (1874), 23 W. R. 23.

459. Taxation of—Under Lands Act, 1869, s. 1—Act not retrospective.]—DOULTON v. METROPOLITAN BOARD OF WORKS (1870), L. R. 5 Q. B. 333; 39 L. J. Q. B. 165; 18 W. R. 790.

Annotations:—Consd. Wombwell v. Barnsley Corpn. (1877), 36 L. T. 708. *Mentd. Re Burdekin*, [1895] 2 Ch. 136.

460. ——— Only when arbitration proceeding under Lands Act, 1845—Not when special provisions introduced.]—DOULTON v. METROPOLITAN BOARD OF WORKS, No. 459, ante.

461. ———.]—WOMBWELL v. BARNSELEY CORPN. (1877), 36 L. T. 708; 41 J. P. 502.

Annotation:—Refd. Re Burdekin, [1895] 2 Ch. 136.

See, further, Part VII., Sect. 5, sub-sects. 12, 13, post.

Part VI. Procedure to acquire Land otherwise than by Agreement.

SECT. 1.—CONDITIONS AS TO EXERCISE OF POWERS.

SUB-SECT. 1.—AMOUNT OF FUNDS.

A. Sufficiency of Funds.

462. Funds insufficient to complete undertaking—Promoters restrained from proceeding with purchase—Provided application for injunction made promptly.]—AGAR *v.* REGENT'S CANAL CO. (1815), Coop. G. 77; 35 E. R. 483, L. C.

*Annotations:—*Consd. Kings Lynn Corp'n. *v.* Pemberton (1818), 1 Swan. 244; Salmon *v.* Randall (1838), 3 My. & Cr. 439; Cohen *v.* Wilkinson (1849), 12 Beav. 138. *Refd.* River Dun Navigation Co. *v.* North Midland Ry. (1838), 1 Ry. & Can. Cas. 135; York & Midland Ry. *v.* R. (1853), 17 Jur. 690; Ellice *v.* Roupell (1863), 32 Beav. 308. *Mentd.* Barker *v.* North Staffordshire Ry. (1848), 5 Ry. & Can. Cas. 401.

463. ———.]—KING'S LYNN CORPN. *v.* PEMBERTON (1818), 1 Swan. 214; 36 E. R. 375. *Annotations:—*Consd. Salmon *v.* Randall (1838), 3 My. & Cr. 439; Cohen *v.* Wilkinson (1849), 5 Ry. & Can. Cas. 741. *Refd.* Ware *v.* Grand Junction Water Co. (1831), 2 Russ. & M. 470; York & Midland Ry. *v.* R. (1853), 17 Jur. 690.

464. Funds insufficient to pay price of land taken—Town improvement commissioners—Not restrained from proceeding with purchase.]—The comrs. appointed under the local Acts of Parliament for improving the town of C. have, upon the true construction of those Acts, a continuing right to exercise, from time to time, the power thereby vested in them, of taking property for the purposes of the Acts, & of referring the assessment of the price to a jury, so long as may be required for carrying into full effect the purposes contemplated by the Acts.

A person whose property is required by the comrs. for the purposes of the Acts is not entitled to restrain them, by injunction, from taking the steps prescribed by the Acts for obtaining possession of the property, until they shall have shown a sufficient fund in hand to satisfy the price which may be awarded to him, or until they shall have shown the means by which they propose to procure it.—SALMON *v.* RANDALL (1838), 3 My. & Cr. 439; 40 E. R. 996, L. C.

*Annotations:—*Refd. Cohen *v.* Wilkinson (1849), 12 Beav. 138; Haynes *v.* Haynes (1861), 1 Drew. & Sm. 426. *Mentd.* Salisbury *v.* G. N. Ry. (1852), 21 L. J. Q. B. 185.

B. Subscription of Capital.

See Lands Act, 1845, ss. 16, 17.

465. Application of s. 16—Not to extension of railway by funds to be raised by new shares.]—Lands Act, 1845, s. 16, does not apply to a case where an extension line of railway is to be made by an existing co. by means of funds to be raised by new shares in such co.—R. *v.* GREAT WESTERN Ry. Co. (1852), 1 E. & B. 253; 22 L. J. Q. B. 65; 20 L. T. O. S. 93; 118 E. R. 434; *proceedings, sub nom.* GREAT WESTERN Ry. Co. *v.* R. (1853), 1 E. & B. 874. Ex. Ch.

*Annotations:—*Fold. Weld *v.* L. & S. V. Ry. (1862), 32 Beav. 340. *Mentd.* Shackell *v.* West (1859), 2 E. & E.

PART VI. SECT. 1, SUB-SECT. 2.—A.

1. Construction of s. 123—Meaning of "Land taken pursuant to Provisional Order."—Lands Act, 1845, s. 123, limits the time for compulsory purchase, if no period is prescribed, to three years after the passing of a special Act. The Military Lands Act, 1892, incorporating the Lands Act, enacted that "in its con-

struction & in that of the incorporated Acts, it should be deemed the special Act." It also enacted that the provisions of the incorporated Acts with respect to compulsory purchase should not be put in force until a Provisional Order had been made & sanctioned by statute. A Provisional Order authorising the taking of lands was confirmed in 1895. In Feb. 1898, a notice to

treat was served, & steps were taken to have compensation ascertained by arbitration. In June, 1898, an action was brought to restrain arbitration proceedings:—*Held*: the "special Act" within Lands Act, 1845, was Military Lands Act, 1892, together with the Act of 1895 confirming the Provisional Order.—HILL *v.* HAIRE, [1899] 1 L. R. 87.—IR.

326; Forbes *v.* Lee Conservancy Board (1879), 48 L. J. Q. B. 402.

466. ——— Not to branch railway authorised to be made by existing company.]—WELD *v.* SOUTH WESTERN Ry. Co. (1863), 32 Beav. 340; 1 New Rep. 415; 33 L. J. Ch. 142; 8 L. T. 13; 9 Jur. N. S. 510; 11 W. R. 448; 55 E. R. 133.

467. ——— Not to entry under s. 85.]—GREAT WESTERN Ry. Co. *v.* SWINDON & CHELTENHAM Ry. Co., No. 36, *ante*.

468. ——— May be superseded by terms of special Act.]—GREAT WESTERN Ry. Co. *v.* SWINDON & CHELTENHAM Ry. Co., No. 36, *ante*.

469. ——— Clause requiring deposit to be made—Deposit duly made.]—MANCHESTER, SHEFFIELD & LINCOLNSHIRE Ry. Co. *v.* SHEFFIELD & SOUTH YORKSHIRE NAVIGATION Co. (1890), 6 T. L. R. 414.

470. ——— Notice to treat not necessarily exercise of compulsory powers within s. 16.]—It is no answer to an action against a railway co. for not issuing their warrant under Lands Act, 1845, s. 39, for the assessment of compensation for land which they have given notice of their intention to purchase, that the undertaking was intended to be carried into effect by means of a certain capital, & that the whole amount has not been subscribed, as required by s. 16, the notice to treat not necessarily being an exercise of the powers of the Act in relation to the compulsory taking of land.—GUEST *v.* POOLE & BOURNEMOUTH Ry. Co. (1870), L. R. 5 C. P. 553; 39 L. J. C. P. 320; 22 L. T. 589; 18 W. R. 836.

*Annotations:—*Consd. G. W. Ry. *v.* Swindon & Cheltenham Ry. (1884), 9 App. Cas. 787; *Re* Uxbridge & Rickmansworth Ry. (1890), 43 Ch. D. 536.

471. ———.]—FORD *v.* PLYMOUTH, DEVONPORT & SOUTH WESTERN JUNCTION Ry. Co., [1887] W. N. 201.

Effect of notice to treat generally.]—See Sect. 2, sub-sect. 5, *post*.

472. Effect of Lands Act, 1845, s. 16—Exercise of compulsory powers before capital subscribed illegal—Although land of third party compulsorily taken on another part of line.]—R. *v.* AMBERGATE, ETC. Ry. Co. (1853), 1 E. & B. 372; 22 L. J. Q. B. 191; 20 L. T. O. S. 216; 17 Jur. 668; 118 E. R. 475.

——— What amounts to exercise of compulsory powers.]—See No. 470, *ante*.

473. Evidence of subscription of capital—Certificate of two justices or police magistrate—Conclusive unless obtained by fraud.]—YSTALYFERA IRON CO. *v.* NEATH & BRECON Ry. Co., No. 489, *post*.

SUB-SECT. 2.—LIMIT OF TIME.

A. In General.

Lands Act, 1845, s. 123.

474. Construction of s. 123—"Powers of promoters"—Mean powers of several promoters of

sect. 1.—Conditions as to exercise of powers: Sub-

several special Acts—Not several powers of promoters of each special Act.]—SPARROW *v.* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO. (1851), 9 Hare, 436; 18 L. T. O. S. 116; 68 E. R. 580; *subsequent proceedings* (1852), 2 De G. M. & G. 94, L. J.J.

*Annotations:—*Refd. St. Thomas' Hospital *v.* Charing Cross Ry. (1860), 30 L. J. Ch. 395. *Mentd.* Salisbury *v.* G. N. Ry. (1852), 17 Q. B. 840; Pinchin *v.* London & Blackwall Ry. (1854), 1 K. & J. 34; Spackman *v.* G. W. Ry. (1855), 1 Jur. N. S. 790; Hedges *v.* Met. Ry. (1860), 28 Beav. 109; Haynes *v.* Haynes (1861), 1 Drew. & Sm. 426; Reddin *v.* Metropolitan Board of Works (1862), 7 L. T. 6.

475. ——— “For compulsory purchase & taking of land” —Do not include powers for carrying into effect purchase already made.]—SPARROW *v.* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO. (1852), 2 De G. M. & G. 94; 7 Ry. & Can. Cas. 92; 21 L. J. Ch. 731; 19 L. T. O. S. 131; 16 Jur. 703; 42 E. R. 806, L. J.J.

*Annotations:—*Consd. Pinchin *v.* London & Blackwall Ry. (1854), 1 K. & J. 34; Spackman *v.* G. W. Ry. (1855), 1 Jur. N. S. 790; Hedges *v.* Met. Ry. (1860), 28 Beav. 109. *Refd.* Haynes *v.* Haynes (1861), 1 Drew. & Sm. 426; Reddin *v.* Metropolitan Board of Works (1862), 4 De G. M. & G. 532; Furniss *v.* Mid. Ry. (1868), L. R. 6 Eq. 473. *Mentd.* St. Thomas' Hospital *v.* Charing Cross Ry. (1861), 1 John. & H. 400.

B. How Fixed.

476. No period prescribed by special Act—Lands Clauses Acts not incorporated—Powers exercisable so long as necessary to carry out purposes of special Act.]—SALMON *v.* RANDALL, No. 464, *ante*.

477. ——— Lands Clauses Acts incorporated—Period limited to three years.]—SEYMOUR *v.* LONDON & SOUTH WESTERN RY. CO. (1859), 33 L. T. O. S. 280; 5 Jur. N. S. 753.

478. Period prescribed by special Act—Three years “from passing of” Act—Day on which Act received royal assent excluded.]—Under a special Act, which incorporated Lands Act, 1845, a railway co. were empowered to take lands compulsorily for the purpose of their undertaking, & the powers of the co. for this purpose were to cease after the expiration of three years from the passing of the Act. The Act received the royal assent on Aug. 9, 1899, & on Aug. 9, 1902, the co. gave to plffs. a notice to treat for the purchase of lands belonging to them & scheduled in the special Act. On an application for an injunction to restrain the co. from proceeding under this notice:—*Held*: the day of the passing of the Act must be excluded in the computation of the three years, & the notice was served in time.—GOLDSMITHS' CO. *v.* WEST METROPOLITAN RY. CO., [1904] 1 K. B. 1; 72 L. J. K. B. 931; 89 L. T. 428; 68 J. P. 41; 52 W. R. 21; 20 T. L. R. 7; 48 Sol. Jo. 13, C. A.

479. ——— “Within three calendar months” —Promoters not allowed to compel parties referred to in Act to sell after expiration.]—TONE RIVER CONSERVATORS *v.* ASH (1829), 10 B. & C. 349; 8 L. J. O. S. K. B. 226; 109 E. R. 479.

*Annotations:—**Mentd.* Bridgwater & Taunton Canal Co. *v.* Bluett (1829), 10 B. & C. 393; Bower *v.* Griffith (1868), 16 W. R. 540; *Re* St. Alphago, London Wall (1888), 59 L. T. 614; Salford Corpn. *v.* Lancashire County Council (1890), 25 Q. B. D. 384.

For completion of works.]—See particular Titles, *passim*.

C. What amounts to Exercise of Powers within prescribed Period.

480. Notice to treat—Summoning of jury before expiration of time—Assessment made after—Injunction to restrain promoters from proceeding

granted—Pending decision of court of law whether powers determined.]—By a railway Act it was provided, that the powers of the co. for the compulsory purchase or taking of lands should not be exercised after the expiration of three years from the passing of the Act. This period expired on July 4. The co. having given plff. notice that they would take a portion of his land under the compulsory powers, a jury was summoned according to the provisions of the Act, & assembled on July 3, but did not terminate their sittings or make their award till July 6. Upon an application that the co. might be restrained from paying the money in the manner directed by the Act, & from proceeding to take possession of the land:—*Held*: an injunction should be granted until the opinion of a ct. of law should be obtained whether the compulsory powers had or had not determined.—BROCKLEBANK *v.* WHITEHAVEN JUNCTION RY. CO. (1847), 15 Sim. 632; 5 Ry. & Can. Cas. 373; 16 L. J. Ch. 471; 9 L. T. O. S. 470; 11 Jur. 663; 60 E. R. 765, L. C.

*Annotations:—*Consd. Kinnersly *v.* North Staffordshire Ry. (1849), 6 Ry. & Can. Cas. 662. *Expld. & Distd.* R. *v.* Birmingham & Oxford Junction Ry. (1850), 15 Q. B. 634. *Distd.* Doe d. Armitstead *v.* North Staffordshire Ry. (1851), 16 Q. B. 526. *Consd.* Webster *v.* S. E. Ry. (1851), 6 Ry. & Can. Cas. 698; Salisbury *v.* G. N. Ry. (1852), 17 Q. B. 840. *Refd.* Dakin *v.* L. & N. W. Ry. (1850), 14 L. T. O. S. 503; Birmingham & Oxford Junction Ry. *v.* R. (1851), 20 L. J. Q. B. 304; Sparrow *v.* Oxford, Worcester & Wolverhampton Ry. (1852), 7 Ry. & Can. Cas. 92.

481. ——— Summoning of jury after expiration of time—Whether valid.]—WOOD *v.* NORTH STAFFORDSHIRE RY. CO. (1849), 3 De G. & Sm. 368; 64 E. R. 519.

482. ——— Valid—Mandamus to compel promoters to summon jury granted.]—Lands Act, 1845, s. 123, provided that the powers of promoters of an undertaking, within that Act & any special Act there referred to, for the compulsory purchase or taking of lands for the purposes of the special Act, should not be exercised after the expiration of three years from the passing of the special Act:—*Held*: this clause does not prevent such promoters from summoning a jury to assess compensation for land at the instance of the landowner, when the promoters had, within the three years, by virtue of their special Act, given notice to the landowner of their requiring such land, but had neglected to summon a jury till the three years had expired, & the promoters might, at the landowner's instance, be compelled by mandamus to summon such jury.—R. *v.* BIRMINGHAM & OXFORD JUNCTION RY. CO. (1851), 15 Q. B. 634; 6 Ry. & Can. Cas. 628; 117 E. R. 599; *sub nom.* BIRMINGHAM & OXFORD JUNCTION RY. CO. *v.* R., 20 L. J. Q. B. 304, Ex. Ch.

*Annotations:—**Expld.* R. *v.* L. & N. W. Ry. (1851), 6 Ry. & Can. Cas. 634; Salisbury *v.* G. N. Ry. (1852), 17 Q. B. 840. *Consd.* Pinchin *v.* Blackwall Ry. (1854), 24 L. T. O. S. 196; Haynes *v.* Haynes (1861), 1 Drew. & Sm. 426. *Refd.* Doe d. Armitstead *v.* North Staffordshire Ry. (1851), 16 Q. B. 526; Sparrow *v.* Oxford, Worcester & Wolverhampton Ry. (1852), 7 Ry. & Can. Cas. 92; Tiverton & North-Devon Ry. *v.* Loosemore (1884), 9 App. Cas. 480.

483. ——— Entry on land under Lands Act, 1845, s. 85, after expiration of time—Valid—Provided time for completion of works unexpired.]—TIVERTON & NORTH DEVON RY. CO. *v.* LOOSEMORE, No. 1035, *post*.

484. ——— ———.]—SPARROW *v.* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO. (1852), 2 De G. M. & G. 94; 7 Ry. & Can. Cas. 92; 21 L. J. Ch. 731; 19 L. T. O. S. 131; 16 Jur. 703; 42 E. R. 806, L. J.J.

*Annotations:—*Consd. Pinchin *v.* London & Blackwall Ry. (1854), 1 K. & J. 34; Hedges *v.* Met. Ry. (1860), 28 Beav. 109; Haynes *v.* Haynes (1861), 1 Drew. & Sm. 426. *Fold.* St. Thomas' Hospital *v.* Charing Cross Ry. (1861), 1 John. & H. 400. *Refd.* Salisbury *v.* G. N. Ry. (1852), 17

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Q. B. 840. *Mentd. Spackman v. G. W. Ry.* (1855), 1 Jur. N. S. 790; *Reddin v. Metropolitan Board of Works* (1862), 4 De G. F. & J. 532; *Furniss v. Mid. Ry.* (1868), L. R. 6 Eq. 473.

485. ————.]—**SALISBURY (MARQUIS) v. GREAT NORTHERN RY. CO.**, No. 1039, *post*.

486. ———— & purchase-money deposited & bond delivered under Lands Act, 1845, s. 85—**Power to purchase land after expiration of time—Exercisable.**]—**SPARROW v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO.** (1852), 2 De G. M. & G. 94; 7 Ry. & Can. Cas. 92; 21 L. J. Ch. 731; 19 L. T. O. S. 131; 16 Jur. 703; 42 E. R. 806, L. J. J. *Annotations*:—*Consd. Pinchin v. London & Blackwall Ry.* (1854), 1 K. & J. 34; *Hedges v. Met. Ry.* (1860), 28 Beav. 109; *St. Thomas' Hospital v. Charing Cross Ry.* (1860), 30 L. J. Ch. 395; *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426. *Refd. Salisbury v. G. N. Ry.* (1852), 17 Q. B. 840. *Mentd. Spackman v. G. W. Ry.* (1855), 1 Jur. N. S. 790; *Reddin v. Metropolitan Board of Works* (1862), 4 De G. F. & J. 532; *Furniss v. Mid. Ry.* (1868), L. R. 6 Eq. 473.

487. ———— **Landowner entitled to have purchase-money assessed under Lands Act, 1845, s. 68, after expiration of time.**]—**DOE d. ARMITSTEAD v. NORTH STAFFORDSHIRE RY. CO.** (1851), 16 Q. B. 526; 20 L. J. Q. B. 249; 17 L. T. O. S. 59; 15 Jur. 944; 117 E. R. 980; *subsequent proceedings* (1852), 19 L. T. O. S. 374.

Annotations:—*Expld. R. v. York, Newcastle & Berwick Ry.* (1851), 6 Ry. & Can. Cas. 648. *Apld. Salisbury v. G. N. Ry.* (1852), 17 Q. B. 840. *Expld. Tiverton & North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480. *Refd. Sparrow v. Oxford, Worcester & Wolverhampton Ry.* (1852), 7 Ry. & Can. Cas. 92; *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101. *Mentd. Doe d. Hudson v. Leeds & Bradford Ry.* (1851), 16 Q. B. 796; *Worsley v. South Devon Ry.* (1851), 16 Q. B. 539; *May v. G. W. Ry.* (1872), L. R. 7 Q. B. 364; *Dowling v. Pontypool Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714; *Finch v. L. & S. W. Ry.* (1889), 60 L. T. 350; *Donaldson v. South Shields Corpn.* (1899), 79 L. T. 685.

488. ———— **Proceedings under notice after expiration of time—& after expiration of time for completion of works—Restrained.**]—A railway co. having compulsory powers to take land served notice on the owner of premises, to which such powers applied, of their intention to take his property, & took no further steps towards acting upon that notice, but replied to the inquiries of the landowner that they should require the land, & intended to act on their notice. The time limited by the co.'s Act for the completion of the line having expired, & the line having, in fact, been completed & opened, the co. procured a fresh Act extending their power to take land, including the premises comprised in the notice, & then claimed to proceed under their original notice:—*Held*: they could not do so, inasmuch as the line having been completed for the ordinary purposes of traffic before the second Act was obtained, the onus was thrown upon the co. of showing that the land was wanted for the purposes of the original undertaking, & this onus was not discharged.—**RICHMOND v. NORTH LONDON RY. CO.** (1868), 3 Ch. App. 679; 37 L. J. Ch. 886; 33 J. P. 86, L. C.

Annotations:—*Expld. & Follid. Ystalyfera Iron Co. v. Neath & Brecon Ry.* (1873), L. R. 17 Eq. 142. *Consd. Loosemore v. Tiverton & North Devon Ry.* (1882), 22 Ch. D. 25. *Refd. Tiverton & North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480. *Mentd. Stretton v. Great Western & Brentford Ry.* (1870), 5 Ch. App. 754, n.

489. ———— **Time for completion extended—Notice to treat not invalidated by lapse.**]—The J. Ry. Co.'s Act, passed in July, 1864, provided that certain persons who had subscribed, & all others who should subscribe, to the undertaking, should be incorporated for the purpose of making the railway thereby authorised, & by the same Act the compulsory powers for taking lands were limited to three years, & the time for completing the works to five years from the passing of the

Act. The co., having obtained the magistrate's certificate that the whole of the required capital had been subscribed for, served a notice to take certain lands of pl'tfs. In 1869 the co., having failed to raise sufficient capital to make the line, obtained an Act, of which pl'tfs. had notice, for amalgamating their co. with the N. Co., who were to make the railway, & the time for completion was extended to July, 1872. In 1871 the N. Co. proceeded under the notice to take pl'tfs.' land. On a bill praying an injunction to restrain the N. Co. from taking the land, alleging that the notice to treat, if valid, had been abandoned by lapse of time, & that such notice was invalid, as no subscription contract had been proved, & the required capital had not then been subscribed for:—*Held*: (1) under the circumstances, there had been no abandonment of the notice; (2) the certificate of two justices or of a police magistrate, under Lands Act, 1845, s. 17, was, unless obtained by fraud, conclusive evidence that the capital was subscribed for, & it appeared from the J. Ry. Co.'s Act that there was a subscription contract, & the notice to treat was valid.—**YSTALYFERA IRON CO. v. NEATH & BRECON RY. CO.** (1873), L. R. 17 Eq. 142; 43 L. J. Ch. 476; 29 L. T. 662; 22 W. R. 149.

Annotation:—*As to* (1) *Refd. Loosemore v. Tiverton & North Devon Ry.* (1882), 22 Ch. D. 25.

Effect of notice to treat generally.]—*See* Sect. 2, sub-sect. 5, *post*.

D. Failure to exercise Powers within prescribed Period.

490. **Effect of—Mandamus to compel promoters to purchase lands to complete works—Refused.**]—The time limited by a railway co.'s special Act for the exercise of the co.'s powers for the compulsory purchase of lands, having actually expired before the granting of a writ of mandamus:—*Held*: the co. could not be compelled by mandamus to purchase the lands necessary for making & completing a branch railway, as they had been required to do by a notice on the part of the landowners, a month before the expiration of their powers. **R. v. LONDON & NORTH WESTERN RY. CO.** (1851), 16 Q. B. 804; 1 E. & B. 199, n.; 6 Ry. & Can. Cas. 634; 20 L. J. Q. B. 399; 17 L. T. O. S. 92; 15 J. P. 642; 15 Jur. 873; 117 E. R. 1113.

Annotations:—*Follid. R. v. South Devon Ry.* (1851), 17 L. T. O. S. 142. *Expld. R. v. York, Newcastle & Berwick Ry.* (1851), 16 Q. B. 886; *R. v. Ambergate, etc. Ry.* (1853), 1 E. & B. 372. *Consd. R. v. Dundalk & Enniskillen Ry.* (1861), 5 L. T. 25. *Refd. Shackell v. West* (1859), 8 W. R. 22.

E. Extension of Time.

491. **By subsequent Act—Promoters entitled to take land within extended time.**]—A co. were empowered by Act of Parliament to take lands for the formation of a railway, & to deviate to the extent of one hundred yards from the line laid down in their map, provided such deviation was made within two years from the passing of the Act, which two years would expire on July 4, 1838. In Jan. 1837, a deviation in the line, within the prescribed limits, was made. A subsequent Act, passed in May, 1837, enacted that the time by the first Act limited for the compulsory purchase of lands should be enlarged for the term of one year, but providing that no deviation from the line laid down should be made after the expiration of the period by the first Act limited. The railway co. having, subsequently to July 4, 1838, given notice to certain owners of lands on the line to which they had deviated in Jan. 1837, of their

Sect. 1.—Conditions as to exercise of powers: Sub-sect. 2, E. Sect. 2; Sub-sect. 1, A., B. & C.; sub-sect. 2, C.; sub-sect. 3.]

intention to take the lands under the powers given by the Acts, on a motion for an injunction to restrain the railway co. from so proceeding to obtain possession, on the ground that the co., having allowed the time limited by the first Act to expire, had no power to take the lands by compulsory process:—*Held*: (1) where it is clearly shown that a public co. is exceeding its powers this ct. cannot refuse to interfere by injunction; (2) the co. having, previous to the expiration of the two years limited by the first Act, & previous, also, to the passing of the second Act, deviated within the authorised limits from the line laid down in the map, the second Act must be construed to give them an enlarged period of one year in which to exercise the power of taking the land in the line to which they had so deviated.—*DUN RIVER NAVIGATION CO. v. NORTH MIDLAND RY. CO.* (1838), 1 Ry. & Can. Cas. 135; 2 Jur. 1076, L. C.

Annotations:—As to (1) *Consd.* *Richmond v. North London Ry.* (1868), L. R. 5 Eq. 352; *London Association of Shipowners & Brokers v. London & India Docks Joint Committee*, [1892] 3 Ch. 242. *Refd.* *Sutton v. S. E. Ry.* (1865), L. R. 1 Exch. 32; *Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714.

492. ——— Notice to treat under first Act—New notice under subsequent Act—To take land included in first notice.]—*WILLIAMS v. SOUTH WALES RY. CO.* (1849), 3 Dc G. & Sm. 354; 13 L. T. O. S. 6; 13 Jur. 443; 64 E. R. 513.

493. ——— Time may be prolonged & extended after expiration.]—*BENTLEY v. ROTHERHAM & KIMBERWORTH LOCAL BOARD OF HEALTH* (1876), 4 Ch. D. 588; 46 L. J. Ch. 284.

2.—THE NOTICE TO TREAT.

SUB-SECT. 1.—NECESSITY FOR NOTICE.

A. In General.

See Lands Act, 1845, ss. 18–20.

494. Acquisition of land—Or water rights—Notice necessary.]—A public body with compulsory powers of appropriating a person's land or water rights or of acquiring some easement over his property cannot take land or interfere with the free use by the owner of his property without giving to the landowner notice to treat for some definite subject-matter. On failure by such body to comply with statutory directions a landowner whose property has been injuriously affected retains his ordinary right of action for trespass, & where the damages are of a substantial character is entitled to an injunction. In such a case there is no discretion in the ct. to award damages only in lieu of an injunction.—*SAUNBY v. LONDON (ONT.) WATER COMRS.*, [1906] A. C. 110; 75 L. J. P. C. 25; 93 L. T. 648; 22 T. L. R. 37, P. C.

B. On Extinguishment of Easements.

495. Acquisition of easement—Notice unnecessary.]—*PINCHIN v. LONDON & BLACKWALL RY. CO.*, No. 601, *post*.

PART VI. SECT. 2, SUB-SECT. 1.—B.

k. Acquisition of easement—Notice necessary.]—A public body with compulsory powers of acquiring some easement over a person's property cannot interfere with its free use by the owner without giving him notice to treat.—*CHAMPION & WHITE v. VANCOUVER CITY*, [1918] 1 W. W. R. 216.—*CAN.*

PART VI. SECT. 2, SUB-SECT. 2.—A.

l. Owners persons empowered to

convey, or interested in land.—*Cestuis que trust—Dominion Railway Act, 1903, s. 171.*—A bare trustee of land is not "the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken," within above sect. & notice must be served upon all *cestuis que trust*.—*Re JAMES BAY RY. CO. & WORRELL* (1905), 10 O. L. R. 740; 6 O. W. R. 473.—*CAN.*

496. ——— Notice necessary.] — *SAUNBY v. LONDON (ONT.) WATER COMRS.*, No. 494, *ante*.
—— What amounts to.]—See Nos. 119, 120, *ante*.

497. Interference with easement—Notice unnecessary.]—*CLARK v. LONDON SCHOOL BOARD*, No. 233, *ante*.

—— Compensation for.]—See Part III., Sect. 3, sub-sect. 4, B. (c), *ante*.

Whether easement included in "land".]—See Part II., Sect. 1, sub-sect. 2, *ante*.

Right to use land to prevent acquisition of prescriptive rights.]—See Part II., Sect. 4, *ante*.

Right to grant easements over land acquired.]—See Part II., Sect. 4, *ante*.

C. Before beginning Authorised Works in or on Land.

498. Tunnelling—Under cul-de-sac—Notice to owner of adjoining land in respect of soil of cul-de-sac—Unnecessary.]—*SOUCH v. EAST LONDON RY. CO.* (1873), L. R. 16 Eq. 108; 42 L. J. Ch. 477; 37 J. P. 644; 21 W. R. 590; *subsequent proceedings* (1874), 22 W. R. 566.

Annotations:—*Mentd.* *Clark v. London School Board* (1873), 21 W. R. 723; *Bailey v. Jamieson* (1876), 34 L. T. 62; *Vernon v. St. James, Westminster Vestry* (1880), 16 Ch. D. 449.

499. ——— Power to "Appropriate & use" subsoil—Notice to landowner necessary.]—*FARMER v. WATERLOO & CITY RY. CO.*, [1895] 1 Ch. 527; 64 L. J. Ch. 338; 72 L. T. 225; 59 J. P. 295; 43 W. R. 363; 11 T. L. R. 210; 13 R. 306.

500. Erection of pillar—Sunk in ground—Not a "taking" within Lands Act, 1845, s. 18.]—*ESCOTT v. NEWPORT CORPN.*, [1904] 2 K. B. 369; 73 L. J. K. B. 693; 90 L. T. 348; 68 J. P. 135; 52 W. R. 543; 20 T. L. R. 158; 2 L. G. R. 779, D. C.

Annotations:—*Consd.* *Andrews v. Abertillery U. C.* (1911), 80 L. J. Ch. 724. *Refd.* *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299.

SUB-SECT. 2.—SERVICE OF NOTICE.

A. Parties to be served.

See Lands Act, 1845, s. 18.

501. Infant—Notice to be given to guardian—Notice given to next friend in pending proceedings—Invalid.]—By an Act of Parliament it was enacted that defts. should, within twelve months, give notice to plff., an infant, of the lands belonging to him, which they might require to take; & it was declared that by the term "Earl of H." should be meant, during his minority, his testamentary guardian. Other proceedings were pending in which plff. was represented by a next friend, & the notice was, within the limited time, served upon the next friend; but it was not until after the expiration of twelve months that any notice was served upon the guardian:—*Held*: no notice had been given under the Act, & the co. must be restrained from taking the land.—*HARRINGTON (EARL) v. METROPOLITAN RY. CO.* (1865), 13 L. T. 658, L. JJ.

m. ——— Transferees of land with unrecorded interest.—*Dominion Railway Act, 1903, s. 171.*—A transferee of land or purchaser under agreement of sale, whose interest is not recorded, but who, during arbitration proceedings by a ry. co. for purchase, records his interest, has a right to notice.—*Re EDMONTON DUNVEGAN & BRITISH COLUMBIA RY. CO.* (1914), 28 W. L. R. 967; 18 D. L. R. 633.—*CAN.*

502. Quarterly tenant—Under notice to quit—Given by promoters after purchase from freeholder—Notice unnecessary.]—Defts. had, under Metropolitan Street Improvements Act, 1872, purchased a house of the owner, pending pltf.'s tenancy, & had given pltf., who was a quarterly tenant, notice to quit at the expiration of his tenancy. On motion for an injunction to restrain defts. from entering upon the premises until they had given pltf. the notice to treat required by Lands Act, 1845, s. 18, & had paid him, or deposited in the bank, the compensation awarded to be paid under the Act, for his interest in the premises:—*Held*: pltf., as a quarterly tenant, had no interest, legal or equitable, in the premises within the meaning of the sect.—*SYERS v. METROPOLITAN BOARD OF WORKS* (1877), 36 L. T. 277, C. A.

503. Mortgagee—After notice given to mortgagor—& possession taken thereunder—Notice valid.]—*COOKE v. LONDON COUNTY COUNCIL*, [1911] 1 Ch. 604; 80 L. J. Ch. 423; 104 L. T. 540; 75 J. P. 309; 9 L. G. R. 593.

B. Mode of Service.

See Lands Act, 1845, s. 19.

504. Must be served personally—Or left at last usual place of abode—Notice left with party's landlord at party's office & not communicated to party—Not properly served.]—*R. v. GREAT NORTHERN RY. CO.* (1876), 2 Q. B. D. 151; 46 L. J. Q. B. 4, D. C.

Annotations:—*Consd. & Folld. Shepherd v. Norwich Corpn.* (1885), 30 Ch. D. 553. *Mentd. R. v. Kennedy* (1893), 41 W. R. 380.

505. May be left with occupier—If party cannot be found after diligent inquiry—Notice left with occupier of part of premises without any attempt made to serve party—Not properly served.]—*SHEPHERD v. NORWICH CORPN.* (1885), 30 Ch. D. 553; 54 L. J. Ch. 1050; 53 L. T. 251; 33 W. R. 841; 1 T. L. R. 545.

506. Irregularity in service—Not cured by party's subsequent adoption of notice.]—*SHEPHERD v. NORWICH CORPN.* (1885), 30 Ch. D. 553; 54 L. J. Ch. 1050; 53 W. R. 841; 1 T. L. R. 545.

C. Service of more than one Notice.

507. On same person—In respect of different lands—Valid—Part taken for railway—Remainder for station.]—*SIMPSON v. LANCASTER & CARLISLE RY. CO.* (1847), 15 Sim. 580; 4 Ry. & Can. Cas. 625; 9 L. T. O. S. 167; 11 Jur. 879; 60 E. R. 744.

Annotation:—*Folld. Stamps v. Birmingham, Wolverhampton & Stour Valley Ry.* (1848), 7 Hare, 251.

508. ——— Land becoming insufficient from unforeseen circumstances.]—A railway co. is entitled, under Lands Act, 1845, to give a second notice to a landowner for land within the limits to which their compulsory powers extend, if, from unforeseen circumstances, the land taken under

the first notice turn out to be insufficient for the authorised purposes of their railway.—*STAMPS v. BIRMINGHAM & STOUR VALLEY RY. CO.* (1848), 2 Ph. 673; 6 Ry. & Can. Cas. 123; 17 L. J. Ch. 431; 41 E. R. 1103, L. C.

Annotations:—*Consd. Haynes v. Haynes* (1861), 1 Drew. & Sim. 426. *Mentd. Southall v. British Mutual Life Assee. Soc.* (1869), 38 L. J. Ch. 711.

509. ——— After first notice validly withdrawn.]—The compulsory powers of promoters, under Lands Act, 1845, s. 18, to purchase land of a particular landowner, are not exhausted by a single notice to treat for part of his land. If that notice is validly withdrawn, as it may be, for instance, upon a counter-notice by the landowner under s. 92 to take the whole of his land, the promoters are in same position as if no notice to treat had been given, & may therefore give a second notice in respect of the land comprised in the first notice, or any part thereof, & upon that being validly withdrawn, may give a third notice, & so on during the time limited by their special Act for the exercise of compulsory powers; the result being that they are entitled to proceed to the assessment of compensation upon the latest notice to treat not validly withdrawn.—*ASHTON VALLEY IRON CO. LTD. v. BRISTOL CORPN.*, [1901] 1 Ch. 591; 70 L. J. Ch. 230; 83 L. T. 694; 49 W. R. 295; 17 T. L. R. 183; 45 Sol. Jo. 201, C. A.

Validity of withdrawal of notice generally, see Sub-sect. 6, *post*.

——— In respect of land & subsequently in respect of minerals thereunder.]—Part IV., Sect. 1, sub-sect. 1, *ante*.

510. ——— In respect of same land—By rival companies.]—Where both pltf. & deft. cos. had Parliamentary powers to take the same land, & each had given notice to treat, without more, but the landowner had not come to an agreement with either co., nor had any other step required by Lands Act, 1845, been taken:—*Held*: (1) assuming Parliament to have given a preference to pltf. co., the ct. would not, after pltf. co.'s powers had expired, restrain deft. co. by interlocutory injunction from entering & commencing works on the land; (2) pltf. co., in taking possession without an agreement, & without taking the steps required by Lands Act, 1845, were trespassers, & their Act of Parliament, did not apply till they had got a title.—*BRISTOL & NORTH SOMERSET RY. CO. v. SOMERSET & DORSET RY. CO.* (1874), 22 W. R. 601, L. C.

511. On different persons—In respect of same land—Valid—Mortgagee—After notice to mortgagor & possession taken thereunder.]—*COOKE v. LONDON COUNTY COUNCIL*, [1911] 1 Ch. 604; 80 L. J. Ch. 423; 104 L. T. 540; 75 J. P. 309; 9 L. G. R. 593.

SUB-SECT. 3.—FORM AND CONTENTS OF NOTICE.

512. Notice accompanied by plan—Showing portion required—No scale of admeasurement

PART VI. SECT. 2, SUB-SECT. 2.—B.

n. Notice of arbitrator's appointment equivalent to service of notice to treat under Lands Act.]—Publication under Railways (Ireland) Act, 1851, s. 8, of notice of the arbitrator's appointment is equivalent to service of notice to treat under Lands Act.—*DOYNE'S TRAVELLERS & SOUTH CITY MARKET CO.* (1888), 24 L. R. Ir. 287. IR.

PART VI. SECT. 2, SUB-SECT. 2.—C.

507 i. On same person—In respect of different lands.]—It is not incompetent or a ry. co. which desires to take land

from a proprietor to divide the land into two parts, & to serve a separate notice with respect to each part.—*COTTS v. CALEDONIAN RY. CO.* (1905), 6 A. (Ct. of Sess.) 1042.—SCOT.

509 i. ——— In respect of a smaller portion of land—Invalid—First notice still subsists.]—Where a ry. co. had served upon a proprietor a notice, that a portion of his ground was to be taken for the purposes of the undertaking, & then entered into a reference with him as to his claims of compensation:—*Held*: (1) they could not competently without his consent, give him a second notice for a more limited

quantity of ground, & that he was not bound to proceed with the reference on that footing; (2) the reference was not destroyed as to the subject-matter originally submitted under the first notice, by the second notice.—*LAING v. CALEDONIAN RY. CO.* (1846), 9 Duml. (Ct. of Sess.) 70; 19 Sc. Jur. 14. —SCOT.

PART VI. SECT. 2, SUB-SECT. 3.

o. Effect of words of limitation.]—A special Act gave power to a co. to acquire any privilege or easement . . . over & along any land, & defined "land" as including such privileges

Sect. 2.—The notice to treat: Sub-sects. 3, 4 & 5, A.,

appended to plan—Sufficient.]—SIMS v. COMMERCIAL RY. CO. (1838), 1 Ry. & Can. Cas. 431.

513. ——— Portion required not mentioned in schedule to notice—Sufficient.]—DOWLING v. PONTYPOOL, CAERLEON & NEWPORT RY. CO., No. 82, *ante*.

514. Must state whether whole or what part required.]—UNIVERSITY LIFE ASSURANCE SOCIETY v. METROPOLITAN RY. CO., [1866] W. N. 167.

515. Effect of words of limitation—"So far as such estate & interest is an estate or interest for which you are entitled to purchase-money or compensation other than such as may be payable under any other notice to treat in respect of same lands"—Reference to arbitration to assess compensation not restricted.]—*Re* CHILWORTH GUNPOWDER CO. & MANCHESTER SHIP CANAL CO. (1891), 8 T. L. R. 79, D. C.

516. Notice comprising two tenements—Regarded as one notice & not as two notices.]—THOMPSON v. TOTTENHAM & FOREST GATE RY. CO. (1892), 67 L. T. 416; 57 J. P. 181; 8 T. L. R. 602; 36 Sol. Jo. 542.

SUB-SECT. 4.—VALIDITY OF NOTICE.

517. Requisites of valid notice—Must operate against both parties.]—*R. v. GREAT NORTHERN RY. CO.* (1876), 2 Q. B. D. 151; 46 L. J. Q. B. 4; 35 L. T. 551; 41 J. P. 197; 25 W. R. 41, D. C.

Annotations:—Consd. Shepherd v. Norwich Corpn. (1885), 30 Ch. D. 553. *Mentd. R. v. Kennedy* (1893), 41 W. R. 380.

518. ——— *SHEPHERD v. NORWICH CORPN.* (1885), 30 Ch. D. 553; 54 L. J. Ch. 1050; 53 L. T. 251; 33 W. R. 841; 1 T. L. R. 545.

519. ——— Notice of intention to take land under special Act—Binding on promoters—Although not valid notice to treat under Lands Act, 1845, s. 18.]—*The M. Ry. (Tower Hill Extension) Act, 1864*, s. 2 incorporated, amongst others, Lands Act, 1845, & by s. 13 provided that the co. before they entered upon or took any tenement under the powers of the Act, should give six months' notice of their intention so to do to the person assessed to the relief of the poor in respect of such tenement. Lands Act, 1845, s. 18, provided that, when the promoters of the undertaking should require to purchase or take lands which they were authorised to take, they should give notice thereof to the parties interested in such lands, & by such notice should demand from them the particulars of their estate & interest in such lands, & of the claims made by them in respect thereof; & that every such notice should state that the promoters

or easement, etc. The notice given by the co. did not state whether it was the fee simple, or merely some easement or privilege that the co. proposed to acquire, but only said the land "to the extent required for the corporate purposes of the co."—*Held*: the notice was too uncertain for expropriation proceedings.—*LEES v. TORONTO & NIAGARA POWER CO.* (1906), 12 O. L. R. 505; 8 O. W. R. 294.—CAN.

PART VI. SECT. 2, SUB-SECT. 4.

p. Requisites of valid notice—Time—Computation—51 Vict. c. 29, s. 164.]—When computing 10 days' previous notice to be given under above sect. to obtain a warrant for expropriation of land by a ry. co., the day of service of notice & the day of

return must both be excluded.—*Re ONTARIO TANNERS' SUPPLIES CO. & ONTARIO & QUEBEC RY. CO.* (1888), 12 P. R. 563.—CAN.

q. ——— Effect of partial invalidity.]—Notice to treat, if invalid *quoad* part of the land specified, is invalid *quoad* the whole.—*COATS v. CALLEDONIAN RY. CO.* (1905), 6 F. (Ct. of Sess.) 1042.—SCOT.

PART VI. SECT. 2, SUB-SECT. 5.—A.

522 i. *Whether that of vendor & purchaser—Mere notice to treat given—Contract enforceable by specific performance constituted.*—*Re TORONTO SUBURBAN RY. CO. & ROGERS* (1920), 46 O. L. R. 201; *affd.* 48 O. L. R. 72.—CAN.

522 ii.

were willing to treat for the purchase of the lands, & as to the compensation to be made for damage sustained by reason of the execution of the works. The M. Co. gave a notice to pltfs. of their intention to take at the expiration of six months a tenement for which pltfs. were rated. In consequence of this notice, which did not purport to be a notice under, or contain the particulars mentioned in Lands Act, 1845, s. 18, pltfs. took other premises, & their former premises remained upon their hands unoccupied. The co. having failed to proceed with the purchase of the premises, pltfs., after the six months had elapsed, commenced an action against them for damages, & claimed a mandamus:—*Held*: the notice served by defts. bound them to proceed with the purchase of the premises within a reasonable time after the expiration of the six months, & pltfs. were entitled to substantial damages, & to a mandamus to compel defts. to proceed.

Semble: the notice delivered was not a sufficient notice to treat, within Lands Act, 1845, s. 18.—*MORGAN v. METROPOLITAN RY. CO.* (1868), L. R. 4 C. P. 97; 38 L. J. C. P. 87; 19 L. T. 655; 17 W. R. 261, Ex. Ch.

Annotations:—Consd. Tyson v. London Corpn. (1871), L. R. 7 C. P. 18. *Distd. Burges v. Bristol Urban S. A.* (1886), 50 J. P. 455. *Mentd. R. v. Vaughan* (1868), L. R. 4 Q. B. 190.

520. ——— Notice of intention to take land under Public Health Act, 1875 (c. 55), s. 176—Not binding on promoters.]—When a local authority, in exercise of their powers, serve on the owner of lands intended to be taken by them for the purposes of the Public Health Act, 1875, the notice required by s. 176, they are not bound to proceed with such notice. Their omission to take the lands specified in such notice, gives the owner of the lands no right of action against them, notwithstanding the confirmation of a Provisional Ord. empowering them to take such lands.—*BURGES v. BRISTOL URBAN SANITARY AUTHORITY* (1886), 50 J. P. 455; 2 T. L. R. 719, D. C.

Form & contents of notice.]—*See* Sub-sect. 3, *ante*.

521. Right of party served to contest validity—After negotiations with promoters—Without knowledge of invalidity.]—*LYNCH v. SEWERS COMRS. OF LONDON*, No. 2252, *post*.

SUB-SECT. 5.—EFFECT OF NOTICE.

A. Nature of Relationship established between Party served and Promoters.

522. Whether that of vendor & purchaser—Mere notice to treat given—Contract enforceable by specific performance constituted.]—*WALKER v. EASTERN COUNTIES RY. CO.* (1848), 6 Hare, 594;

Act incorporating Lands Act, 1845, power was vested in the council of B. to purchase properties & to complete the same within five years. The council served a notice on lessees of the properties requiring particulars of title, & amount of the compensation sought:—*Held*: the relation of vendor & purchaser was thereby created, & the council were bound, within a reasonable time, to complete.—*DUFFERN v. BELFAST TOWN COUNCIL* (1846), 10 L. L. R. 40.—IR.

522 iii. ———.]—*EDINBURGH, PERTH & DUNDEE RY. CO. v. LEVEN* (1852), 1 Macq. 284; 24 Sc. Jur. 413; 1 Stuart, 686.—SCOT.

522 iv. ———.]—*LOCKERBY v. CITY OF GLASGOW IMPROVEMENT TRUSTEES* (1872), 10 Macph. (Ct. of Sess.) 971.—SCOT.

—.]—By a local

5 Ry. & Can. Cas. 469; 12 Jur. 787; 67 E. R. 1300.

Annotations:—**Distd.** Adams v. London & Blackwall Ry. (1850), 2 Mac. & G. 118. **Dbtd. & Distd.** Regent's Canal Co. v. Ware (1857), 23 Beav. 575. **Consd.** Haynes v. Haynes (1861), 1 Drew. & Sm. 426. **Dbtd.** Lind v. Isle of Wight Ferry Co. (1862), 1 New Rep. 13. **Refd.** Hill v. G. N. Ry. (1854), 3 Eq. Rep. 324; Richardson v. Elmit (1876), 2 C. P. D. 9.

523. ——— Doubtful whether contract enforceable by specific performance constituted.]—ADAMS v. LONDON & BLACKWALL RY. CO., No. 1097, *post*.

524. ——— No contract enforceable by specific performance constituted.]—INGE v. BIRMINGHAM, WOLVERHAMPTON & STOUR VALLEY RY. CO. (1853), 3 De G. M. & G. 658; 2 Eq. Rep. 80; 22 L. T. O. S. 109; 2 W. R. 22; 43 E. R. 259, L. C.

Annotation:—**Consd.** Haynes v. Haynes (1861), 1 Drew. & Sm. 426.

525. ———.]—HILL v. GREAT NORTH-EERN RY. CO. (1851), 3 Eq. Rep. 324; 24 L. J. Ch. 212; 24 L. T. O. S. 332; 1 Jur. N. S. 102; 3 W. R. 39.

Annotation:—**Consd.** Haynes v. Haynes (1861), 1 Drew. & Sm. 426.

526. ———.]—Where a notice to treat for the purchase of certain property was served by a railway co. on the owner of such property, & nothing further was done until after the death of the owner, who by his will had specifically devised the property comprised in the notice to treat:—*Held*: (1) the mere notice to treat served by the co. did not constitute a contract by the owner for the sale of the property; (2) if it did, a bill for specific performance would not lie against the owner, & the notice to treat did not effect conversion of the property comprised in the notice.—HAYNES v. HAYNES (1861), 1 Drew. & Sm. 426; 30 L. J. Ch. 578; 4 L. T. 199; 7 Jur. N. S. 595; 9 W. R. 497; 62 E. R. 442.

Annotations:—*As to* (1) **Apprvd.** *Re* Arnold, *Ex p.* Battersea Park Comrs. (1863), 2 New Rep. 257. **Consd.** Met. Ry. v. Woodhouse (1865), 34 L. J. Ch. 297. **Apld.** Rawlings v. Met. Ry. (1868), 37 L. J. Ch. 824. **Distd.** Watts v. Watts (1873), L. R. 17 Eq. 217. **Consd.** Wild v. Woolwich B. C., [1909] 2 Ch. 287. **Refd.** Gardner v. Charing Cross Ry. (1861), 2 John. & H. 218; Harding v. Met. Ry. (1872), 7 Ch. App. 154; Sewell v. Harrow & Uxbridge Ry. (1902), 19 T. L. R. 130; Mercer v. Liverpool, St. Helen's & South Lancashire Ry., [1903] 1 K. B. 652. *As to* (2) **Refd.** *Re* Bagot's Settlement (1862), 31 L. J. Ch. 772; *Re* Battersea Park Acts (1863), 32 Beav. 591; Edwards v. West (1878), 7 Ch. D. 858.

527. ———.]—HARDING v. METROPOLITAN RY. CO., No. 762, *post*.

——— Power of promoters to withdraw notice.]—*See* Sub-sect. 6, *post*.

——— Notice to treat followed by other acts.]—*See* Part X., Sect. 1, sub-sect. 1, *post*.

528. Promoters constituted equitable owners.]—STRETTON v. GREAT WESTERN & BRENTFORD RY. CO. (1870), 40 L. J. Ch. 51 n.; 23 L. T. 44; *reversd.* on other grounds, 5 Ch. App. 751, L. C. & L. J.J.

Annotations:—**Mentd.** Stoneham v. L. B. & S. C. Ry. (1871), 20 W. R. 77; Dowling v. Pontypool, Caerleon & Newport Ry. (1874), L. R. 18 Eq. 714; London Corpn. v. Horner (1914), 111 L. T. 512.

529. ———.]—BRISTOL & NORTH SOMERSET RY. CO. v. SOMERSET & DORSET RY. CO. (1874), 22 W. R. 399; *reversd.* on other grounds, 22 W. R. 601, L. C.

530. Does not constitute "debt owing or accruing" capable of attachment—Under R. S. C., Ord. 45, r. 1.]—RICHARDSON v. ELMIT (1876), 2 C. P. D. 9; 36 L. T. 58.

B. On Right of Party served to have Compensation assessed.

Power of party served to compel promoters to proceed.]—*See* Part VII., Sect. 5, sub-sect. 9, Sect. 6, sub-sect. 2, D., *post*.

C. On Power of Party served to deal with Land required.

531. To sell—Injunction at suit of purchaser after work completed refused.]—CARNOCHAN v. NORWICH & SPALDING RY. CO. (1858), 26 Beav. 169; 53 E. R. 861.

Annotation:—**Mentd.** Mercer v. Liverpool, St. Helen's & South Lancashire Ry., [1903] 1 K. B. 652.

532. ——— Sale restrained.]—METROPOLITAN RY. CO. v. WODEHOUSE (1865), 5 New Rep. 463; 34 L. J. Ch. 297; 12 L. T. 113; 11 Jur. N. S. 296; 13 W. R. 516.

Annotations:—**Distd.** Sewell v. Harrow & Uxbridge Ry. (1902), 19 T. L. R. 130. **Refd.** Bristol & North Somerset Ry. v. Somerset & Dorset Ry. (1874), 22 W. R. 399. **Mentd.** R. v. Bedfordshire County Council, *Ex p.* Sear, [1920] 2 K. B. 465.

533. ——— Subject to notice—No power to create new interest.]—SEWELL v. HARROW & UXBRIDGE RY. CO. (1903), 20 T. L. R. 21, C. A.

To lease—Right of tenants under leases granted after notice.]—*See* Part XIII., Sect. 5, *post*.

D. On Obligations of Party served in reference to Land required.

534. Covenant to repair—Breaches after notice & before assignment—Damages recoverable from party served.]—MILLS v. EAST LONDON UNION (1872), L. R. 8, C. P. 79; 42 L. J. C. P. 46; 27 L. T. 557; 37 J. P. 6; 21 W. R. 142.

Annotations:—**Refd.** Joyner v. Weeks, [1891] 2 Q. B. 31; Curling v. Matthey (1921), 37 T. L. R. 717.

Effect of exercise of compulsory powers on lessee's covenants generally, *see* Part XIII., Sect. 5, sub-sect. 4, *post*.

535. Notice to take down & rebuild premises—Expenses of local authority of doing work on default—Recoverable from party served.]—BARNET v. METROPOLITAN BOARD OF WORKS (1882), 46 L. T. 384; 46 J. P. 469.

E. On Agreements relating to Land required.

536. Agreement for purchase of land—Between promoters & landowners—Subsequent notice to treat given by mistake—No waiver of agreement.]—KEMP v. SOUTH-EASTERN RY. CO., No. 93, *ante*.

537. Land subject-matter of building agreement—Notice given in respect of part of—Agreement severable—Not determined by notice—Agreement binding as to land not affected by notice.]—*Re* FURNESS & WILLESDEN URBAN DISTRICT COUNCIL (1905), 70 J. P. 25; 22 T. L. R. 52.

Covenant to repair—Liability of lessee for breaches—After notice.]—*See* No. 534, *ante*.

F. Whether Equivalent to Taking or Requiring Possession of Land.

538. Taking land—Within Lands Act, 1845, s. 18—Not equivalent to.]—BURKINSHAW v. BIRMINGHAM & OXFORD JUNCTION RY. CO., No. 1099, *post*.

——— What amounts to.]—*See*, generally, Part III., Sect. 1, *ante*, & compare Part VIII., Sect. 1, *post*.

539. Requiring possession of land—Within Lands Act, 1845, s. 121—Not equivalent to.]—Lands Act, 1845, s. 121, applies only to cases where

Sect. 2.—The notice to treat: Sub-sect. 5, F., G., H., I. & J.; sub-sects. 6, 7 & 8. Sects. 3 & 4:

the tenant has been required to give up possession of his land, & a notice to treat under s. 18 is not equivalent to requiring possession.—*R. v. STONE* (1866), L. R. 1 Q. B. 529; 7 B. & S. 769; 35 L. J. M. C. 208; 14 L. T. 552; 30 J. P. 488; 14 W. R. 791.

Annotations:—Folld. Great Northern & City Ry. v. Tillett, [1902] 1 K. B. 874. Refd. R. v. Kennedy (1893), 41 W. R. 380.

G. Whether Equivalent to Exercise of Power.

Within Lands Act, 1845, s. 16.]—See Nos. 470, 471, ante.

Within Lands Act, 1845, s. 123.]—See Nos. 480–489, ante.

540. Within special Act—Notice by itself not exercise of compulsory powers.]—A railway co. was incorporated by special Act of Parliament in 1881. S. 35 provided for the application of the parliamentary deposit fund, & enacted if the co. did not complete & open their railways as therein mentioned, the deposit fund should be applicable towards compensating landowners & other persons whose property had been interfered with or rendered less valuable by the commencement, construction or abandonment of the railway, or who had suffered injury or loss in consequence of the compulsory powers conferred upon the co., & subject thereto should be forfeited to the Crown, or, in the discretion of the Ch. Div., if the co. had been ordered to be wound-up, should be applied as part of the assets of the co. for the benefit of creditors. The railway was not constructed, & in 1888 an Abandonment Act was passed.

Held: notice to treat was not by itself an exercise of the compulsory powers of the co.—*Re UXBRIDGE & RICKMANSWORTH RY. CO.* (1890), 43 Ch. D. 536; 59 L. J. Ch. 409; 62 L. T. 347; 38 W. R. 611, C. A.

H. Whether Operating as Conversion.

541. Not mere notice to treat.]—HAYNES v. HAYNES, No. 526, ante.

Notice to treat followed by other acts.]—See Part X., Sect. 1, sub sect. 1, post.

Whether payment into court operates as conversion.]—See Part XI., Sect. 6, post.

I. When not acted on.

542. Notice of no effect—In considering tenant's interest for more or less than year.]—*R. v. KENNEDY*, [1893] 1 Q. B. 533; 62 L. J. M. C. 168; 68 L. T. 454; 57 J. P. 346; 41 W. R. 380; 5 R. 270, D. C.

Annotation:—Refd. Bexley Heath Ry. v. North (1894), 70 L. T. 903.

Purchase of interests for less than a year generally.]—See Part XIII., Sect. 6, post.

Whether abandonment by promoters.]—See Sub-sect. 7, post.

J. Under Metropolitan Paving Act (Michael Angelo Taylor's Act), 1817.

See Part XV., Sect. 3, sub-sect. 7, B., post.

PART VI. SECT. 2, SUB-SECT. 7.

a. What amounts to.]—A co. proposing to expropriate lands, served notice to treat under Dominion Railway Act. Thereafter the co. served a new notice, at the same time serving a notice abandoning & desisting from

the first notice:—*Held:* a new notice served at the same time as the abandonment of the first notice is not an abandonment contemplated under above Act.—*ATWOOD v. KETTLE RIVER VALLEY RY. CO.* (1910), 15 B. C. R.

t. Right to abandon or desist

SUB-SECT. 6.—WITHDRAWAL OF NOTICE.

543. By trustees for public purpose not on behalf of Crown—Invalid—Street improvement commissioners.]—*R. v. MANCHESTER IMPROVING COMRS.* (1831), 4 B. & Ad. 333, n.; 110 E. R. 480. *Annotations:—Apld. R. v. Hungerford Market Co.* (1832), 4 B. & Ad. 327. *Consd. Birch v. Marylebone Vestry* (1869), 17 W. R. 1014. *Refd. Walker v. Eastern Counties Ry.* (1848), 5 Ry. & Can. Cas. 469; *Morgan v. Met. Ry.* (1868), 1 L. R. 4 C. P. 97.

544. ——— Municipal corporation.]—*STEELE v. LIVERPOOL CORPN.* (1866), 7 B. & S. 261; 14 W. R. 311.

545. By company—Invalid—Market company.]—*R. v. HUNGERFORD MARKET CO.* (1832), 4 B. & Ad. 327; 1 Nev. & M. K. B. 112; 110 E. R. 478.

Annotations:—Apld. Morgan v. Met. Ry. (1868), L. R. 4 C. P. 97. *Consd. Birch v. St. Marylebone Vestry* (1869), 20 L. T. 697. *Refd. R. v. Brocknock & Abergavenny Canal Co.* (1835), 3 Ad. & El. 217; *Walker v. Eastern Counties Ry.* (1848), 5 Ry. & Can. Cas. 469. *Mentd. R. v. Kirke* (1834), 5 B. & Ad. 1089; *Re Palmer & Hungerford Market Co.* (1839), 9 Ad. & El. 463; *R. v. L. & N. W. Ry.* (1851), 16 Q. B. 864.

546. ——— Railway company.]—*TAWNEY v. LYNN & ELY RY. CO.* (1847), 4 Ry. & Can. Cas. 615; 16 L. J. Ch. 282.

Annotations:—Distd. Brocklebank v. Whitehaven Junction Ry. (1847), 5 Ry. & Can. Cas. 373. *Refd. Walker v. Eastern Counties Ry.* (1848), 5 Ry. & Can. Cas. 469; *Haynes v. Haynes* (1861), 30 L. J. Ch. 578.

547. ———.]—*STEELE v. LIVERPOOL CORPN.* (1866), 7 B. & S. 261; 14 W. R. 311.

548. By commissioners acting on behalf of executive government—Valid—Commissioners of Woods & Forests.]—*R. v. WOODS & FORESTS COMRS.* (1850), 15 Q. B. 761; 19 L. J. Q. B. 497; 15 L. T. O. S. 561; 15 Jur. 35; 117 E. R. 646.

Annotations:—Distd. Steele v. Liverpool Corpn. (1866), 7 B. & S. 261; *Birch v. St. Marylebone Vestry* (1869), 20 L. T. 697. *Refd. Guest v. Poole & Bournemouth Ry.* (1870), L. R. 5 C. P. 553. *Mentd. Re Nathan* (1884), 12 Q. B. D. 461; *R. v. Income Tax Special Purposes Comrs.* (1888), 21 Q. B. D. 313.

549. ———.]—*STEELE v. L.* (1866), 7 B. & S. 261; 14 W. R. 311.

After counter-notice by landowner requiring promoters to take more land.]—See Sect. 4, sub-sect. 2, post.

550. After landowner's refusal to accept or repudiation of notice—Valid.]—(1) Where a landowner has been served with a notice to treat under Metropolitan Paving Act (Michael Angelo Taylor's Act), 1817, he must either treat the notice as good or repudiate it as a whole; he cannot accept it in part & repudiate it in part.

(2) Where a landowner has declined to accept or has repudiated the validity of a notice to treat, the local authority is entitled to withdraw it altogether, & cannot be compelled to proceed with that part of it which is acceptable to the landowner.—*WILD v. WOOLWICH BOROUGH COUNCIL*, [1910] 1 Ch. 35; 79 L. J. Ch. 126; 101 L. T. 580; 74 J. P. 33; 26 T. L. R. 67; 54 Sol. Jo. 64; 8 L. G. R. 203, C. A.

SUB-SECT. 7.—ABANDONMENT OF NOTICE BY PROMOTERS.

551. Delay in proceeding on notice—Mandamus to compel promoters to proceed—Refused.]—*R. v. SOUTH DEVON RY. CO.* (1851), 17 L. T. O. S. 142.

*New notice pending arbitration.]—*Under 14 & 15 Vict. c. 51, s. 11 (16), notice may be desisted from, even after the arbitrators have met, & are engaged in the arbn.—*GRIMSHAW v. GRAND TRUNK RY. CO.* (1856), 15 U. C. R. 224.—**CAN.**
u. ——— Before lands actually

PART VI.—PROCEDURE TO ACQUIRE LAND OTHERWISE THAN BY AGREEMENT. 177

552. — Injunction to restrain promoters from summoning jury—After party served lead to believe that notice to treat abandoned—Granted.]—HEDGES v. METROPOLITAN RY. CO. (1860), 28 Beav. 109; 3 L. T. 643; 6 Jur. N. S. 1275; 54 E. R. 307.

*Annotations:—*Refd. *Stretton v. G. W. & Brentford Ry.* (1870), 5 Ch. App. 754, n.; *London Corpn. v. Horner* (1914), 111 L. T. 512.

553. Promoters' claim to possession not based on notice to treat—Action of ejectment brought by landowner—Promoters not entitled to rely after judgment on ignored notice.]—STRETTON v. GREAT WESTERN & BRENTFORD RY. CO., No. 528, ante.

554. Legal proceedings instituted by promoters inconsistent with relationship constituted by notice—Pleading.]—By a lease dated in 1882 deft. became lessee of a market. Pltfs. subsequently purchased the reversion of that lease. In 1902 an Act was passed conferring on pltfs. compulsory powers of acquiring deft.'s interest in the market. In 1903 pltfs. served on deft. a notice to treat. The price which they were to pay was to be fixed by arbn. Differences arose between pltfs. & defts. as to the value of his rights under his lease, & in 1907 an action was brought by the A.-G. at the relation of pltfs. to determine, amongst other things, the extent of deft.'s franchise in the market. These matters were finally determined in 1913, & thereupon pltfs. desired to proceed to acquire deft.'s interest under the notice to treat. Deft. objected that the notice was invalid. Pltfs. then brought an action claiming a declaration that the notice was given in accordance with the provisions of the Act of 1902 & was valid. Deft. by his defence pleaded that the notice was invalid; that pltfs.' powers under the Act of 1902 had expired; & alleged that those proceedings were subversive of & inconsistent with the relation of landlord & tenant & vendor & purchaser which had been constituted by the notice to treat, & consequently pltfs. were not entitled to enforce the notice if valid. Pltfs. applied to have those paragraphs of the defence struck out on the ground that they were irrelevant & embarrassing, the only question raised by their statement of claim being whether their notice was valid:—*Held*: the matters referred to in the paragraphs complained of were such as deft. ought not to be precluded from raising at the trial of the action against him by pltfs., & there was nothing in the present case to justify the ct. in depriving deft. of that right.—*LONDON CORPN. v. HORNER* (1914), 111 L. T. 512, C. A.

taken.]—Abandonment of notice must take place while the notice is still a notice, & before taking the lands.—CANADIAN PACIFIC RY. CO. v. LITTLE SEMINARY OF STE. THÉRÈSE (1889), 16 S. C. R. 606.—CAN.

w. — HASKILL & GRAND TRUNK RY. CO. (1904), 24 C. L. T. 232; 7 O. L. R. 429; 3 O. W. R. 377.—CAN.

y. — A second time.]—Held: a ry. co. having once abandoned, or desisted from their notice, given under R. S. O. 1877, c. 165, s. 20, can not again desist, pending an arbn. proceeding, under a second notice.—*MOORE v. CENTRAL ONTARIO RY. CO.* (1883), 2 O. R. 647.—CAN.

z. — A third time.—Owner stopped by previous opposition.]—A ry. co. at different times served H. with three notices that portions of land owned by him were required. To each of the first two, H. replied by a notice appointing an arbitrator, expressly reserving his right to insist that the co. had no right to take any

part of his land. The co. served successive notices of desistment from all their notices, & H. gave notice he objected to the third notice, & claimed the co. had no right to desist from that notice:—*Held*: the co. had not exhausted their powers, but had the right to desist.—*Re HOOPER & ERNE & HURON RY. CO.* (1888), 12 P. R. 108.—CAN.

PART VI. SECT. 3.

a. May be amended.]—Where a notice to treat is served upon a landowner & he makes a claim, such claim may be the subject of amendment. — *Re WILDMAN, Ex p. LILYDALE & WARBURTON RAILWAY CONSTRUCTION TRUST* (1901), 27 V. L. R. 43.—AUS.

b. Waiver by promoter of time limit for filing.]—The provision in Public Works Act, 1882, s. 35, that the claim & notice must be filed within the time limited, can be waived by the public body either before or after the lapse of the time limited.—*JOSEPH v. WELLINGTON (MAYOR, ETC.)* (1885), 3 N. Z. L. R. 291.—N.Z.

SUB-SECT. 8.—WAIVER OF NOTICE BY PARTY SERVED.

555. Consent—Request for summoning of jury for date preventing service of proper notice.]—R. v. SOUTH HOLLAND DRAINAGE COMMITTEE MEN (1838), 8 Ad. & El. 429; 1 Per. & Dav. 79; 1 Will. Woll. & H. 647; 8 L. J. Q. B. 64; 112 E. R. 901.

*Annotations:—*Consd. *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610. *Mentd. R. v. Manchester & Leeds Ry.* (1838), 1 Per. & Dav. 164; *R. v. Swansea Harbour Trustees* (1839), 8 Ad. & El. 439; *R. v. Stainforth* (1845), 11 Q. B. 66; *R. v. Salop JJ.* (1859), 29 L. J. M. C. 39; *R. v. Surrey JJ.* (1870), L. R. 5 Q. B. 466; *R. v. Sheward* (1880), 5 Q. B. D. 179; *R. v. Williams, Ex p. Phillips*, [1914] 1 K. B. 608.

556. Giving counter-notice requiring promoters to take more.]—PINCHIN v. LONDON & BLACKWALL RY. CO., No. 601, post.

SECT. 3.—NOTICE OF CLAIM.

See Lands Act, 1845, s. 21.

557. Under special Act—To be made within six months—Claim made subsequently barred.]—R. v. BRISTOL DOCK CO. (1837), 6 L. J. K. B. 157.

558. Failure of claimant to state nature of his interest—Notice bad.]—*Re NORTH STAFFORDSHIRE RY. CO. & LANDOR* (1848), 2 Exch. 235; 6 Ry. & Can. Cas. 17; 17 L. J. Ex. 350; 154 E. R. 478.

*Annotation:—*Mentd. *Re Levick & Epsom & Leatherhead Ry.* (1859), 8 W. R. 66.

Notice of claim under Lands Act, 1845, s. 68—Requisites of.]—See Part IX., Sect. 1, sub-sect. 1, post.

SECT. 4.—RESTRICTIONS ON TAKING PART OF LAND AND PREMISES.

SUB-SECT. 1.—RIGHT OF PROMOTERS TO TAKE PART OF HOUSE OR OTHER BUILDING OR MANUFACTORY.

A. In General.

See Lands Act, 1845, s. 92.

559. Promoters bound under special Act to take whole of certain "properties" if so required —& to take houses, manufactories & buildings within fifty feet of works if so required—Promoters ordered to take house & garden within fifty feet—But not manufactory & smaller houses on same land not within fifty feet.]—R. v. LONDON & GREENWICH RY. CO. (1842), 3 Q. B. 166; 2

c. — Public Works Act, 1894, s. 44—Omission to challenge claim—Court cannot give relief.]—Appls., having expropriated lands under Public Works (N. Z.) Act, 1891, inadvertently omitted to give notice, under s. 44, of non-admission of respondents' claims for compensation within 60 days of receiving the same; & accordingly the respts. filed copies of their claims, with receipts for service, in the Supreme Ct.

Held: the claims having thereupon become enforceable awards under the Act, the applts. were not entitled, under the Act or otherwise, to any relief against the consequences of their omission.—*WELLINGTON CORPN. v. JOHNSTON, WELLINGTON CORPN. v. LLOYD*, [1902] A. C. 396, P. C.—N.Z.

PART VI. SECT. 4, SUB-SECT. 1.—A.

d. Special Act—Promoters bound to acquire whole of ground belonging to properties included in plan.]—CONNELL v. CLYDE TRUSTEES (1845), 7 Duml. (Ct. of Sess.) 829; 17 Sc. Jur. 431.—SCOT.

Sect. 4.—Restrictions on taking part of land and premises: Sub-sect. 1, A. & B. (a).]

Gal. & Dav. 444; 3 Ry. & Can. Cas. 138; 11 L. J. Q. B. 187; 6 Jur. 892; 114 E. R. 471.

*Annotations:—*Expld. *Ex p. Quicke* (1865), 12 L. T. 580. *Mentd. St. Thomas' Hospital v. Charing Cross Ry.* (1860), 30 L. J. Ch. 395.

560. Promoters liable to take houses within fifty feet of works if so required—But not bound to take parts outside fifty feet—Promoters with option to take whole if required to take part—House of which large proportion was within fifty feet deemed a house within fifty feet.]—*WALKER v. LONDON & BLACKWALL RY. CO.* (1842), 3 Q. B. 744; 12 L. J. Q. B. 88; 7 Jur. 323; 114 E. R. 692; *sub nom. R. v. MIDDLESEX (SHERIFF), Re WALKER v. LONDON & BLACKWALL RY. CO.*, 3 Gal. & Dav. 549; 3 Ry. & Can. Cas. 396; *subsequent proceedings, sub nom. R. v. MIDDLESEX (SHERIFF)* (1843), 5 Q. B. 365.

561. Incorporation of s. 92 in special Act.—Not excluded by provision in special Act that such parts of railway line as passed through certain land should be arched over so as to afford communication.]—By the special Act for a railway co. certain sects. were introduced, requiring the securing to the owner of a certain property particular benefits for arching, making roads, etc., if that property or adjoining property were taken. By another sect. no building was to be erected on part of the land required by the co., & by another sect. the co. were required to buy certain specified property. Lands Act, 1845, s. 92, required a co., if it took part, to take the whole of a manufactory, & that Act was incorporated with the special Act. The co. gave notice of an intention to take a small strip of land which was within the boundary line of tinplate works & was used for deposit of ashes from the works, but which was not, at the time of the passing of the special Act, nor at the time of the notice, built upon, but which was soon afterwards covered with buildings:—*Held*: (1) the land proposed to be taken formed part of a manufactory within the sect.; (2) the sects. in the special Act were not inconsistent with the sect. of the general Act.

At the hearing, the co. produced evidence to show that what they required could be attained by making a tunnel under the land, & so not touch any part of the surface:—*Held*: (3) it was not competent for them to set up such a case at the hearing.

(4) *Semble*: such a tunnel would be taking part of a manufactory.

(5) Where the construction of an Act of Parliament, which gives authority for the compulsory taking of land, is doubtful, it should be construed most favourably to those who seek to protect the land from innovation.

(6) The injunction will be made perpetual in the terms in which it was made before, except that there must be an undertaking on the part of pltf. to make a good title to the land & to execute a conveyance. I suppose there will be no difficulty about that. If they have not a good title to the manufactory, they cannot be able & willing to convey it (*LORD CRANWORTH, L.J.*).—*SPARROW v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO.* (1852), 2 De G. M. & G. 94; 7 Ry. & Can. Cas. 92; 21 L. J. Ch. 731; 19 L. T. O. S. 131; 16 Jur. 703; 42 E. R. 806, L. J.

*Annotations:—*As to (1) *Consd. Hedges v. Met. Ry.* (1860), 28 Beav. 109; *Haynes v. Haynes* (1861), 1 Drew. & Sm.

426; *St. Thomas' Hospital v. Charing Cross Ry.* (1861), 30 L. J. Ch. 395; *Reddin v. Metropolitan Board of Works* (1862), 4 De G. M. & J. 532. *Refd. Salisbury v. G. N. Ry.* (1852), 17 Q. B. 840; *Pinchin v. London & Blackwall Ry.* (1854), 1 K. & J. 34; *Furniss v. Mid. Ry.* (1868), L. R. 6 Eq. 473. *As to* (6) *Consd. Pinchin v. London & Blackwall Ry.* (1854), 1 K. & J. 34. *Folld. Spackman v. G. W. Ry.* (1855), 1 Jur. N. S. 790; *St. Thomas's Hospital v. Charing Cross Ry.* (1861), 1 John. & H. 400.

Incorporation of Lands Clauses Acts generally.]—*See Part II., Sect. 1, sub-sect. 1, ante.*

562. Construction of s. 92—General rule.]—Pltf. was the owner of a leasehold house in H. street, & of five freehold cottages in B. Row, which ran parallel to H. Street, the yards at the back of the cottages abutting on the back yard & buildings held with the house in H. Street. Pltf. used the house in H. Street as a dwelling-house & shop, & the buildings behind it as a candle manufactory, candle store, bread store & provision store. One of the cottages in B. Row was turned into a storehouse, & was made to communicate with the H. Street premises, & was used as a back entrance to them. A tramway co. gave notice to treat for the five cottages in B. Row & the yards behind them. Pltf. gave a counter-notice that the land proposed to be taken was part of premises occupied by him as a manufactory, & calling upon the co. to take the whole of the premises; & on the co.'s refusal he brought an action asking for a declaration that he might not be compelled to sell the part only of his manufactory buildings & land which was comprised in the notice to treat; & for an injunction:—*Held*: (1) the whole block constituted one "house" within the sect.; (2) (*BRETT, L.J.*) the whole block also constituted one "manufactory."

(3) The words "house or other building or manufactory" in the sect. refer to three distinct things; & it is sufficient that the owner of premises, part of which is required by a co., should specify the premises which he requires them to take without stating whether he makes the claim on the ground that they are a "house," or a "building," or a "manufactory."—*RICHARDS v. SWANSEA IMPROVEMENT & TRAMWAYS CO.* (1878), 9 Ch. D. 425; 38 L. T. 833; 43 J. P. 174; 26 W. R. 764, C. A. *Annotations:—*As to (1) *Refd. Silgenberg v. Met. Dist. Ry.* (1883), 49 L. T. 554. *As to* (3) *Consd. Regent's Canal & Dock Co. v. L. C. C.*, [1912] 1 Ch. 583. *Refd. Brook v. M. S. & L. Ry.*, [1895] 2 Ch. 571.

— **Meaning of "house."]**—*See* Sub-sect. 1, B., *post.*

— **Meaning of "other building."]**—*See* Sub-sect. 1, C., *post.*

— **Meaning of "manufactory."]**—*See* Sub-sect. 1, D., *post.*

563. Promoters authorised to take part of certain properties provided no interference caused with main structure—Part of building proposed to be taken involving reconstruction of such building—Owner willing & able to sell whole.]—By s. 18 London County Council (Tramways & Improvements) Act, 1913, which incorporated Lands Act, 1845, defts. were authorised to take the parts of the several properties shown on the deposited plans & scheduled to the Act, comprising, *inter alia*, forecourt, walls, gates & railings of the H. Church, which lay within the line marked, limits of deviation, or such part thereof as they might require, without being required or compellable to purchase any greater part or the whole of any such property, provided that the sect. should not entitle the council to take or interfere with the main structure of any house, building or manufactory. On Mar. 18, 1914, defts. served notice

to treat in respect of the lands scheduled to the Act. It appeared that defts. proposed to take practically the whole of the forecourt in front of the church, the entrance to which was through the forecourt by a flight of stone steps in the centre of the front of the building, & by two flights of steps at each front corner which gave access to galleries. The result would have been that the roadway would be brought to within ten inches of the central flight of steps by which the church was entered, & as the road was a steep incline, it would be impossible to enter the church or the school buildings in the rear of the church without effecting extensive alterations in the main structure. The trustees of the church were willing & able to sell the whole of the buildings. They served notice on the council requiring them to purchase & take the whole of the chapel or other building, & moved to restrain them from entering on the land in question or any part thereof & from taking proceedings to obtain possession thereof, or any further steps to assess the value thereof, until judgment or further order. By their writ they also asked for a declaration that the council was not entitled to acquire the property compulsorily without also taking the chapel building & other lands & appurtenances adjoining same belonging to plffs.:—*Held*: the proposed operations of the council would interfere with the main structure of the building within the proviso to s. 18 of the special Act, & they were not entitled to take part only of the property.—*GENDERS v. LONDON COUNTY COUNCIL*, [1915] 1 Ch. 1; 84 L. J. Ch. 42; 112 L. T. 365; 79 J. P. 121; 31 T. L. R. 34; 59 Sol. Jo. 58; 13 L. G. R. 14, C. A.

Under Metropolitan Paving Act (Michael Angelo Taylor's Act), 1817.]—See Part XV., Sect. 3, subsect. 7, B., *post*.

B. Meaning of "House."

(a) In General.

See Lands Act, 1845, s. 92.

564. Comprises everything that would pass under grant or devise of house.]—*GROSVENOR (LORD) v. HAMPSHIRE JUNCTION RY. CO.*, No. 574, *post*.

565. —.]—(1) The word house in s. 92, 1845, comprises everything which would pass by that word in a conveyance.

(2) A property consisted of a house & stables, etc., with a garden, pleasure grounds & orchard, standing on one & a quarter acres of ground. A railway co. proposed to take a part of the orchard & a corner of the garden:—*Held*: they were bound to take the whole.

(3) A railway co. having given notice to take a part of a property, & being required to take the whole, may abandon their notice & refuse to take any part.—*KING v. WYCOMBE RY. CO.* (1860), 28 Beav. 104; 29 L. J. Ch. 462; 2 L. T. 107; 24 J. P. 279; 6 Jur. N. S. 239; 54 E. R. 305.

Annotations:—As to (1) *Reid*, *Fergusson v. L. B. & S. C. Ry.* (1863), 2 New Rep. 503. As to (3) *Expld.* *Wild v. Woolwich B. Co.*, [1910] 1 Ch. 35.

566. — Includes curtilage & garden—and all that is necessary to enjoyment of house.]—*ST. THOMAS'S HOSPITAL (GOVERNORS) v. CHARING CROSS RY. CO.*, No. 417, *ante*.

567. — Does not include land not necessary to occupation of house.]—Attached to a house,

sought to be taken by a railway co., was a shrubbery & a series of gardens, which were separated by walls, but had a connecting path through the whole:—*Held*: the term "house" meant everything which would pass under an ordinary conveyance of a house, & the shrubbery & gardens were part of the house, & within s. 92, & the railway co. were bound to take the whole.—*HEWSON v. SOUTH WESTERN RY. CO.* (1860), 2 L. T. 369; 24 J. P. 675; 8 W. R. 467.

568. —.]—*F.* was lessee of a house & garden, & of a strip or piece of meadow land separated therefrom by a road originally made for the convenience of himself & the lessees of the adjoining houses, but which road was afterwards thrown open to the public. Each of the other lessees had also a strip of land on the other side of the road. The leases contained covenants restraining the lessees from building on the strips, & the strips were by arrangement all thrown into one piece, & were used by *F.* & the other lessees in common as a cricket & pleasure ground; the whole being, however, also let to a butcher for grazing purposes. A railway co. required this piece of land for the construction of their line; *F.* insisted that the co. if they took the land must also take his house & garden, & on their proceeding to obtain possession under Lands Act, 1845, filed his bill praying for an injunction:—*Held*: the strip of land being held for pleasure only, & not of necessity for the enjoyment & occupation of the residence of plff., it would not have passed by a conveyance of the "house" simply.—*FERGUSON v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1863), 3 De G. J. & Sm. 653; 2 New Rep. 566; 33 L. J. Ch. 29; 9 L. T. 134; 27 J. P. 580; 11 W. R. 1088; 46 E. R. 790, L. J.J.

Annotations:—*Distd.* *Marson v. L. C. & D. Ry.* (1868), 37 L. J. Ch. 483. *Consd.* *Kerford v. Seacombe, Hoylake & Deeside Ry.* (1888), 57 L. J. Ch. 270. *Refd.* *Pulling v. L. C. & D. Ry.* (1864), 3 De G. J. & Sm. 661; *Steele v. Mid. Ry.* (1866), 1 Ch. App. 275; *Barnes v. Southsea Ry.* (1884), 27 Ch. D. 536; *Allhusen v. Ealing & South Harrow Ry.* (1898), 78 L. T. 285.

569. —.]—(1) Where a railway co. propose to take land, forming part of a house, within Lands Act, 1845, s. 92, the owner cannot insist that they shall take other land of which it forms a portion, & that another portion, which is in precisely same position, shall not be taken.

(2) A field, separated from the garden of a house by a ha-ha crossed by two bridges & occasionally used for the purposes of pleasure, but otherwise used for keeping plff.'s cows, cannot be considered as "pleasure grounds," & as forming part of a "house" within the sect.

(3) Land adjoining a house, which would not pass under a conveyance of the house, does not form part of a "house" within the above sect.

(4) The above sect. is applicable although the landowner may have only a leasehold interest.—*PULLING v. LONDON, CHATHAM & DOVER RY. CO.* (1864), 3 De G. J. & Sm. 661; 4 New Rep. 386; 33 L. J. Ch. 505; 10 L. T. 741; 28 J. P. 499; 10 Jur. N. S. 665; 12 W. R. 969; 46 E. R. 793, L. J.J.

Annotations:—As to (1) *Consd.* *Finck v. L. & S. W. Ry.* (1890), 44 Ch. D. 330. As to (2) *Refd.* *Allhusen v. Ealing & South Harrow Ry.* (1898), 78 L. T. 285. As to (3) *Consd.* *Barnes v. Southsea Ry.* (1884), 27 Ch. D. 536; *Kerford v. Seacombe, Hoylake & Deeside Ry.* (1888), 57 L. J. Ch. 270. *Refd.* *Allhusen v. Ealing & South Harrow Ry.* (1898), 78 L. T. 285.

PART VI. SECT. 4, SUB-SECT. 1.— B. (a).

564.1. Comprises everything that would pass under grant or devise of house.]—"House" under Lands (Scot.) Act, 1845, s. 90, includes the solum on which it stands, a *coclo usque ad medium*

terrac.—*GLASGOW CITY & DISTRICT RY. CO. v. MACBRAYNE* (1883), 10 R. (Ct. of Sess.) 894; 20 Sc. L. R. 602.—SCOT.

566.1. Access to public street—Included in "house."—Business premises abutting on a courtyard had an access

from the public street:—*Held*: the access was part of the "house or building or manufactory" of the proprietor to which Lands (Scot.) Act, 1845, s. 90, were applicable.—*CALEDONIAN RY. CO. v. TURCAN* (1898), 25 R. (Ct. of Sess.) 7; 35 Sc. L. R. 404.—SCOT.

Sect. 4.—Restrictions on taking part of land and premises: Sub-sect. 1, B. (a) & (b), C. & D. (a).]

570. ———.]—Pltf. was owner & occupier of a house & six acres of meadow land on the west of E. road. He had a large family, & the ground he had, being insufficient for the horse & cows which he kept for their use, he bought six & a quarter acres on the other side of the road, the nearest point being distant 120 yards from his entrance gate. At the nearest point of this land were a cow-house, loose box, & a cottage, which was occupied by his grooms, because he had no accommodation for them on his own side of the road, & he for a number of years occupied the land for the purpose of feeding the horses & cows requisite for his establishment:—*Held*: the six & a quarter acres could not be considered part of the house within Lands Act, 1845, s. 92.

The word "house" in the above sect. includes all that would pass by a devise of the house; but that does not include land which is not necessary for the convenient use & occupation of the house, but only for the personal use & convenience of the owner & occupier (TURNER, L.J.).—*STEELE v. MIDLAND RY. CO.* (1866), 1 Ch. App. 275; 14 L. T. 3; 30 J. P. 227; 12 Jur. N. S. 218; 14 W. R. 367, L. J.J.; *subsequent proceedings* (1869), 20 L. T. 475.

Annotations:—*Consd.* Kerford v. Seacombe, Hoylake & Deeside Ry. (1888), 57 L. J. Ch. 270. *Refd.* Smith v. Ridgway (1866), L. R. 1 Exch. 331; Benington v. Metropolitan Board of Works (1886), 54 L. T. 837; Wright v. Wallasey L. B. (1887), 18 Q. B. D. 783; Allhusen v. Ealing & South Harrow Ry. (1898), 78 L. T. 285; *Re* Willis, Spencer v. Willis, [1911] 2 Ch. 563. *Mentd.* Cuthbert v. Robinson (1882), 51 L. J. Ch. 238.

571. ———.]—KERFORD v. SEACOMBE, HOYLAKES & DEESIDE RY. CO. (1888), 57 L. J. Ch. 270; 58 L. T. 445; 52 J. P. 487; 36 W. R. 431; 4 T. L. R. 228.

572. ———.]—The term "house" in Lands Act, 1845, s. 92, must be taken to include everything that would pass under the grant of a "house" on a simple conveyance of it as such.

Where there was a paddock at the back of a cottage & garden, & having access only from these latter, & the paddock was used by its present, & had been used by its former, proprietor for purposes connected with their respective businesses:—*Held*: the paddock was within the term "house" as used in s. 92, inasmuch as it was clear that it would pass under a grant of the "house" on a simple conveyance of the latter as such.—*Low v. STAINES RESERVOIRS JOINT COMMITTEE* (1900), 64 J. P. 212; 16 T. L. R. 184, C. A.

573. Does not include house built on land after notice to treat given.—*LITTLER v. RHYL IMPROVEMENT COMRS.*, [1878] W. N. 219.

(b) In Particular Instances.

See Lands Act, 1845, s. 92.

574. Land on which intended to erect wing to existing buildings—Included in "house."—(1) Trustees of a charity purchased land & covenanted to erect upon it buildings, consisting of a hall in the centre, with almshouses, some on each side of the hall, & others forming wings of the main building, with a garden in the centre. A portion was to be built within a specified time, & the rest as funds were subscribed. Before more than the centre was completed a railway co., under

Lands Act, 1845, required to take a portion of the land which, when the design was complete, would be part of the garden in front of one of the intended, but then unbuilt, almshouses:—*Held*: the land was part of a house within s. 92.

(2) It is the duty of cts. of justice to construe Acts of Parliament so as to protect private proprietors against public cos. (KNIGHT BRUCE, L.J.).

(3) I know of no means by which we can interpret the word "house" in this sect. except by a reference to the legal construction put upon that word in other instruments. I take, therefore, the question to be, what would pass under a conveyance of the house? That, as I think, must be judged of by the particular situation & circumstances of the property at the time (TURNER, L.J.).—*GROSVENOR (LORD) v. HAMPSTEAD JUNCTION RY. CO.* (1857), 1 De G. & J. 446; 26 L. J. Ch. 731; 29 L. T. O. S. 319; 21 J. P. 547; 3 Jur. N. S. 1085; 5 W. R. 812; 44 E. R. 796, L. J.J.

Annotations:—*As to* (1) *Folld.* Cole v. West London & Crystal Palace Ry. (1859), 27 Beav. 242; *Hewson v. South Western Ry.* (1860), 2 L. T. 369. *Consd.* St. Thomas' Hospital v. Charing Cross Ry. (1861), 1 J. & H. 400; *Fergusson v. L. B. & S. C. Ry.* (1863), 3 De G. J. & Sm. 653. *Distd.* Chambers v. L. C. & D. Ry. (1863), 11 W. R. 479. *Consd.* Marson v. L. C. & D. Ry. (1868), L. R. 6 Eq. 101; *Allhusen v. Ealing & South Harrow Ry.* (1898), 78 L. T. 285. *Refd.* Eastern Counties, etc. Coys. v. Marriage (1860), 9 H. L. Cas. 32. *As to* (2) *Consd.* Kerford v. Seacombe Hoylake & Deeside Ry. (1888), 57 L. J. Ch. 270. *As to* (3) *Consd.* Harvie v. South Devon Ry. (1874), 31 L. T. 424; *Kerford v. Seacombe, Hoylake & Deeside Ry.* (1888), 57 L. J. Ch. 270. *Generally*, *Mentd.* King v. Wycombe Ry. (1860), 24 J. P. 279.

575. Unfinished house—Included in "house."—*ALEXANDER v. CRYSTAL PALACE RY. CO.* (1862), 30 Beav. 556; 31 L. J. Ch. 500; 26 J. P. 595; 8 Jur. N. S. 833; 54 E. R. 1005.

576. Semi-detached villas under one continuous roof—Party wall only carried up to ceilings of bedrooms—Space between bedroom ceilings & roof forming one continuous space—Not a "house."—Pltf. was the lessee of two semi-detached villas under one continuous roof. The party wall between them was only carried up to the ceilings of the bedrooms, so that the space between those ceilings & the roof formed one continuous space, through which a person might creep from one end of the roof to the other, but, with this exception, there was no internal communication between the two villas. The party wall was so ineffective that if one of the villas were to be pulled down, the other villa would become uninhabitable. Each villa had its own distinct garden. A railway co., under Lands Act, 1845, gave notice to treat for a strip of the garden of one of the villas, & received a counter-notice requiring them to take the two villas. The co. deposited only the assessed value of the strip of garden comprised in their notice to treat. Pltf. filed his bill to compel the co. to take the two villas, & thereupon they agreed to take the whole of one of the villas:—*Held*: (1) the two villas did not constitute one house within Lands Act, 1845, s. 92, & the co. could take one villa without taking the other; (2) the co. were right in proceeding on their own notice, & not depositing the value of the two villas, as the counter-notice was not good.

(3) In his counter-notice to the co. the owner of the tenements described them as two houses, claiming that they could not be safely separated:—*Held*: (MALINS, V.C.) he was not on that account

PART VI. SECT. 4, SUB-SECT. 1.—B. (b).

5741. Land on which intended to erect addition to existing building—Included in "house."—Defts. required part of a house, which would cut off part of an unfinished cathedral, for

their ry., & took possession, but pltf., declined to sell or convey, or arbitrate as to the value of, anything less than the whole house. In an action to compel the ry. co. to take the whole:—*Held*: (1) the land was set apart for cathedral purposes, & an injunction

was granted against the ry. taking a part only; (2) the mere going into possession of part, did not necessarily commit defts. to the purchase of the whole.—*HOLY TRINITY CATHEDRAL v. WEST ONTARIO PACIFIC RY. CO.* (1887), 14 O. R. 246.—CAN.

disentitled to insist that the co. should take both.—*HARVIE v. SOUTH DEVON RY. CO.* (1874), 32 L. T. 1; 23 W. R. 202, C. A.

577. Two houses with internal communications—Used for purposes of one business—Under separate leases of even date—Is a “house.”—*SIEGENBERG v. METROPOLITAN DISTRICT RY. CO.* (1883), 49 L. T. 554; 32 W. R. 333.

578. Cottage used as store room—Internal communication with house, shop & buildings used as manufactory—Is part of “house.”—*RICHARDS v. SWANSEA IMPROVEMENT & TRAMWAYS CO.*, No. 562, *ante*.

579. Building behind dwelling-house & shop—Used as candle manufactory—Whole block of buildings a “house.”—*RICHARDS v. SWANSEA IMPROVEMENT & TRAMWAYS CO.*, No. 562, *ante*.

580. Garden attached to house—Included in “house.”—*COLE v. WEST LONDON & CRYSTAL PALACE RY. CO.* (1859), 27 Beav. 242; 28 L. J. Ch. 767; 1 L. T. 178; 5 Jur. N. S. 1114; 54 E. R. 94.

Annotations:—*Folld. Alexander v. West End of London & Crystal Palace Co.* (1862), 26 J. P. 595. *Refd. Eastern Counties, etc. Co. v. Marriage* (1860), 9 H. L. Cas. 32; *King v. Wycombe Ry.* (1860), 24 J. P. 279; *Fergusson v. L. B. & S. C. Ry.* (1863), 2 New Rep. 503.

581. ——— House & part of garden held under one demise—Other part of garden under another demise.—Where a proprietor of a house & garden held them under two demises, the house & part of the garden being comprised in one, & the other part of the garden in the other demise:—*Held*: the co. must take the whole & make compensation. *MACGREGOR v. METROPOLITAN RY. CO.* (1866), 14 L. T. 351.

582. ——— Part used as nursery garden.—*SALTIER v. METROPOLITAN DISTRICT RY. CO.* (1870), L. R. 9 Eq. 432; 39 L. J. Ch. 567; 34 J. P. 391.

Annotation:—*Refd. Clifford v. Holt*, [1899] 1 Ch. 698.

583. Garden attached to new wing of hospital—Is part of “house.”—*ST. THOMAS'S HOSPITAL (GOVERNORS) v. CHARING CROSS RY. CO.*, No. 117, *ante*.

584. Land subject to agreement by landlord to grant future lease—To enable tenant to extend garden—Not part of “house.”—*CHAMBERS v. LONDON, CHATHAM & DOVER RY. CO.* (1863), 1 New Rep. 517; 8 L. T. 235; 27 J. P. 627; 11 W. R. 479.

585. Orchard attached to house—Included in “house.”—*KING v. WYCOMBE RY. CO.*, No. 565, *ante*.

586. Market garden attached to cottage—Not part of “house.”—*Pltf.* was owner of a piece of land 2a. 2r. 20p. in extent, situate within the municipal boundary of the city of B., in the immediate neighbourhood of dwelling-houses, but not completely surrounded by them. The land was comprised within a ring fence, & had for many years been used as a market garden. About twenty-five years before a cottage, consisting of three rooms nine feet in height, with two cellars suitable for storing fruit & vegetables, was erected near a road forming part of the boundary of the land for the purpose of being occupied by the tenant of the garden. A railway co. drove through this piece of land a tunnel which passed under one corner of the cottage, & divided the land into two portions, one of which was less than half an acre:—*Held*: (1) the co. were not bound to take the whole piece of land, but only the part lying above the tunnel, the cottage & the piece of land lying between the cottage & the road; & also, if the owner required it, the severed portion, which was less than half an acre; (2) the premises were not in a town within Lands Act, 1845, s. 93.—

FALKNER v. SOMERSET & DORSET RY. CO. (1873), L. R. 16 Eq. 458; 42 L. J. Ch. 851.

587. Land separated from house by public road—Not part of “house”—Land used as meadow & cricket ground.—*FERGUSON v. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, No. 568, *ante*.

588. ——— House for owner's servants built on part of land—Remainder used as pasturage for cows.—*STEELE v. MIDLAND RY. CO.*, No. 570, *ante*.

589. Land separated from house by public footpath—Is part of “house”—Land treated as passing to lessee by every demise for sixty years—Used by customers of house.—*MARSON v. LONDON, CHATHAM & DOVER RY. CO.* (1868), L. R. 6 Eq. 101; 37 L. J. Ch. 483; 18 L. T. 317; 32 J. P. ; *subsequent proceedings* (1869), L. R. 7 Eq. 546.

Annotations:—*Folld. Falkner v. Somerset & Dorset Ry.* (1873), L. R. 16 Eq. 458. *Distd. Grieron v. Cheshire Lines Committee* (1874), L. R. 19 Eq. 83. *Refd. Wright v. Wallasey L. B.* (1887), 18 Q. B. D. 783; *Kerford v. Seacombe, Hoylake, etc. Ry.* (1888), 36 W. R. 431; *Pilbrow v. St. Leonard, Shoreditch Vestry*, [1895] 1 Q. B. 33.

590. Land separated from house by private road—Not part of “house”—Stables & greenhouse erected on part of land—Remainder laid out as garden.—*KERFORD v. SEACOMBE, HOYLAKES & DEESIDE RY. CO.* (1888), 57 L. J. Ch. 270; 58 L. T. 445; 52 J. P. 487; 36 W. R. 431; 4 T. L. R. 228.

591. Land separated from house by sunk hedge & crossed by bridges—Used for keeping cows but occasionally used for purposes of amusement—Not part of “house.”—*PULLING v. LONDON, CHATHAM & DOVER RY. CO.*, No. 569, *ante*.

592. Paddock—Part of “house”—Access to paddock through garden & from public road running along far side of paddock.—*BARNES v. SOUTHEAST RY. CO.* (1884), 27 Ch. D. 536; 51 L. T. 762; 32 W. R. 976.

Annotations:—*Refd. Allhusen v. Ealing & South Harrow Ry.* (1898), 78 L. T. 285. *Mentd. Wright v. Wallasey L. B.* (1887), 18 Q. B. D. 783.

593. ——— Only access to paddock through garden.—*LOW v. STAINES RESERVOIRS JOINT COMMITTEE*, No. 572, *ante*.

594. Soil of private road leading to mansion house—Not included in “house.”—A railway co. proposed to take part of a private road leading to a mansion house with the object solely of carrying a bridge over the road for the purposes of their railway at a spot a quarter of a mile from the house. The owner claimed an injunction to restrain them from so doing without purchasing the whole property:—*Held*: such part of the private road would not pass on a conveyance of the “house” by that description, & was not a part only of the house, within Lands Act, 1845, s. 92.—*ALLHUSEN v. EALING & SOUTH HARROW RY. CO.* (1898), 78 L. T. 396; 46 W. R. 483; 11 T. L. R. 349; 42 Sol. Jo. 428, C. A.

C. Meaning of “Other Building.”

See Lands Act, 1845, s. 92.

595. Means building in nature of house—Undertaking of canal company—including houses & other building—Not a “building.”—*REGENT'S CANAL & DOCK CO. v. LONDON COUNTY COUNCIL*, [1912] 1 Ch. 583; 81 L. J. Ch. 377; 106 L. T. 745; 76 J. P. 353; 28 T. L. R. 248; 56 Sol. Jo. 309; 10 L. G. R. 358.

D. Meaning of “Manufactory.”

(a) *In General.*

See Lands Act, 1845, s. 92.

596. Means actual manufactory—Not adjoining

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conveniences.]—BARKER v. NORTH STAFFORDSHIRE Ry. Co., No. 1043, post.

597. Does not mean land employed for business not involving manufacture—Part used for auxiliary manufacturing processes.]—Where land is employed for the purposes of a business not involving manufacture, but portions of it are used for auxiliary manufacturing processes, the whole is not a "manufactory" within Lands Act, 1845.

Where a dust contractor used a large piece of land for the purpose of collecting & disposing of the contents of dust heaps, one portion being used as a sorting place, another for the conversion of parts of the heaps into cement, & another for converting other parts into manure:—*Held*: under Lands Act, 1845, the first-mentioned portion might be taken compulsorily without the rest.—*REDDIN v. METROPOLITAN BOARD OF WORKS* (1862), 4 De G. F. & J. 532; 31 L. J. Ch. 660; 7 L. T. 6; 27 J. P. 4; 10 W. R. 764; 45 E. R. 1290, L. C.

Annotations:—Consd. Gibson v. Hammersmith & City Ry. (1862), 2 Drew. & Sm. 603; *Benington v. Metropolitan Board of Works* (1886), 54 L. T. 837.

598. Means place where raw material converted into manufactured article.]—*BENINGTON & SONS v. METROPOLITAN BOARD OF WORKS* (1886), 54 L. T. 837; 50 J. P. 740.

(b) *In Particular Instances.*

See Lands Act, 1845, s. 92.

599. Land included in same wall with tinplate works—Used for deposit of ashes from works—Is part of "manufactory."—*SPARROW v. OXFORD, WORCESTER & WOLVERHAMPTON Ry. Co., No. 561, ante.*

600. Tunnel under manufactory—Part of "manufactory."—*SPARROW v. OXFORD, WORCESTER & WOLVERHAMPTON Ry. Co., No. 561, ante.*

601. Right of way—Not part of manufactory.]—(1) A railway co., a short time before the expiration of the time limited by their Act for the compulsory purchase or taking of lands, gave a notice to treat for the purchase of the right or easement of making & for ever maintaining their railway by throwing a bridge over a yard belonging to a manufactory: the owner, after the expiration of the co.'s compulsory powers, gave a counter-notice requiring the co. to take the whole of the manufactory; the co. did nothing upon the notice & counter-notice for nearly twelve months, they then gave a notice for the purchase of the whole manufactory, & proceeded to take steps for summoning a jury to assess its value. On an application by the owner for an injunction:—*Held*: whether the original notice to treat was valid or not, the ct. could not after the counter-notice, which had been given by the landowner, interfere with the proceedings of the co., this decision being, however, without prejudice to any steps which the owner might take to stay or quash those proceedings.

Semble: (2) a notice to treat for the purchase of such a right or easement is not a notice warranted by the Lands Act, 1845, the word "hereditaments," used in the interpretation clause as a meaning of the word "lands," signifying corporeal hereditaments, & not including a right of way; (3) such a notice to treat did not confer on the owner a right to give a counter-notice requiring the co. to take the whole of the manufactory, because a right of way could not be considered as part of the manufactory; (4) where a valid notice has been given to take part of a house or manufactory, & on that a valid counter-notice has been given to take the whole, the notice & counter-notice will be treated

as constituting one notice for the purpose of enabling the jury to assess the value of the property forming the subject-matter of the notice & counter-notice.

(5) When a co. has given a valid notice to take land, it is competent to the landowner to apply at once for a mandamus to compel them to proceed to complete the purchase, & he cannot at a subsequent time urge delay on the part of the co. as a ground for the interference of a ct. of equity with their taking proceedings to obtain the land.—*PINCHIN v. LONDON & BLACKWALL Ry. Co.* (1854), 5 De G. M. & G. 851; 3 Eq. Rep. 433; 24 L. J. Ch. 417; 24 L. T. O. S. 196; 18 J. P. 822; 1 Jur. N. S. 241; 3 W. R. 52; 43 E. R. 1101, L. C. & L. JJ.

Annotations:—As to (1) Refd. Schwinge v. London & Blackwall Ry. (1855), 3 Sm. & G. 30; *Ingram v. Mid. Ry.* (1860), 3 L. T. 533; *London Assocn. of Shipowners & Brokers v. London & India Docks Joint Committee*, [1892] 3 Ch. 242. *As to (2) Refd. G. W. Ry. v. Swindon & Cheltenham Ry.* (1884), 9 App. Cas. 787. *Generally Mentd. Haynes v. Haynes* (1861), 1 Drew. & Sm. 426; *Re Met. Dist. Ry. & Cosh* (1880), 13 Ch. D. 607.

602. Cottages used as warehouses—Separated from manufactory by road—Only warehouses connected with manufactory—Are part of "manufactory."—*SPACKMAN v. GREAT WESTERN Ry. Co.* (1855), 26 L. T. O. S. 22; 1 Jur. N. S. 790.

Annotation:—Consd. Furniss v. Mid. Ry. (1868), L. R. 6 Eq. 473.

603. Cottage used as storeroom—Internal communication with buildings where business & manufactory carried on—Part of "manufactory."—*RICHARDS v. SWANSEA IMPROVEMENT & TRAMWAYS Co., No. 562, ante.*

604. Land used by dust contractor—Part used for sorting & part for conversion of materials into manure—Part used for sorting not part of "manufactory."—*REDDIN v. METROPOLITAN BOARD OF WORKS*, No. 597, *ante.*

605. Machinery for storing & conveying power of manufactory worked by water power—Goit, shuttles, mill-house—Part of "manufactory."—*FURNISS v. MIDLAND Ry. Co.* (1868), L. R. 6 Eq. 473.

Annotation:—Consd. Allhusen v. Ealing & South Harrow Ry. (1898), 78 L. T. 396.

606. Building behind dwelling-house & shop—Used as candle manufactory & store—Whole block of buildings a "manufactory."—*RICHARDS v. SWANSEA IMPROVEMENT & TRAMWAYS Co., No. 562, ante.*

607. Building where tea broken up blended & mixed—Not a "manufactory."—*BENINGTON & SONS v. METROPOLITAN BOARD OF WORKS* (1886), 54 L. T. 837; 50 J. P. 740.

608. Building where tea packed—Not a "manufactory."—*BENINGTON & SONS v. METROPOLITAN BOARD OF WORKS* (1886), 54 L. T. 837; 50 J. P. 740.

609. — Separated from building where manufactory carried on—Not part of "manufactory."—*BENINGTON & SONS v. METROPOLITAN BOARD OF WORKS* (1886), 54 L. T. 837; 50 J. P. 740.

610. Adjoining houses constituting manufactory—One house used in part only for purpose of manufacture—Part of "manufactory."—*BROOK v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE Ry. Co.* (1895), 2 Ch. 571; 64 L. J. Ch. 890; 73 L. T. 205; 43 W. R. 698; 11 T. L. R. 549; 39 Sol. Jo. 689; 13 R. 798.

SUB-SECT. 2.—NOTICE BY OWNER REQUIRING WHOLE OF PREMISES TO BE TAKEN

A. Who may give Notice.

611. Owners without power of sale.]—*ST. THOMAS'S HOSPITAL (GOVERNORS) v. CHARING CROSS Ry. Co., No. 417, ante.*

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612. Leaseholder.] — PULLING v. LONDON, CHATHAM & DOVER RY. CO., No. 569, ante.
Agent.]—See Nos. 618, 634, post.

B. Time for giving Notice.

See Lands Act, 1845, s. 21.

613. Not limited to twenty-one days—Under Lands Act, 1845, s. 21.]—SCHWINGE v. LONDON BLACKWALL RY. CO. (1855), 3 Sm. & G. 30; 3 Eq. Rep. 536; 24 L. J. Ch. 405; 25 L. T. O. S. 124; 1 Jur. N. S. 368; 3 W. R. 260; 65 E. R. 550.
Annotation:—Mentd. Treadwell v. L. & S. W. Ry. (1884), 54 L. J. Ch. 565.

614. Before promoters exercise compulsory powers.]—GARDNER v. CHARING CROSS RY. CO. (1861), 2 John. & H. 248; 31 L. J. Ch. 181; 5 L. T. 418; 26 J. P. 3; 8 Jur. N. S. 151; 10 W. R. 120; 70 E. R. 1049.

Annotations:—Refd. Gibson v. Hammersmith Ry. (1863), 32 L. J. Ch. 337. Consd. Lavers v. L. C. C. (1905), 93 L. T. 233. Mentd. Rawlings v. Met. Ry. (1868), 37 L. J. Ch. 824.

See, also, Nos. 618, 637, post.

C. Form and Extent of Notice.

615. Form—Sufficient if property identified.]—POLLARD v. MIDDLESEX COUNTY COUNCIL (1906), 95 L. T. 870; 71 J. P. 85; 5 L. G. R. 37.

616. — Not invalidated by describing premises as two houses.]—HARVIE v. SOUTH DEVON RY. CO., No. 576, ante.

— **Whether verbal notice sufficient.]—See Nos. 618, 634, post**

617. Extent—Owner cannot require promoters to take more than part required—If less than whole.] — PULLING v. LONDON, CHATHAM & DOVER RY. CO., No. 569, ante.

D. Loss of Right to give Notice.

618. By delay—Until after entry by promoters on part—Prior verbal refusal to sell part by owner's solicitor—Right not lost.]—SPACKMAN v. GREAT WESTERN RY. CO. (1855), 26 L. T. O. S. 22; 1 Jur. N. S. 790.

Annotation:—Refd. Furniss v. Mid. Ry. (1868), L. R. 6 Eq. 473.

619. Not by abortive negotiations—As to price of part.]—GARDNER v. CHARING CROSS RY. CO. (1861), 2 John. & H. 248; 31 L. J. Ch. 181; 5 L. T. 418; 26 J. P. 3; 8 Jur. N. S. 151; 10 W. R. 120; 70 E. R. 1049.

Annotations:—Refd. Gibson v. Hammersmith Ry. (1863), 32 L. J. Ch. 337. Folld. Lavers v. L. C. C. (1905), 93 L. T. 233. Mentd. Rawlings v. Met. Ry. (1868), 37 L. J. Ch. 824.

620. Not by claim for compensation for part—Followed by agreement apportioning rent—If compensation not agreed.]—LAVERS v. LONDON COUNTY COUNCIL (1905), 93 L. T. 233; 69 J. P. 362; 21 T. L. R. 695; 3 L. G. R. 1025.

Annotation:—Apld. Pollard v. Middlesex County Council (1906), 95 L. T. 870.

621. Not by agreement by surveyors—As to compensation to be paid—If agreement not adopted by principals.]—POLLARD v. MIDDLESEX COUNTY COUNCIL (1906), 95 L. T. 870; 71 J. P. 85; 5 L. G. R. 37.

E. Effect of Notice.

(a) On Original Notice to treat.

622. Promoters may abandon purchase.]—R. v. LONDON & SOUTH WESTERN RY. CO. (1848), 12 Q. B. 775; 5 Ry. & Can. Cas. 669; 17 L. J. Q. B. 326; 11 L. T. O. S. 433; 12 Jur. 973; 116 E. R. 1061.

Annotation:—Consd. Ex p. Quicke (1865), 12 L. T. 580.

623. —.]—KING v. WYCOMBE RY. CO., No. 565, ante.

624. Notice to treat not revived by withdrawal of counter-notice.]—Ex p. QUICKE (1865), 12 L. T. 580; 13 W. R. 924.

625. —.]—ASHTON VALE IRON CO., LTD. v. BRISTOL CORPN., No. 509, ante.

626. — Owner cannot treat original notice to treat as subsisting as to part.]—THOMPSON v. TOTTENHAM & FOREST GATE RY. CO. (1892), 67 L. T. 416; 57 J. P. 181; 8 T. L. R. 602; 36 Sol. Jo. 542.

627. — Promoters' power to take whole limited—To premises severable without material detriment—Material detriment question for jury.]—MORRISON, WOOD & CO. v. GREAT EASTERN RY. CO. (1885), 53 L. T. 384; 1 T. L. R. 658.

, also, No. 639, post.

Withdrawal of notice to treat.]—See, generally, Sect. 2, sub-sect. 6, ante.

Right of owner to compel specific performance—After notice to treat.]—See Sect. 2, sub-sect. 5, A., ante.

— **Followed by assessment of compensation.]—See Part X., Sect. 1, sub-sect. 1, post.**

628. Notice to treat suspended not destroyed.]—SCHWINGE v. LONDON & BLACKWALL RY. CO. (1855), 3 Sm. & G. 30; 3 Eq. Rep. 536; 24 L. J. Ch. 405; 25 L. T. O. S. 124; 1 Jur. N. S. 368; 3 W. R. 260; 65 E. R. 550.

Annotation:—Mentd. Treadwell v. L. & S. W. Ry. (1884), 54 L. J. Ch. 565.

See, also, No. 516, ante.

629. Sufficient notice to treat for whole—To enable jury to assess compensation.]—PINCHIN v. LONDON & BLACKWALL RY. CO., No. 601, ante.

630. — If assented to—Notice to summon jury insufficient assent.]—SCHWINGE v. LONDON & BLACKWALL RY. CO. (1855), 3 Sm. & G. 30; 3 Eq. Rep. 536; 24 L. J. Ch. 405; 25 L. T. O. S. 124; 1 Jur. N. S. 368; 3 W. R. 260; 65 E. R. 550.
Annotation:—Refd. Treadwell v. L. & S. W. Ry. (1884), 54 L. J. Ch. 565.

(b) On Amount to be deposited by Promoters.

631. Promoters must deposit value of whole.]—UNDERWOOD v. BEDFORD & CAMBRIDGE RY. CO. (1861), 7 Jur. N. S. 941.

632. —.]—DADSON v. EAST KENT RY. CO. (1859), 7 Jur. N. S. 941.

633. —.]—GILES v. LONDON, CHATHAM & DOVER RY. CO., No. 1044, post.

634. — Verbal understanding between surveyors to parties—That whole to be taken.]—BINNEY v. HAMMERSMITH & CITY RY. CO. (1863), 8 L. T. 161; 9 Jur. N. S. 873.

635. Promoters need not deposit value of whole—If counter-notice bad.]—HARVIE v. SOUTH DEVON RY. CO., No. 576, ante.

(c) Other

636. Promoters cannot avoid notice—By change of plan—Railway passing under land by tunnel.]—SPARROW v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., No. 561, ante.

637. Notice by owner under special statutory powers—Given before notice to treat—Disentitles owner to extra compensation—For compulsory purchase.]—JERVIS v. NEWCASTLE & GATESHEAD WATER CO. (1897), 13 T. L. R. 312, C. A.

F. What amounts to Acceptance of Notice.

638. Entry on part comprised in notice to treat.]—MARSON v. LONDON, CHATHAM & DOVER RY. CO. (1869), L. R. 7 Eq. 546; 38 L. J. Ch. 371; 20 L. T. 773.

Annotations:—Mentd. Falkner v. Somerset & Dorset Ry. (1873), L. R. 16 Eq. 458; Grierson v. Cheshire Lines Committee (1874), L. R. 19 Eq. 83.

Sect. 4.—Restrictions on taking part of land and premises: Sub-sect. 2, F.; sub-sect. 3. Sect. 5: Sub-sects. 1 & 2. Part VII. Sects. 1 & 2: Sub-sects. 1 & 2.]

639. Not notice of intention to apply for appointment of surveyor—For valuation of whole.]—GRIERSON *v.* CHESHIRE LINES COMMITTEE (1874), L. R. 19 Eq. 83; 44 L. J. Ch. 35; 31 L. T. 428; 23 W. R. 68; 39 J. P. 229.

*Annotation:—*Consd. Ashton Vale Iron Co. *v.* Bristol Corpn. (1901), 83 L. T. 694.

640. Not acceptance by promoters' solicitors—Where notice invalid.]—TREADWELL *v.* LONDON & SOUTH WESTERN RY. CO. (1884), 54 L. J. Ch. 565; 51 L. T. 894; 33 W. R. 272.

Withdrawal of notice to treat—After counter-notice by owner.]—See Sub-sect. 2, E., (a), *ante*, & generally, Sect. 2, sub-sect. 6, *ante*.

Right of owner to compel specific performance—After notice to treat.]—See Sect. 2, sub-sect. 5, A., *ante*.

—— **Followed by assessment of compensation.]—**See Part X., Sect. 1, sub-sect. 1, *post*.

SUB-SECT. 3.—FORM OF JUDGMENT TO TAKE WHOLE PREMISES.

641. Must contain statement that plaintiffs able & willing or undertaking by plaintiffs to make good title to whole.]—SPARROW *v.* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., No. 561, *ante*.

642. —.]—LONDON CORPN. (GOVERNORS OF ST. THOMAS'S HOSPITAL) *v.* CHARING CROSS RY. CO. (1861), 4 L. T. 85.

643. — Inquiry as to title directed—& further consideration reserved.]—MARSON *v.* LONDON, CHATHAM & DOVER RY. CO. (1868), L. R. 6 Eq. 101; 37 L. J. Ch. 483; 18 L. T. 317; 32 J. P. 565; *subsequent proceedings* (1869), L. R. 7 Eq. 546.

*Annotations:—*Folld. Falkner *v.* Somerset & Dorset Ry. (1873), L. R. 16 Eq. 458. Consd. Grierson *v.* Cheshire Lines Committee (1874), L. R. 19 Eq. 83. Mentd. Wright *v.* Wallasey L. B. (1887), 18 Q. B. D. 783; Kerford *v.* Seacombe, Hoylake & Ry. (1888), 36 W. R. 431; Pilbrow *v.* St. Leonard, Shoreditch Vestry, [1895] 1 Q. B. 33.

644. Promoters not bound to take whole "house"—Tunnel dividing market garden on which cottage erected—Promoters ordered to take part of market garden severed if so required by plaintiff—Statement inserted in decree that plaintiff so required.]—FALKNER *v.* SOMERSET & DORSET RY. CO., No. 586, *ante*.

645. On failure of promoters to proceed—Promoters ordered to take proceedings to ascertain amount to be paid for whole premises—Declaration of landowner's lien with liberty to apply to enforce.]—MARSON *v.* LONDON, CHATHAM & DOVER RY. CO. (1869), L. R. 7 Eq. 546; 38 L. J. Ch. 371; 20 L. T. 773.

*Annotations:—*Mentd. Falkner *v.* Somerset & Dorset Ry. (1873), L. R. 16 Eq. 458; Grierson *v.* Cheshire Lines Committee (1874), L. R. 19 Eq. 83.

SECT. 5.—REQUIREMENTS AS TO TAKING SMALL PORTIONS OF INTERSECTED LANDS.

SUB-SECT. 1.—RIGHT OF OWNER TO REQUIRE SALE.

See Lands Act, 1845, s. 93.

646. Land not being "situate in a town"—Land within municipal boundaries but not surrounded by houses—Not "situate" in a town.]—ER *v.* SOMERSET & DORSET RY. CO., No. 586,

Ascertainment of value of such land—Whether question included in arbitration to ascertain value of land required by promoters.]—See No. 731, *post*.

SUB-SECT. 2.—RIGHT OF PROMOTERS TO REQUIRE SALE.

See Lands Act, 1845, s. 94.

647. Lands Act, 1845, s. 94—Applies to all intersected lands—Whether situate in town or not.]—EASTERN COUNTIES & LONDON & BLACKWALL RY. COS. *v.* MARRIAGE, No. 29, *ante*.

—— **Costs of inquiry under.]—**See No. 929, *post*.

Part VII.—Assessment of Purchase Price and Compensation.

SECT. 1.—APPLICATION OF ACTS.

648. Lands Act, 1845—When doubt as to true ownership of land—Neither claimant absent nor prevented from treating—Value determined by verdict of jury or award under s. 23—Not by surveyor appointed under ss. 58, 59.]—Ex *p.* LONDON & SOUTH WESTERN RY. CO. (1869), 38 L. J. Ch. 527.

649. — Provisions relating to assessment—Applicable to assessment under Railways Act, 1845, s. 78.]—R. *v.* LONDON & NORTH WESTERN RY. CO., [1894] 2 Q. B. 512; 63 L. J. Q. B. 695; 58 J. P. 719; 10 R. 359.

*Annotations:—*Refd. R. *v.* St. Giles Camberwell Vestry (1897), 66 L. J. Q. B. 337; Smith *v.* Chorley District Council (1897), 66 L. J. Q. B. 427; L. & N. W. Ry. *v.* Walker (1900), 82 L. T. 93.

650. Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57)—Statutory contract

contained in prior special Act not overruled by—Compensation assessable under prior Act.]—By a special Act provision was made for arbn. on the compensation to be paid for lands taken from plffs., who had procured the insertion of s. 70 & other provisions for their own protection. Deft. corpn. served notices on plffs. to treat under the special Act a few days before the Acquisition of Land (Assessment of Compensation) Act, 1919, came into force, & claimed that the latter Act, which diminished the amount of compensation payable on a compulsory purchase, was applicable:—*Held*: compensation was assessable in the manner provided by the special Act, & not under the general Act.—BLACKPOOL CORPN. *v.* STARR ESTATE CO. LTD. (1921), 38 T. L. R. 79; 66 Sol. Jo. (W. R.) 17; 19 L. G. R. 721, H. L.

—— **Compensation for special suitability or**

PART VII. SECT. 1.

e. Land (Scot.) Act, 1845, ss. 23–35.—Whether applicable to agreement to refer dated prior to passing of special Act.]—A ry. co. brought a bill into Parliament, to enable it to form a branch line. A proprietor, through

whose lands the proposed branch line was to pass, opposed the bill. A deed of agreement was entered into whereby the ry. co. agreed to refer the proprietor's claim of compensation to two arbiters specially named. The bill thereafter passed into law, the

above Act being incorporated:—*Held*: at the date of the transaction, above Act was not applicable & not binding on the parties.—SCOTT *v.* NORTH BRITISH RY. CO. (1847), 19 Sc. Jur. 643.—SCOT.

adaptability under.]—See Part III., Sect. 1, subsect. 3, C., *ante*.

Incorporation, construction & application of Acts.]
—*Sec, generally, Part II., Sects. 1, 2, ante.*

SECT. 2.—JURISDICTION OF ASSESSING TRIBUNALS.

SUB-SECT. 1.—IN GENERAL.

651. Competency of tribunal cannot be challenged—When decision made final by statute.]—*BARNESLEY CANAL CO. v. TWIBELL*, No. 410, *ante*.

652. Power of jury to construe Act—To determine whether claim made within its provisions.]—*EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. v. GATKE*, No. 202, *ante*.

SUB-SECT. 2.—LIMITED TO ASCERTAINING AMOUNT.

653. May find no damage—Warrant containing words "if any."]—By a railway Act it was enacted that, for settling differences between the co. & owners of land, the co. should issue a warrant commanding the sheriff to impanel, etc., a jury, which jury should enquire of, assess & give a verdict for the sum of money to be paid, by way of satisfaction or compensation, for the damages sustained from the co.'s acts. It was also provided that no proceedings had in pursuance of the Act should be quashed or vacated for want of form, or removed by *certiorari*. The co. issued their warrant to the sheriff, commanding him to impanel a jury for the purpose of inquiring of, assessing & giving a verdict for, the sum of money, if any, to be paid to C. by way of satisfaction or compensation for the damages, if any, which should have been done, etc. The jury, on the inquisition in pursuance of this warrant, found that C. had not sustained any damage; & it was considered that no damages or sum of money should be assessed, etc.:—*Held*: (1) the jury, even though the words "if any" had not been in the warrant, would still have been authorised to find that there was no damage; (2) the words in the warrant did not vary the duty imposed upon the jury, or prevent the warrant from being in pursuance of the Act; (3) the proceedings were within the jurisdiction conferred by the Act, & no *certiorari* lay.—*R. v. LANCASTER & PRESTON JUNCTION RY. CO.* (1845), 6 Q. B. 759; 3 Ry. & Can. C. s. 725; 14 L. J. Q. B. 84; 9 Jur. 303; 115 E. R. 286.

Annotations:—*As to* (1) *Consd.* *East & West India Docks & Birmingham Junction Ry. v. Gattke* (1851), 3 Mac. & G. 155. *Expld.* *R. v. L. & N. W. Ry.* (1854), 3 E. & B. 443. *Apld.* *Re Bradby & Southampton District L. B. of Health* (1855), 4 E. & B. 1014. *Consd.* *Hill v. Audus* (1855), 1 K. & J. 263. *Refd.* *L. & N. W. Ry. v. Bradley* (1851), 3 Mac. & G. 336; *Chapman v. Monmouthshire Ry. & Canal Co.* (1857), 27 L. J. Ex. 97; *Edinburgh & District Water Trustees v. Clippens Oil Co.* (1902), 87 L. T. 275.

PART VII. SECT. 2, SUB-SECT. 1.

1. Jurisdiction of Superior Court Judge under Railway Act, s. 196.]—A Superior Court Judge acting under above sect. is *persona designata* to hear applications; & an appeal from a judge so acting does not lie. The jurisdiction given to the Superior Court judge under the above Act is special & peculiar, & distinct from his jurisdiction as a judge of that ct.—*CANADIAN NORTHERN ONTARIO RY. CO. v. SMITH* (1914), 50 S. C. R. 476; 22 D. L. R. 265. —CAN.

g. —.]—*Re CHAMBERS & CANADIAN PACIFIC RY. CO.* (1910), 15 W. L. R. 694; 20 Man. L. R. 277.—CAN.

PART VII. SECT. 2, SUB-SECT. 2.

654 i. Cannot enquire into title or legal rights of claimant.]—The question for determination is the amount of compensation payable in respect of that estate or interest of the claimant which has been the subject of valuation. Questions of title cannot be entered into.—*REID (ROBERT) & CO. v. MINISTER FOR PUBLIC WORKS* (1902), 2 S. R. N. S. W. 405; 19 N. S. W. W. N. 258.—AUS.

654 ii. — *Vancouver Incorporation Act, 1900, s. 133.]*—The right to compensation cannot be determined by arbitrators appointed under above sect., as their jurisdiction is limited to find-

654. Cannot enquire into title or legal rights of claimant—Under Lands Act, 1845.]—*EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. v. GATKE*, No. 202, *ante*.

655. —.]—*Lands Act, 1845, s. 68*, which provides that if any person shall be entitled to any compensation in respect of any lands or any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works, & for which the promoters shall not have made satisfaction, such party may have the amount of such compensation settled by arbn. or by a jury, does not give the arbitrators or jury jurisdiction to inquire into the title of claimant to the land or other hereditament in respect of which he claims compensation, but only to decide upon the question of amount.—*R. v. LONDON & NORTH WESTERN RY. CO.* (1854), 3 E. & B. 443; 23 L. J. Q. B. 185; 22 L. T. O. S. 346; 18 Jur. 993; 2 C. L. R. 1157; 118 E. R. 1208.

Annotations:—*Expld. & Folld.* *Re Bradby & Southampton District L. B. of Health* (1855), 4 E. & B. 1014. *Consd.* *Chapman v. Monmouthshire Ry. & Canal Co.* (1857), 2 H. & N. 267. *Apld.* *Horrocks v. Met. Ry.* (1863), 4 B. & S. 315. *Consd.* *Read v. Victoria Station & Pimlico Ry.* (1863), 1 H. & C. 826; *Beckett v. Mid. Ry.* (1866), L. R. 1 C. P. 241; *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 380. *Apprvd.* *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221. *Refd.* *Barber v. Nottingham & Grantham Ry. & Canal Co.* (1864), 15 C. B. N. S. 726; *G. N. & City Ry. v. Tillet*, [1902] 1 K. B. 874. *Mentd.* *Pinchin v. London & Blackwall Ry.* (1854), 1 K. & J. 34; *R. v. M. S. & L. Ry.* (1854), 1 Jur. N. S. 419; *R. v. Burslem L. B. of Health* (1859), 5 Jur. N. S. 1394; *Re Bristol & North Somerset Ry., Re Somerset & Dorset Ry., Re L. & S. W. & Mid. Rys.* (1877), 37 L. T. 527; *Dawson v. G. N. & City Ry.*, [1905] 1 K. B. 260.

656. —.]—The finding of the sheriff's jury on an inquisition, under Lands Act, 1845, s. 68, is not conclusive; & therefore in an action brought on such an inquisition, it is competent to deft., on a traverse that pltf.'s property was damaged or injuriously affected within the Act, & that pltf. was not entitled to compensation under the provisions thereof, in respect of same having been so damaged or seriously affected, to prove that the subject-matters of the claim are not such as are contemplated by s. 68.—*CHAPMAN v. MONMOUTHSHIRE RY. & CANAL CO.* (1857), 2 H. & N. 267; 27 L. J. Ex. 97; 157 E. R. 111.

Annotations:—*Dbtd.* *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 380. *Refd.* *Read v. Victoria Station & Pimlico Ry.* (1863), 1 H. & C. 826.

657. —.]—(1) The assessment of damages by the verdict of a jury under Lands Act, 1845, in respect of lands injuriously affected by public works, is not conclusive that the lands were damaged & injuriously affected; & therefore in an action upon such verdict & the judgment thereon to recover the damages awarded & costs, defts. are not estopped from pleading that the lands & pltf.'s interest therein were not damaged & injuriously affected.

(2) Where the damages claimed & awarded exceed £50, defts. are estopped from denying that

ing the amount of compensation.—*Re NORTHERN COUNTIES INVESTMENT TRUST, LTD. & VANCOUVER CITY* (1901), 8 B. C. R. 338.—CAN.

654 iii. — *Lands (Scot.) Act, 1845.]*—The sole duty of arbiters appointed under above Act is to assess compensation on the footing that the compulsory purchase is to be carried out; & they cannot decide any question of law affecting vendee's right to compensation or his right to enforce payment of the amount assessed.—*LOCKERBY v. CITY OF GLASGOW IMPROVEMENT TRUSTEES* (1872), 10 Macph. (Ct. of Sess.) 971.—SCOT.

Sect. 2.—Jurisdiction of assessing tribunals: Sub-sect. 2. Sect. 3.]

pltf. was entitled to compensation to an amount exceeding £50.—*READ v. VICTORIA STATION & PIMLICO RY. CO.* (1863), 1 H. & C. 826; 1 New Rep. 446; 32 L. J. Ex. 167; 9 Jur. N. S. 1061; 11 W. R. 1032; 158 E. R. 1117.

Annotations:—*As to (1) Apprvd. Barber v. Nottingham & Grantham Ry. & Canal Co.* (1864), 15 C. B. N. S. 726. *Consd. Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221; *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 380. *Refd. Horrocks v. Met. Ry.* (1863), 4 B. & S. 315. *As to (2) Refd. Barber v. Nottingham & Grantham Ry. & Canal Co.* (1864), 15 C. B. N. S. 726.

Defences available to promoters generally, see Sect. 6, sub-sect. 8, B., *post*.

658. ———.]—HORROCKS v. METROPOLITAN RY. CO. (1863), 4 B. & S. 315; 2 New Rep. 452; 27 J. P. 694; 11 W. R. 910; 122 E. R. 477; *sub nom. R. v. METROPOLITAN RY. CO.* 32 L. J. Q. B. 367; 8 L. T. 663; 10 Jur. N. S. 204; *subsequent proceedings, sub nom. HORROCKS v. METROPOLITAN RY. CO.* (1865), 19 C. B. N. S. 139.

Annotation:—*Apprvd. Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221.

659. ———.]—Re NEWBOLD & METROPOLITAN RY. CO. (1863), 14 C. B. N. S. 405; 2 New Rep. 168; 143 E. R. 503.

Annotations:—*Consd. Re Harper & G. E. Ry.* (1875), L. R. 20 Eq. 39. *Refd. Rhodes v. Airedale Drainage Comrs.* (1874), L. R. 9 C. P. 508.

660. ———.]—BRANDON v. BRANDON, No. 1461, *post*.

661. ——— Court will apportion amount when too large an interest claimed.]—Re NORTH LONDON RY. CO. (CITY BRANCH), Ex p. COOPER, No. 2044, post.

662. ——— Effect of reference & notice to treat—Question of title left open.]—CAMPBELL v. LIVERPOOL CORPN. (1870), L. R. 9 Eq. 579; 21 L. T. 814; 18 W. R. 422.

Annotation:—*Mentd. Ex p. Liverpool* (1870), L. R. 11 Eq. 15.

663. ——— Under private Act.]—By a canal Act comrs. were appointed for settling, determining & adjusting all questions, matters & differences between the co. & the owners of lands, etc., prejudiced by the execution of any of the powers thereby granted; & by a subsequent sect. the amount of compensation was to be assessed by a jury, & the comrs. were to give judgment for the sum so assessed, which was to be binding & conclusive to all intents & purposes:—*Held*: the verdict & judgment were conclusive as to the amount, but not as to claimant's right to compensation.—*BARBER v. NOTTINGHAM CANAL CO.* (1864), 15 C. B. N. S. 726; 3 New Rep. 510; 33 L. J. C. P. 193; 9 L. T. 829; 10 Jur. N. S. 260; 12 W. R. 376; 143 E. R. 970.

Annotations:—*Consd. Dunn v. Birmingham Canal Co.* (1872), L. R. 7 Q. B. 244. *Refd. Beckett v. Mid. Ry.* (1866), Har. & Ruth. 189; *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 380; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1902), 71 L. J. K. B. 837.

664. ——— Under Regulation of Railways Act, 1868 (c. 119), s. 41—Proceedings removed to superior court.]—By Regulation of Railways Act, 1868, s. 41, "whenever in the case of any lands purchased or taken otherwise than by agreement for the purposes of any public railway, any question of compensation in respect thereof, or any question

of compensation in respect of lands injuriously affected by the execution of the works of any public railway, was, under Lands Act, 1845, to be settled by the verdict of a jury empanelled & summoned as in that Act mentioned, the co. or the party entitled to the compensation, may apply to the judge of any one of the superior cts. of common law, who shall, if he think fit, make an order for trial of the question in one of the superior cts., upon such terms & in such manner as to him shall seem fit, etc.; & the proceedings shall be under & subject to the control & jurisdiction of the ct. as in ordinary actions therein":—*Held*: the question to be tried under s. 41, by a judge of a superior ct. with a jury, was the same as that previously tried by the sheriff with a jury, & consequently the judge & jury had no jurisdiction to determine the title to the compensation, but could only determine the amount.

Semble: notwithstanding the Judicature Acts & Rules, a trial in the High Ct. under s. 41 cannot be by a judge without a jury.—*Re EAST LONDON RY. CO., OLIVER'S CLAIM* (1890), 24 Q. B. D. 507; 63 L. T. 147; 38 W. R. 312.

2, further, Sect. 6, post.

665. Cannot inquire into collateral matters—Under Lands Act, 1845.]—Re BYLES & IPSWICH DOCK COMRS. (1855), 11 Exch. 464; 25 L. J. Ex. 53; 26 L. T. O. S. 151; 156 E. R. 913.

666. Jury cannot award additional sum for accommodation works—Matter for justices—Under Railways Act, 1845, ss. 68, 69.]—R. v. SOUTH WALES RY. CO. (1849), 13 Q. B. 988; 116 E. R. 1540; *sub nom. Re SOUTH WALES RY. CO. v. RICHARDS*, 6 Ry. & Can. Cas. 197; 18 L. J. Q. B. 310; 13 L. T. O. S. 446; 14 J. P. 6; *sub nom. Re RICHARDS v. SOUTH WALES RY. CO.*, 13 Jur. 1095.

Annotations:—*Mentd. Re Penny* (1857), 7 E. & B. 660; *Mortimer v. S. W. Ry.* (1859), 5 Jur. N. S. 784.

667. Arbitrator cannot substitute accommodation works.]—(1) An arbitrator, appointed under Lands Act, 1845, has no power to set out approaches to lands not taken, in lieu of communications formerly existing over lands taken, both portions of lands belonging to same party; but can only award compensation in respect of the injuriously affecting the lands not taken by reason of the loss of the approaches. If power to set out such approaches be given by an additional submission, not containing a consent that this additional submission shall be made a rule of ct., the ct. cannot set aside the award on the ground that no approaches are set out; inasmuch as Lands Act, 1845, s. 36, authorises the making such submission only a rule of ct. as is in pursuance of the Act; & Arbitration Act, 1698 (c. 15) gives such authority only where the submission contains such consent.

(2) Under Lands Act, 1845, the arbitrator is not bound to award compensation in respect of contingent future damage, suggested as likely to arise from the execution of works to be done by the promoters, unless it clearly appears that such damage must necessarily arise. If such damage in fact arises afterwards, the remedy for the party damaged is under s. 68.

(3) Where part only of leasehold premises,

665 i. Cannot enquire into collateral matters—Under 54 Vict. c. 51.]—HILLES v. ELLICE, CROOKS v. ELLICE (1894), 20 A. R. 225; 23 S. C. R. 429.—**CAN.**

h. Arbitrator can only award a fixed sum—Wynberg Railway Company Act, s. 18.]—The above sect. directed that in the case of disputes arbitrators

should determine the amount of recompense or compensation to be paid to proprietors for land appropriated & damage done by construction of the ry. A dispute having arisen, arbitrators ordered the co., on taking possession of ground to pay the proprietor the sum of £350, & further, at their own cost, excavate certain material &

deposit it at a convenient spot for the use of the proprietor:—*Held*: the award should have assigned a money value to the material & ordered the co. to pay such value in the event of the proprietor not being satisfied to take the material.—*WYNBERG VALLEY RY. CO. v. EKSTEEN* (1863), 1 R. 70.—**S. AF.**

subject to an entire single rent, is taken, the arbitrator has no power to apportion the rent. The remedy is under s. 119.

(4) The award is not bad for not expressly awarding compensation in respect of damage done to the land before the making of the award, by reason of the land having remained untenanted in consequence of the notice.—*Re WARE & REGENT'S CANAL CO.* (1854), 9 Exch. 395; 7 Ry. & Can. Cas. 780; 23 L. J. Ex. 145; 2 C. L. R. 1055; 156 E. R. 169; *subsequent proceedings, sub nom. REGENT'S CANAL CO. v. WARE* (1857), 23 Beav. 575.

Annotations:—As to (2) Consd. Croft v. L. & N. W. Ry. (1863), 3 B. & S. 436; *Todd v. Met. Dist. Ry.* (1871), 24 L. T. 435.

668. Not bound to award for contingent future damage—Unless apparent that damage must arise.]—*Re WARE & REGENT'S CANAL CO.*, No. 667, *ante*.

669. Cannot apportion rent—When part of leaseholds taken—Premises subject to entire single rent.]—*Re WARE & REGENT'S CANAL CO.*, No. 667, *ante*.

670. May award interest—For detention of sum awarded.]—In an action of debt to recover a sum awarded to pltf. by a jury under 43 Geo. 3, c. 140, & 48 Geo. 3, c. 11, as a compensation to be made by the B. Co. for an injury done to pltf.'s property by means of the works authorised by those Acts:—*Held*: the jury might give interest for the detention of the sum awarded.—*HILHOUSE v. DAVIS* (1813), 1 M. & S. 169; 105 E. R. 64.

Annotations:—Consd. Arnott v. Redfern (1826), 3 Bing. 353. *Refd. L. C. & D. Ry. v. S. E. Ry.*, [1892] 1 Ch. 120.

671. ——— From time amount settled—Or by virtue of contract.]—Where a pecuniary claim had been left by the creditor for years unascertained & unexamined, the debtor having always been ready & willing to meet the demand:—*Held*: the right to interest on the principal sum did not commence until after the debt had been established, & the precise amount settled.

Interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld (*LORD WESTBURY*).—*CALEDONIAN RY. CO. v. CARMICHAEL* (1870), L. R. 2 Sc. & Div. 56, H. L.

Annotations:—Distd. Fletcher v. Lancashire & Yorkshire Ry., [1902] 1 Ch. 901. *Consd. Borthwick v. Elderslie S. S. Co.*, [1905] 2 K. B. 516; *Re Richard & G. W. Ry.*, [1905] 1 K. B. 68. *Distd. Re Northumberland & Tyne-mouth Corpn.*, [1909] 2 K. B. 374. *Refd. Webster v. British Empire Mutual Life Assce.* (1880), 15 Ch. D. 169.

SECT. 3.—INJUNCTION TO RESTRAIN PROCEEDINGS TO ASSESS COMPENSATION.

672. Jurisdiction of court to grant—Effect of Judicature Act (1873) (c. 66), s. 25 (8)—No juris-

j. Cannot award interest—*Railway Act, 1906.*—The power conferred on arbitrators appointed under the above Act, to award compensation for lands taken by a ry. co. is limited to determining the amount of such compensation merely; & they exceed their jurisdiction in awarding interest on the amounts allowed as compensation from the date with reference to which the same were ascertained.—*Re CLARK & TORONTO, GREY & BRUCE RY. CO.* (1909), 18 O. L. R. 628; 13 O. W. R. 699; 9 Can. Ry. Cas. 290.—CAN.

k. ———.]—*Re KETCHESON & CANADIAN NORTHERN ONTARIO RY. CO.* (1913), 25 O. W. R. 20; 5 O. W. N. 36; 13 D. L. R. 854.—CAN.

PART VII. SECT. 3.

672 l. Jurisdiction of court to grant—

diction though proceedings futile or vexatious.]—

(1) Notwithstanding the enlarged powers of granting injunctions conferred by the above sect., the High Ct. has not since that Act, any more than the Ct. of Ch. had before it, jurisdiction to restrain by injunction a person from proceeding before an arbitrator on a claim for compensation under Lands Act, 1845, notwithstanding that his claim may be futile or vexatious. Nor does the fact that claimant is, in the proceedings before the arbitrator, using the name of a third party without authority, make any difference.

(2) The time for deciding on the title of claimant to compensation is when he brings an action to enforce the award, if any, made by the arbitrator.—*LONDON & BLACKWALL RY. CO. v. CROSS* (1886), 31 Ch. D. 354; 55 L. J. Ch. 313; 54 L. T. 309; 34 W. R. 201; 2 T. L. R. 231, C. A.

Annotations:—As to (1) Distd. Birmingham & District Land Co. v. L. & N. W. Ry. (1888), 40 Ch. D. 268. *Refd. Farrar v. Cooper* (1890), 44 Ch. D. 323; *Wood v. Lillies* (1892), 61 L. J. Ch. 158; *Kitts v. Moore*, [1895] 1 Q. B. 253; *L. & N. W. Ry. v. Walker* (1900), 82 L. T. 93. *Generally, Mentd. Hanly & Fisher v. Mallet* (1886), 3 T. L. R. 71.

673. Claimant insisting that promoters only authorised to take part—Injunction to restrain assessment of value of excess refused.]—*MOUCHET, RICH & LICHFIELD v. GREAT WESTERN RY. CO.* (1838), 1 Ry. & Can. Cas. 567.

674. Promoters refusing to ratify agreement—Proceeding under compulsory powers subsequently obtained—Injunction granted—Notwithstanding undertaking not to enter on lands until further order of court—& expiry of powers before hearing of suit.]—The committee of certain subscribers, applying for an Act of Parliament to authorise the formation of a railway, entered into an agreement with pltf., through whose estates the railway was intended to pass, that, in consideration of his withholding his opposition to their bill, the incorporated co., in the event of the railway being, under the powers of their Act, made to pass through pltf.'s estates, in the line laid down on their parliamentary plan, should, previous to entering thereon, pay to pltf. the sum of £120,000 for the value of the land, & for compensation; & that the co. should within three weeks after their incorporation ratify the agreement. Pltf. withheld his opposition to the bill, & it passed into an Act. The co. refused to ratify the agreement, & being empowered by their Act to take compulsorily pltf.'s land in the line mentioned in the agreement, served on him a notice to treat for same. Pltf., having filed his bill & having obtained an injunction restraining the co. from proceeding to assess the value of such land:—*Held*: the injunction must be continued, notwithstanding the tender of an undertaking on the part of the co. not to enter on the land until the further order of the ct., & notwithstanding that the time, during which

9 Edw. 7, c. 93, s. 23—No jurisdiction.]—*SANDWICH LAND IMPROVEMENT CO. v. WINDSOR BOARD OF EDUCATION* (1912), 23 O. W. R. 142; 3 O. W. N. 1150; 4 O. W. N. 112; 6 D. L. R. 854.—CAN.

1. When granted—General

—Where a claim for compensation is made under Lands (Scot.) Act, 1845, the ct. will not supersede the statutory arbn. for the purpose of determining the amount of compensation, unless it is satisfied that the claim is irrelevant, or that the arbiter is asked to exercise a jurisdiction which he does not possess, or that claimant's *prima facie* right to compensation is otherwise met by an objection which excludes inquiry.—*GLASGOW, YOKER & CLYDEBANK RY. CO. v. LUGGERWOOD* (1895), 33 Sc. L. R. 146.—SCOT.

673 i. Claimant insisting that promoters only authorised to take part—Injunction to restrain assessment of value of whole refused.]—An arbitrator had been appointed by the ct. to assess compensation for lands of H. expropriated by a city corpn. H. claimed that corpn. were entitled only to a portion of the land & asked that arbn. proceedings should be stayed until such claim should be determined:—*Held*: an injunction should be refused.—*HEALEY v. VICTORIA CITY* (1912), 21 W. L. R. 966; 17 B. C. R. 345; 5 D. L. R. 704.—CAN.

m. Promoters & owner not agreeing respect to price—Entry by promoters—Injunction refused.]—*HANKY v. WINNIPEG & NORTHERN RY. CO.* (1912), 20 W. L. R. 540; 1 W. W. R. 1046.—CAN.

Sect. 3.—Injunction to restrain proceedings to assess compensation. Sects. 4 & 5: Sub-sects. 1 & 2.]

the co. were authorised to take lands for the railway, would have expired before the hearing of the cause.—**PETRE (LORD) v. EASTERN COUNTIES RY. CO.** (1838), 1 Ry. & Can. Cas. 462, L. C.

*Annotations:—***Consd.** Stockton & Hartlepool Ry. v. Leeds & Thirsk & Clarence Ry. (1848), 5 Ry. & Can. Cas. 691; Hawkes v. Eastern Counties Ry. (1852), 1 De G. M. & G. 737; Preston v. Liverpool, Manchester & Newcastle-upon-Tyne Junction Ry. (1856), 25 L. J. Ch. 421; Shrewsbury v. North Staffordshire Ry. (1865), L. R. 1 Eq. 593. **Refd.** Lindsey v. G. N. Ry. (1853), 10 Hare, 664; Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees (1856), 27 L. T. O. S. 241; Leominster Canal Navigation Co. v. Shrewsbury & Hereford Ry. (1857), 3 K. & J. 654; Bowes v. Toronto City (1858), 11 Moo. P. C. C. 463; Bedford & Cambridge Ry. v. Stanley (1862), 1 New Rep. 162.

675. Where rights of parties doubtful—Injunction granted—Till rights of parties ascertained.]

—A railway co. under the powers of their Act gave notice to the lessees of a factory & buildings, that they required a part of their premises. The lessees thereupon gave a counter-notice requiring the co., under Lands Act, 1845, s. 92, to take the whole. The co. took no further proceedings until the lease of the premises had expired. The lessees having remained in the possession of the premises, the railway co., without serving any new notice on defts., had the value of their interest in the whole of the premises assessed, deposited the amount in ct., delivered a bond & entered into possession of a part of the premises under s. 85. Defts., conceiving that the co. had no right to proceed under s. 85, sent in a claim, & gave them notice to issue their warrant to the sheriff, to summon a jury to assess compensation under s. 68. The co. thereupon filed their bill to restrain such proceedings. Negotiations had been entered into by the reversioners with the co. & with defts., which rendered it doubtful to what interest in the premises the latter was entitled. On motion to dissolve an injunction granted *ex p.*:—**Held**: the injunction to restrain proceedings by defts. under s. 68 was to continue until the rights of the several parties had been ascertained.—**LONDON & SOUTH WESTERN RY. CO. v. COWARD** (1848), 1 H. & Tw. 377; 5 Ry. & Can. Cas. 703; 47 E. R. 1457, L. C. *Annotations:—***Consd.** Maunsell v. Mid. G. W. (Ireland) Ry. (1863), 1 Hem. & M. 130. **Refd.** Kitts v. Moore, [1895] 1 Q. B. 253.

676. Claim in respect of "injurious affection"

—**Injunction granted—Property not required by promoters—Action directed to try right to compensation.]**—(1) The owner of property not required for the purposes of a railway co. has no right to enforce, as against the co., the provisions of Lands Act, 1845, s. 68, on the allegation that his property is injuriously affected by the proximity of the railway.

(2) Where a party so circumstanced had given notice to the co., either to pay the amount claimed by him for compensation, or to summon a jury under s. 68, the ct., at the instance of the co., granted an injunction, restraining him from taking any proceedings under the notice, &, at the same time, gave him liberty to bring an action for the purpose of trying his right to compensation.—**LONDON & NORTH WESTERN RY. CO. v. SMITH** (1849), 1 Mac. & G. 216; 5 Ry. & Can. Cas. 716; 1 H. & Tw. 364; 19 L. J. Ch. 193; 13 L. T. O. S. 153; 13 Jur. 417; 41 E. R. 1246, L. C.

*Annotations:—*As to (1) **Fold.** East & West India Docks & Birmingham Junction Ry. v. Patterson (1849), 14 L. T. O. S. 369. **Refd.** Cale. Ry. v. Ogilvy (1855), 25 L. T. O. S. 106; Chamberlain v. West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605. As to (2) **Consd.** & **Distd.** East India Docks & Birmingham Junction Ry. v. Gattke, 3 Mac. & G. 155. **Consd.** & **N.F.** L. & Y. Ry. v. Evans (1851), 15 Beav. 322. **N.F.** South Staffordshire

Ry. v. Hall (1851), 1 Sim. N. S. 373. **Sutton Harbour Improvement Co. v. Hitchens** (1851), 1 De G. M. & G. 161; **Norfolk v. Tennant** (1852), 9 Hare, 745. **Consd.** R. v. L. & N. W. Ry. (1854), 3 E. & B. 443. **Distd.** Read v. Victoria Station & Pimlico Ry. (1863), 1 H. & C. 826. **Consd.** Abrahams v. London Corp'n. (1868), L. R. 6 Eq. 625; Brierley Hill L. B. v. Pearsall (1884), 9 App. Cas. 595; London & Blackwall Ry. v. Cross (1886), 31 Ch. D. 354; **Re East London Ry., Oliver's Claim** (1890), 63 L. T. 147. **Refd.** L. & N. W. Ry. v. Bradley (1851), 6 Ry. & Can. Cas. 551; Horrocks v. Met. Ry. (1863), 4 B. & S. 315; Maunsell v. Mid. G. W. (Ireland) Ry. (1863), 1 Hem. & M. 130; Rhodes v. Airedale Drainage Comrs. (1876), 1 C. P. D. 380. **Generally, Refd.** Glover v. North Staffordshire Ry. (1851), 16 Q. B. 912; **Re Byles** (1855), 11 Exch. 464; Ricket v. Met. Ry. (1867), L. R. 2 H. L. 175; Kitts v. Moore, [1895] 1 Q. B. 253. **Mentd.** Wallis v. Wallis (1859), 4 Drew. 458; A.-G. v. Royal College of Physicians (1861), 30 L. J. Ch. 757.

677. ————]—**EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. v. PATTERSON** (1849), 14 L. T. O. S. 369.

678. ——— Injunction refused.]—**LANCASHIRE & YORKSHIRE RY. CO. v. EVANS**, No. 21, *ante*.

679. ——— Obstruction of access—Personal loss.]—**EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. v. GATTKE**, No. 202, *ante*.

680. ————]—Defts. claimed a sum of money from a railway co. by way of damages for having injuriously affected his land by crossing the road leading to it & called upon the co. either to pay the sum claimed or to summon a jury to assess the amount of compensation. The co. alleged deft.'s land was not injuriously affected within the meaning of Lands Act, 1845, s. 68, & filed their bill to restrain deft. from taking proceedings to assess the damage:—**Held**: an injunction could not be maintained.—**SOUTH STAFFORDSHIRE RY. CO. v. HALL** (1851), 3 Mac. & G. 353; 7 Ry. & Can. Cas. 983; 16 Jur. 93; 42 E. R. 296, L. C.

*Annotations:—***Consd.** R. v. L. & N. W. Ry. (1854), 3 E. & B. 443; **Re East London Ry., Oliver's Claim** (1890), 38 W. R. 312. **Refd.** L. & Y. Ry. v. Evans (1851), 15 Beav. 322; Cale. Ry. v. Ogilvy (1855), 25 L. T. O. S. 106; **Read v. Victoria Station & Pimlico Ry.** (1863), 1 H. & C. 826; **Abrahams v. London Corp'n.** (1868), L. R. 6 Eq. 625.

681. ———— Erection of coffer-dam in public harbour.]—A coal merchant, alleging that he was injuriously affected in consequence of his business being impeded by the erection by a co. of a coffer-dam in a public harbour, gave notice of arbitration under Lands Act, 1845, s. 68:—**Held**: an injunction to restrain proceedings must be refused.—**SUTTON HARBOUR IMPROVEMENT CO. v. HITCHENS** (1851), 1 De G. M. & G. 161; 21 L. J. Ch. 73; 18 L. T. O. S. 163; 16 Jur. 70; 42 E. R. 514, L. JJ.; *subsequent proceedings* (1853), 16 Beav. 381.

*Annotations:—***Refd.** R. v. L. & N. W. Ry. (1851), 3 E. & B. 443; **Bradford L. B. of Health v. Hopwood** (1858), 6 W. R. 818.

682. ——— Unauthorised use of name of third party by claimant.]—**LONDON & BLACKWALL RY. CO. v. CROSS**, No. 672, *ante*.

683. ——— Under Public Health Act, 1848 (c. 63), s. 123—Similar in provisions to Lands Act, 1845, s. 25.]—**BRADFORD LOCAL BOARD OF HEALTH v. HOPWOOD** (1858), 22 J. P. 561; 6 W. R. 818.

*Annotation:—***Consd.** R. v. Burslem L. B. of Health (1860), 1 E. & E. 1088.

—**Principles on which compensation assessed.]**—*See* Part III., Sect. 3, *ante*.

Restraint of arbitration by injunction generally *see* **ARBITRATION**, Vol. II., pp. 377–381, Nos. 412–427.

684. Claimant insisting on separate assessment of two distinct properties—Injunction to restrain assessment of both properties together refused.]—**STARR v. LONDON CORPN.** (1869), L. R. 7 Eq. 236; 20 L. T. 937.

4.—PROCEDURE BEFORE JUSTICES.

See Lands Act, 1845, ss. 22, 121, 124, 125.

685. When claimant should proceed before justices—Under private Act—Assessment of further damage under £20.]—R. v. MARYPORT & CARLISLE RY. CO. (1844), 3 L. T. O. S. 102.

—Under Lands Act, 1845, s. 121—When “no greater interest than as tenant for a year or from year to year.”—See Part XIII., Sect. 5, *post*.

Time for lodging complaint.]—See Nos. 688–691, *post*.

686. Who may adjudicate—Not interested justice—Unless objection waived.]—The Railways Act, 1845, s. 3, enacted that the word justice should mean a justice of the peace acting, etc., & who should not be interested in the matter:—Held: this enactment did not enlarge the general rule of law that a justice shall not adjudicate in a matter in which he is interested, & an order or conviction on a summons under Railways Act, 1845, was not null & void on account of an interested justice having taken part in the adjudication, if the objection to his adjudicating had been waived.—WAKEFIELD BOARD OF HEALTH v. WEST RIDING & GRIMSBY RY. CO. (1865), L. R. 1 Q. B. 84; 6 B. & S. 794; 35 L. J. M. C. 69; 13 L. T. 590; 30 J. P. 20; 12 Jur. N. S. 160; 14 W. R. 100; 10 Cox, C. C. 162; 122 E. R. 1386.

Annotation:—Mentd. Muir v. Hore (1877), 47 L. J. M. C. 17.

687. Objection to jurisdiction—On ground of transfer of interest by promoters to third party—Not maintainable.]—GREEN v. GREAT NORTHERN RY. CO. (1867), 31 J. P. 260.

688. Determination of justices—Whether enforceable as “order” within Summary Jurisdiction Act, 1848 (c. 43), s. 11—Whether application to determine must be within six months after cause of complaint.]—Re EDMUNDSON (1851), 17 Q. B. 67; 117 E. R. 1207; *sub nom. Re EDMONDSON*, 17 L. T. O. S. 93; *sub nom. R. v. LEEDS & BRADFORD RY. CO., Re EDMONDSON*, 15 J. P. 674; *subsequent proceedings, sub nom. R. v. LEEDS & BRADFORD RY. CO. (1852)*, 18 Q. B. 343.

Annotations:—Consd. R. v. Hannay (1874), 44 L. J. M. C. 27; R. v. Edwards (1884), 13 Q. B. D. 586. Mentd. New River Co. v. Mather (1875), 44 L. J. M. C. 105.

689. ———.]—R. v. LEEDS & BRADFORD RY. CO. (1852), 18 Q. B. 343; 21 L. J. M. C. 193; 19 L. T. O. S. 86; 16 J. P. 631; 16 Jur. 817; 118 E. R. 129.

690. ———.]—R. v. HANNAY (1874), 44 L. J. M. C. 27; 31 L. T. 702; 36 J. P. 534; 23 W. R. 164.

Annotations:—Refd. R. v. Edwards (1884), 13 Q. B. D. 586; G. N. & City Ry. v. Tillett, [1902] 1 K. B. 874.

691. ———.]—The settlement of compensation by two justices for lands taken or injuriously affected under Lands Act, 1845, s. 22, is not an order within Summary Jurisdiction Act, 1848 (c. 43), & the complaint need not be made within six months of the matter arising; neither is it a decision by which damages are directed to be paid enforceable by distress within Railways

Act, 1845, s. 140.—R. v. EDWARDS (1884), 13 Q. B. D. 586; 53 L. J. M. C. 149; 51 L. T. 586; 49 J. P. 117, C. A.

Annotations:—Refd. East London Waterworks Co. v. Charles, [1894] 2 Q. B. 730; R. v. Part (1906), 70 J. P. 398.

692. ——— Not enforceable by distress under Railways Act, 1845—As being decision by which damages directed to be paid.]—R. v. EDWARDS, No. 691, *ante*.

693. No appeal from determination—To Bail Court under Justices Protection Act, 1848 (c. 44), s. 4—Matter in which justices have jurisdiction—Refusal to grant compensation under Lands Act, 1845, s. 89.]—Ex p. COHEN (1851), 15 J. P. Jo. 386.

694. Costs of application to justices—Included in “full costs” payable by promoters.]—HUDDERSFIELD CORPN. v. SHAW (1890), 54 J. P. 724.

SECT. 5.—PROCEDURE BY ARBITRATION.

See Lands Act, 1845, ss. 23, 64, 68, 96, 99, 105, 110, 115, 124, 130.

SUB-SECT. 1.—THE SUBMISSION.

See, generally, ARBITRATION, Vol. II., pp. 312–398.

695. Compliance with statutory formalities—Only necessary when arbitration compulsory—Not when arbitration by agreement—Submission in writing under hand of secretary or clerk sufficient.]—COLLINS v. SOUTH STAFFORDSHIRE RY. CO. (1851), 7 Exch. 5; 21 L. J. Ex. 247; 18 L. T. O. S. 96; 16 Jur. 843; 155 E. R. 831.

Annotations:—Consd. Martin v. Leicester Waterworks Co. (1858), 3 H. & N. 463. Refd. R. v. M. S. & L. Ry. (1854), 4 B. & B. 88.

696. Common law submission—Incorporating incidents of statutory submission—Not revoked by death of landowner.]—CALEDONIAN RY. CO. v. LOCKHART, No. 321, *ante*.

697. Submission under Lands Act, 1845, s. 25—Is submission by consent—Within Common Law Procedure Act, 1854 (c. 125), s. 17.]—Ex p. HARPER (1874), L. R. 18 Eq. 539; 22 W. R. 942.

Annotations:—Expld. Re Harper & G. E. Ry. (1875), L. R. 20 Eq. 39. Consd. Rhodes v. Airedale Drainage Comrs. (1876), 1 C. P. D. 402.

SUB-SECT. 2.—APPOINTMENT OF ARBITRATOR.

See Lands Act, 1845, ss. 25, 26.

See, generally, ARBITRATION, Vol. II., pp. 399–403, 406–408.

698. Who may be appointed—Not surveyor of promoters previously treating with owners—Objection waived by proceeding with arbitration—After protest.]—Re ELLIOT & SOUTH DEVON RY. CO., No. 757, *post*.

PART VII. SECT. 5, SUB-SECT. 1.

n. Requisites of valid Compliance with statutory formalities—No authority for submission—Award void.]—INVERNESS RY. & COAL CO. v. McISAAC (1905), 37 S. C. R. 134.—CAN.

o. ——— Must conform to agreement to refer.]—A co. agreed with a proprietor to refer the question of his compensation to arbiters:—Held: submission to the arbiters must be in conformity with the agreement.—SCOTT v. NORTH BRITISH RY. CO. (1847), 19 Sc. Jur. 643.—SCOT.

p. Reference under statute — Whether “submission” under General

Arbitration (Alberta) Act, 1898.]—There is no submission within above Act in an enforced statutory arbn. for fixing compensation for lands expropriated where the compensation Act does not declare that proceedings under it shall be “deemed” a submission.—Re HUMBERTON & CITY OF EDMONTON (1910), 14 W. L. R. 492.—CAN.

PART VII. SECT. 5, SUB-SECT. 2.

q. Who may be appointed—Ratepayer of shareholder—Municipality.]—Where the arbitrator appointed by a ry. co. was a ratepayer of a city largely interested in the ry. co. as a shareholder & creditor, but was not himself a

shareholder, nor had any personal interest in the matter:—Held: he was not disqualified.—Re McQUILLAN & GUELPH JUNCTION RY. CO. (1887), 12 P. R. 294.—CAN.

r. ——— Not officers of arbitrating municipality.]—Where under their Act a municipality appointed two of the arbitrators, & the owner of the land a third; the decision of any two being final & binding & the municipality appointed its chairman & ex-chairman as their arbitrators:—Held: an appointee to such position must be one standing indifferent between the parties.—PALMITER v. POWER (1891), 7 Nfld. L. R. 565.—NFLD.

Sect. 5.—Procedure by arbitration: Sub-sects. 2, 3

699. Single arbitrator—Appointment of by claimant to act for both parties—Invalid unless arbitrator previously appointed by claimant—& appointment notified to promoters.]—A railway co. having refused compensation for injury done to the premises of B., he on Dec. 5, served them with a notice under Lands Act, 1845, requiring them to appoint an arbitrator on their behalf, & stating that it was his intention to appoint M. as his arbitrator; & that if for the space of fourteen days after that notice the co. failed to appoint an arbitrator on their behalf, he would appoint M. to act for both parties. The co. having refused to refer the matter to arbn., B., on Jan. 1 following, served them with a notice, which, after reciting that he had appointed M. as his arbitrator, stated that he then appointed M. to act as arbitrator on behalf of both parties. The arbitrator having awarded a certain sum to be paid to B.:—*Held*: the award could not be enforced or set aside on motion, & there was no valid appointment of the arbitrator.

Semble: under Lands Act, 1845, s. 25, an appointment by claimant of an arbitrator to act for both parties is not valid, unless he has previously appointed an arbitrator on his behalf, & notified such appointment to the co.—*BRADLEY v. LONDON & NORTH WESTERN RY. CO.* (1850), 5 Exch. 769; 1 L. M. & P. 597; 20 L. J. Ex. 3; 16 L. T. O. S. 129; 155 E. R. 336.

700. — Claimant must attempt to procure—Before nominating arbitrator—Where money not paid within twenty-one days under Lands Act, 1845, s. 68.]—(1) Where the amount claimed for compensation under Lands Act, 1845, is not paid within twenty-one days, as provided by s. 68, it is the duty of claimant before nominating an

arbitrator on his behalf, to attempt to procure the appointment of a single arbitrator.

(2) Claimant having immediately on the expiration of twenty-one days from the service of his notice of claim, nominated an arbitrator on his behalf, the promoters subsequently, & before nominating their arbitrators, & before claimant delivered his nomination to his arbitrator, tendered a sum for damages & costs, which was refused, & the umpire afterwards awarded a less sum for compensation:—*Held*: claimant was not entitled to the costs of the arbn.—*YATES v. BLACKBURN CORPN.* (1860), 6 H. & N. 61; 29 L. J. Ex. 447; 2 L. T. 746; 25 J. P. 23; 158 E. R. 26.

Annotations:—*Generally, Mentd. Re* Hayward & Met. Ry. (1864), 4 B. & S. 787; *Re* Balls & Metropolitan Board of Works (1866), 7 B. & S. 177; *Owen v. L. & N. W. Ry.* (1867), L. R. 3 Q. B. 54.

701. — Unnecessary when arbitrators & umpire appointed.]—*EAGLE v. CHARING CROSS RY. Co., No. 286, ante.*

702. Notice of appointment—Promoters desiring service of, at particular place or particular persons—Must say so clearly & at once—Objection after award not maintainable.]—*R. v. METROPOLITAN RY. Co., Ex p. KNOCK* (1867), 17 L. T. 291.

SUB-SECT. 3.—APPOINTMENT OF UMPIRE.

See Lands Act, 1845, s. 27.

See, generally, ARBITRATION, Vol. II., pp. 403–408, 413–415.

703. Time for making—Under Lands Act, 1845, s. 27—No appointment or award by arbitrators within twenty-one days—Subsequent appointment by Board of Trade valid.]—*Re* BRADSHAW & EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. (1848), 12 Q. B. 562; 12 Jur. 998; 116 E. R. 979; *sub nom. Re* EAST & WEST

a. — Not paid servant of public body party to proceedings.]—No paid servant of the public body ought to be appointed assessor. Such servant is “interested.”—*JOSEPH v. WELLINGTON (MAYOR, ETC.)* (1885), 3 N. Z. L. R. 291.—N.Z.

t. Single arbitrator—Appointment by judge—No notice to owner—Appointment bad.]—Where the owner had omitted to name an arbitrator, & a sole arbitrator was appointed by the judge, without notice of the intended application for his appointment having been given to the owner under Railway Act, 1877, c. 165, & the arbitrator proceeded to ascertain the compensation:—*Held*: the owner was not bound by the act of the arbitrator, & the co. were restrained from proceeding with their works until a proper application was made upon the notice.—*McGIBBON v. NORTH SIMCOE RY. Co.* (1879), 26 Gr. 226.—CAN.

u. — — — — —.]—An order appointing a sole arbitrator under the New Brunswick Railway Act, 1903, must be set aside where no notice of the application has been given, so as to allow the land owner an opportunity of objecting to the appointment of any particular person.—*Re* ANDERSON (1914), 14 E. L. R. 438.—CAN.

w. Whether proper to appoint an arbitrator—When complainant's remedy is by action.]—*Re* SHADE & GALT & GUELPH RY. CO., *Re* McNAUGHTON & GALT & GUELPH RY. CO. (1855), 13 U. C. R. 577.—CAN.

y. — — — — —.]—*Re* JONES & ERIE & NIAGARA RY. CO. (1876), 25 C. P. 559.—CAN.

z. Both parties must agree

to appointment—“Opposite party”—*Dominion Railway Act, 1888, s. 150.]—*The words “opposite party” in the above sect. must be read so as to include both intgor. & mtgee., & both must concur in the appointment of an arbitrator to determine the compensation to be paid for mortgaged land required for a ry.—*Re* TORONTO, HAMILTON & BUFFALO RY. CO. & BURKE (1896), 27 O. R. 690.—CAN.

a. — — — — —.]—A co. served both the owner of land & a mortgagee with the notice & certificate prescribed by Railway Act, 1888, ss. 146, 147, the owner refused the sum offered & notified the co. of the name of her arbitrator, but the mortgagee gave no such notice:—*Held*: under sect. 150 of above Act, the co. was entitled to apply to have a sole arbitrator appointed, as the mortgagee should be treated as an “opposite party” within the meaning of that sect.—*Re* CANADIAN PACIFIC RY. & BATTER (1900), 13 Man. L. R. 200.—CAN.

b. Form of appointment—1 & 2 Edw. 7, c. 77, s. 796.]—Under the above sect. the appointment of an arbitrator to determine compensation for land to be expropriated must be signed in the same manner as a by-law, & it is not sufficient that a regularly signed by-law had been passed authorising the mayor to appoint a named person as arbitrator, & that the appointment had been signed by the mayor alone under the corporate seal.—*DEVITT v. CITY OF WINNIPEG* (1906), 16 Man. L. R. 398.—CAN.

c. By judge—No power to rescind order—*Railway Act, 1906, c. 37, s. 196.]—A judge after appointing an arbitrator in the exercise of his powers under above sect. has no jurisdiction to*

rescind the order of appointment even if it be shown such order was made without jurisdiction.—*Re* CHAMBERS & CANADIAN PACIFIC RY. CO. (1910), 20 Man. L. R. 277.—CAN.

d. — Default by municipality in appointing—*R. S. B. C. 1911, c. 11, s. 8.]—*An order may be made, by a Judge of the Supreme Court, under above Act, appointing an arbitrator, in default of appointment by a municipal corp., where a claim for compensation for injury to land by lowering the grade of a street is made upon the corp.—*Re* CITY OF NORTH VANCOUVER & JACKSON (1914), 27 W. L. R. 456; 19 B. C. R. 147; 16 D. L. R. 400.—CAN.

e. — — — — — Mandamus to compel appointment—Necessity of application within one year.]—*R. v. MUNICIPAL COUNCIL OF CORPN. OF DISTRICT OF MISSION* (1900), 7 B. C. R. 513.—CAN.

to appeal.]—Where a judge acting within his jurisdiction has exercised his discretion in appointing an arbitrator, in a claim for statutory compensation, it is, generally speaking, binding on an appeal et.—*Re* REID NEWFOUNDLAND CO. & THE GOVERNMENT (1904), 9 Nfld. L. R. 48.—NFLD.

PART VII. SECT. 5, SUB-SECT. 3.

g. By judge—Whether power to rescind—*Lands (Scot.) Act, 1845, s. 27.]—*A Lord Ordinary under above sect. appointed an oversman who was afterwards objected to as disqualified from previous actings:—*Held*: the appointment, being statutory & ministerial, was final.—*MACKENZIE v. INVERNESS & ROSE-SHIRE RY. Co.* (1861), 24 Dunl. (Ct. of Sess.) 251; 34 Sc. Jur. 125.—SCOT.

INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. & BRADSHAW, 5 Ry. & Can. Cas. 527; 17 L. J. Q. B. 362; 12 L. T. O. S. 268.

Annotations:—*Reid*. Beaufort v. Swansea Harbour Trustees (1880), 8 C. B. N. S. 146; Holdsworth v. Wilson (1863), 4 B. & S. 1; *Re* Pullen & Liverpool Corpn. (1882), 51 L. J. Q. B. 285.

704. — Under Public Health Act, 1848 (c. 63), s. 125—Valid if within three months of appointing last arbitrator—Though after expiry of twenty-one days limited for making award.]—(1) If arbitrators appointed under Public Health Act, 1848 (c. 63), s. 125, allow twenty-one days from the date on which the second was appointed to expire without entering upon the reference or making an award, they may nevertheless, if called upon by the parties afterwards, make a valid appointment of an umpire at any time before the end of three months from the date of the last appointment.

(2) Where an umpire, on a reference under the Act, orders one party to pay the costs of the reference, not fixing the amount, the award is perfectly valid.

(3) The successful party may commence an action for the costs, without first having had the amount of the costs settled by the Master on taxation.—*HOLDSWORTH v. WILSON* (1863), 4 B. & S. 1; 32 L. J. Q. B. 289; 8 L. T. 434; 10 Jur. N. S. 171; 11 W. R. 733; 122 E. R. 360; *sub nom.* *WILSON v. HOLDSWORTH*, 2 New Rep. 190; Ex. Ch.

Annotations:—As to (1) *Consd.* Met. Dist. Ry. v. Sharpe (1880), 5 App. Cas. 425. *Reid*. *Re* Pullen & Liverpool Corpn. (1882), 51 L. J. Q. B. 285. As to (3) *Consd.* Chesterfield Corpn. & Brampton L. B. (1886), 50 J. P. 824. *Reid*. *Simpson v. L. R. Comrs.*, [1914] 2 K. B. 842. *Generally*, *Mentd.* West Ham Grdns. v. St. Matthew, Bethnal Green, [1896] A. C. 477.

705. Whether condition precedent—To one arbitrator proceeding ex parte—On refusal of other arbitrator to act before umpire appointed.]—*SHEPHERD v. NORWICH CORPN.* (1885), 30 Ch. D. 553; 54 L. J. Ch. 1050; 53 L. T. 251; 33 W. R. 841; 1 T. L. R. 542, 545.

SUB-SECT. 4.—TIME FOR MAKING AWARD.

See Lands Act, 1845, ss. 23, 31.

See, generally, ARBITRATION, Vol. II., pp. 409–412, 415–423.

706. General rule—Lands Act, 1845. s. 23—Applicable to arbitrations under s. 68.]—*EVANS v. LANCASHIRE & YORKSHIRE RY. CO.* (1853), 1 E. & B. 754; 22 L. J. Q. B. 254; 21 L. T. O. S. 87; 17 Jur. 878; 1 C. L. R. 82; 118 E. R. 618.

707. — Not obligatory when parties agree to alternative arrangement.]—*R. v. MANLEY-SMITH* (1893), 63 L. J. Q. B. 171; 37 Sol. Jo. 841; 10 R. 611.

PART VII. SECT. 5, SUB-SECT. 4.

h. Expiry of time for award.]—Where the statutory time for making an award, in proceedings for compensation, had expired, a charge on the decree-arbitral was interdicted.—*GLASGOW, BARNHEAD & NEILSTON RY. CO. v. NITSHILL COAL CO.* (1850), 22 Sc. Jur. 627.—*SCOT.*

occasioned by act of party.]—The statutory period, during which the Lands (Scot.) Act, 1845, provided that the award should be pronounced, expired owing to delay occasioned by the act of a party:—*Held*: the arbiters could not continue their proceedings.—*LAING v. CALEDONIAN RY. CO.* (1850), 22 Sc. Jur. 135.—*SCOT.*

k. — Refusal of umpire to act.]—The owner of lands intersected by a proposed ry., desired compensation to

be settled by arbn. in terms of the Act. Arbiters were named by both parties, & an oversman by the arbiters. The arbiters having differed, executed devolution in favour of the oversman, who declined to act. Three months after the nomination of the arbiters, the owner intimated *de novo* to the co. that he had named a new arbiter. The co. having declined to name one on their part, he nominated his to be sole arbiter, in terms of the Act:—*Held*: the time having elapsed without any award, the claim fell to be settled by a jury.—*DEESIDE RY. CO. v. ANDERSON & RHIND, ANDERSON v. DEESIDE RY. CO.* (1853), 2 Stuart, 425.—*SCOT.*

713*i.* Enlargement of time—After reference back for redetermination.]—*DEMAREST v. GRAND JUNCTION RY. CO.* (1885), 10 O. R. 515.—*CAN.*

Death of arbitrator pend-

708. By umpire—Within three months—Calculated from date of appointment of umpire.]—The three months allowed by Lands Act, 1845, s. 23, to the arbitrators or their umpire for making their award, is not one & the same period, but the umpire has a new period of three months for making his award, from the time when the arbn. devolves upon him.—*SKERRATT v. NORTH STAFFORDSHIRE RY. CO.* (1848), 2 Ph. 475; 5 Ry. & Can. Cas. 166; 17 L. J. Ch. 161; 11 L. T. O. S. 23; 12 Jur. 46; 41 E. R. 1027, L. C.

Annotations:—*Folld.* *Re* Bradshaw & East & West India Docks & Birmingham Junction Ry. (1848), 12 Q. B. 562; *Re* Pullen & Liverpool Corpn. (1882), 51 L. J. Q. B. 285. *Consd.* *Shepherd v. Norwich Corpn.* (1885), 30 Ch. D. 553.

709. — — — — —.]—*Re* BRADSHAW & EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. (1848), 12 Q. B. 562; 12 Jur. 998; 116 E. R. 979; *sub nom.* *Re* EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. & BRADSHAW, 5 Ry. & Can. Cas. 527; 17 L. J. Q. B. 362; 12 L. T. O. S. 268.

Annotations:—As to (1) *Consd.* *Re* Pullen & Liverpool Corpn. (1882), 51 L. J. Q. B. 285. *Reid.* *Holdsworth v. Wilson* (1863), 4 B. & S. 1. *Generally*, *Mentd.* *Beaufort v. Swansea Harbour Trustees* (1880), 8 C. B. N. S. 146.

710. — — — — — Not from time when awarding power of arbitrators comes to an end.]—*Re* PULLEN & LIVERPOOL CORPN. (1882), 51 L. J. Q. B. 285; 46 L. T. 391; 46 J. P. 468.

711. Enlargement of time—Parties may agree to.]—*CALEDONIAN RY. CO. v. LOCKHART*, No. 321, *ante*.

712. — — — — —.]—*PALMER v. METROPOLITAN RY. CO.* (1862), 31 L. J. Q. B. 259; 10 W. R. 714. *Annotation*:—*Consd.* *R. v. Manley Smith* (1893), 63 L. J. Q. B. 171.

713. — After reference back for redetermination—In discretion of court—Award made rule of court—Common Law Procedure Act, 1854 (c. 125), s. 15.]—When an award has been made a rule of ct. it comes within Common Law Procedure Act, 1854, s. 15. Therefore, if it be referred back by the ct. for redetermination, & no new award be made within three months, it is still in the discretion of the ct., under that Act to allow or not an enlargement of the term for redetermination by the arbitrator.—*DARE VALLEY RY. CO. v. RHYS* (1869), 38 L. J. Ch. 417; 20 L. T. 291.

Delay.]—An award by an umpire under a reference pursuant to the Lands Act, 1845, for ascertaining the amount of compensation having, on the application of the landowner, been set aside by the ct., & the matter referred back to the umpire, no proceeding was taken under the reference for nearly seven months from the date of the order, & the landowner then served the co. with notice of his desire to have the compensation settled by a jury. The co. applied

award.]—The arbitrator appointed by the proprietor died before the award had been made & 4 days prior to the date fixed for making the same:—*Held*: in such case the proprietor was entitled to be allowed a reasonable time for the appointment of another arbitrator to fill the vacancy, & to have the arbn. proceedings continued, although the time fixed had expired without any award having been made or the time for the making thereof having been prolonged.—*SHANNON v. MONTREAL PARK & ISLAND RY. CO.* 28 S. C. R. 374.—*CAN.*

1. Award re-executed after time expired—*Validity.*]—An award was declared void & was amended; it was re-executed by the arbitrators after the time limited for making the award had expired:—*Held*: the award was valid.—*NORVELL v. CANADA SOUTHERN RY. CO.* (1884), 9 A. R. 310.—*CAN.*

Sect. 5.—Procedure by arbitration: Sub-sects. 4, 5, 6 & 7.]

to have the time for making the award extended:—*Held*: the provisions of Common Law Procedure Act, 1854 (c. 125), with regard to remitting matters to the reconsideration of the arbitrator, & enlarging the time for making the award, applied to references under the Lands Act, 1845, & the ct. had jurisdiction to extend the time, but after the delay which had taken place this jurisdiction ought not to be exercised so as to deprive the landowner of a trial by jury.—*Re DARE VALLEY RY. CO.* (1869), 4 Ch. App. 554; 20 L. T. 717; 17 W. R. 717, L. J.J.

Annotations:—*Reid*. *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 402; *Re Mackenzie & Ascot District Gas Co.* (1886), 55 L. J. Q. B. 309; *Knowles v. Bolton Corpn.* (1900), 69 L. J. Q. B. 481.

715. Waiver—Must be intentional act with knowledge.]—A railway co. agreed to make such accommodation works as A. should notify within one month after possession should have been given to the co. A. & the co.'s engineer met & discussed the necessary works, & a memorandum was made specifying certain works. Certain discussions as to these works were protracted beyond the month, A. supposing that the condition as to time was waived. Two months after the one month had expired A. made his award. The award provided for a cattle-arch which had not been previously mentioned. The solrs. of the co. not being fully informed as to the exact date of the award, took it up & paid the arbitrator's charges:—*Held*: (1) the condition as to time was not waived as to such works as had not been previously mentioned, for a waiver must be an intentional act with knowledge, & it was incumbent on any party insisting on a verbal agreement, in substitution of a written contract, to show that both parties understood the terms of the substituted agreement; (2) as the parties had agreed to leave matters to the discretion of A., the ct. had no power to substitute its own discretion for that of A., so as to order the construction of works, though such might appear to be necessary & proper.

(3) *Semble*: taking up an award known to have been made after the limited time had expired, does not amount to an admission that the arbitrator's authority has not expired.—*DARNLEY (EARL) v. LONDON, CHATHAM & DOVER RY. CO.* (1867), L. R. 2 H. L. 43; 36 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817, H. L.

Annotations:—*Generally*. *Mentd.* *A.-G. v. Cambridge Consumers Gas Co.* (1868), L. R. 6 Eq. 282; *Breckon v. Russell* (1868), 19 L. T. 468; *Budding v. Murdoch* (1875), 1 Ch. D. 42.

SUB-SECT. 5.—DECLARATION BY ARBITRATORS AND UMPIRE.

See Lands Act, 1845, s. 33.

716. Time for making—Sufficient if made before umpire enters upon matters referred.]—*Re BRADSHAW & EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO.* (1848), 12 Q. B. 562; 12 Jur.

PART VII. SECT. 5, SUB-SECT. 5.

719i. Effect of failure to make—Award bad—Railway Act, 1868.]—*Re HORTON & CANADA CENTRAL RY. CO.* (1880), 45 U. C. R. 141.—CAN.

m. ——— *Knowledge of omission by other party—Municipal Act, 1897, s. 458.]*—The failure of the arbitrator to take the oath required

by above sect. is fatal to his award; but when an award is moved against on the ground of such failure, it must be clearly shown that appl. was not aware of the omission until after the making of the award.—*Re BURNETT & TOWN OF DURHAM* (1899), 31 O. R. 262.—CAN.

PART VII. SECT. 5, SUB-SECT. 6.

n. Whether right to waive statutory

998; 116 E. R. 979; *sub nom. Re EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. & BRADSHAW*, 5 Ry. & Can. Cas. 527; 17 L. J. Q. B. 362; 12 L. T. O. S. 208.

Annotations:—*Consd.* *Holdsworth v. Wilson* (1863), 4 B. & S. 1; *Re Pullen & Liverpool Corpn.* (1882), 51 L. J. Q. B. 285. *Reid*. *Beaufort v. Swansea Harbour Trustees* (1860), 8 C. B. N. S. 146.

717. Before whom made—Justice of the peace of any county—Not limited to county where matter in dispute arose.]—*DAVIES v. SOUTH STAFFORDSHIRE RY. CO.* (1851), 2 L. M. & P. 599; 21 L. J. M. C. 52; 18 L. T. O. S. 110; 15 J. P. 787; 15 Jur. 1133.

718. Effect of failure to make—Submission not within Lands Act, 1845—Award upheld.]—Where the submission contained other matters than the question of compensation, & was therefore outside Lands Act, 1845, & it did not distinctly appear that the party applying was ignorant that the declaration was required to be made by the arbitrator under s. 33, the ct. refused to set aside an award on that ground.—*Re LEVICK v. EPSOM & LEATHERHEAD RY. CO.* (1859), 1 L. T. 60; 8 W. R. 66.

719. — Under Public Health Act, 1875 (c. 55), s. 180—Award set aside.]—*LUDLOW CORPN. v. PROSSER* (1906), 70 J. P. 400; 22 T. L. R. 597; 4 L. G. R. 910.

SUB-SECT. 6.—THE HEARING.

See Lands Act, 1845, s. 32.

See, generally, ARBITRATION, Vol. II., pp. 431–456.

720. Evidence—Taken ex parte—Notwithstanding competency from personal observation—Makes award bad.]—(1) Where the owners of land, which was required by a railway co., had made an appointment of an arbitrator under Lands Act, 1845, but refused to produce it for the purpose of enabling the registrar to draw up an order which had been obtained by the co., making the submission a rule of ct., the ct. refused a motion on behalf of the co. that the order might be drawn up, or that the landowners might produce the appointment. But there being in the landowners' affidavits, in opposition to the motion, a statement that their arbitrator had been duly appointed, & there being a recital to that effect in an appointment of an umpire, the ct., on a subsequent motion, ordered the submission to be made a rule of ct. on that evidence of the appointment of the landowners' arbitrator.

A railway co. & the owners of land which was required by the co. appointed under Lands Act, 1845, arbitrators, who appointed an umpire. The arbitrators & umpire met on Nov. 4, & adjourned to the following day. On that day the co.'s arbitrator did not attend. The other arbitrator & the umpire proceeded in his absence, notwithstanding the protest of the co.'s solr., & examined a witness. The co.'s solr. left the meeting without examining his witnesses. No meeting was held after Nov. 5, nor had the co. any notice to attend

provisions—Effect of submission under Lands (Scot.) Act, 1845, on rights of parties.]—A reference under above Act being once entered into, the parties cannot waive adherence to its provisions in the conduct of the proceedings.—*GLASGOW, BARRHEAD & NEILSTON RY. CO. v. NITSHILL COAL CO.* (1850), 7 Bell, Sc. App. SCOT.

on Nov. 6 or any subsequent day. On Nov. 22 the landowners' solr. informed the umpire that the arbitrators had not made an award, & required him to make his award, which he did on Nov. 29, without any evidence on the part of the co. having been given:—*Held*: (2) it must be presumed that the evidence taken *ex p.* on Nov. 5 was not disregarded by the umpire; (3) it was not a just inference from the above facts that the co. had no evidence to adduce, or did not wish to adduce any; (4) whether there was or not any general rule that an umpire need not receive evidence or be active in summoning the parties, the umpire, in the above circumstances, ought to have made no award without tendering to the co. an opportunity of producing evidence before him or addressing him; (5) he was bound to take up the proceedings *de novo*, or from the close of Nov. 4; (6) in the above circumstances, his skill or competency to decide from personal observation made no difference; (7) his award was consequently bad, & ought to be set aside.—*Re HAWLEY, BRIDGEWOOD & GOODWIN & NORTH STAFFORDSHIRE RY. CO.* (1848), 2 De G. & Sm. 33; 5 Ry. & Can. Cas. 383; 10 L. T. O. S. 518; 12 Jur. 389; 61 E. R. 15; *affd.*, 5 Ry. & Can. Cas. 392, L. C.

721. — Need not be on oath—Waiver by parties.—*WAKEFIELD v. LLANELLY RY. & DOCK CO.* (1865), 3 De G. J. & Sm. 11; 12 L. T. 509; 11 Jur. N. S. 456; 13 W. R. 823; 46 E. R. 512, L. J.

722. — Provisional agreement for purchase not carried out—May* be admitted as evidence of value of land—Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57).—*PERCIVAL v. PETERBOROUGH CORPN.*, No. 173, *ante*.

723. Umpire may join in inquiry with arbitrators—Before time of his acting arises.—*Re ELLIOT & SOUTH DEVON RY. CO.*, No. 757, *post*.

724. Whom arbitrator may consult—Experts & men of science.—*CALEDONIAN RY. CO. v. LOCKHART*, No. 321, *ante*.

725. — Not attorney of one party—On form of award.—Where the attorney to one of the parties to a reference under Lands Act, 1845, who had appeared as advocate for such client before the arbitrator, was consulted by the arbitrator & assisted him in drawing up the award, & charged for same in his bill of costs sent in to the arbitrator & by him claimed from the opposite party, a motion was made to set aside the award on the ground of improper conduct by the arbitrator:—*Held*: although the proceeding was most objectionable, the award would not be set aside, the arbitrator in his affidavit denying that he had done more than consult the attorney, who was his usual professional adviser, as to the form of the award, & asserting that he had decided on the question submitted to him before he had such communication with the attorney.—*Re UNDERWOOD & BEDFORD & CAMBRIDGE RY. CO.* (1861), 11 C. B. N. S. 442; 31 L. J. C. P. 10; 5 L. T. 581; 10 W. R. 106; 142 E. R. 868.

726. Non-attendance of party—Right to proceed ex parte after notice—Attendance necessary if delay required.—Where an umpire, appointed under Lands Act, 1845, had given due notice of a meeting, & one of the parties had refused to attend, & the umpire had thereupon proceeded *ex p.*, & made an award:—*Held*: (1) that party was let in to be heard only as a matter of indulgence, & on the terms of his paying all the costs; (2) it was his duty to have attended, & stated his reasons for

desiring delay.—*Re HEWITT & PORTSMOUTH WATERWORKS CO.* (1862), 10 W. R. 780.

SUB-SECT. 7.—STATEMENT OF SPECIAL CASE.

See, generally, ARBITRATION, Vol. II., pp. 456–462.

727. Within power of umpire—Under Common Law Procedure Act, 1854 (c. 125), s. 5.—(1) An umpire appointed to ascertain the amount of compensation under Lands Act, 1845, has power to state a special case under Common Law Procedure Act, 1854, s. 5.

(2) By a local Act defts. were empowered to execute drainage works. S. 43 enacted that in the execution of the Act the comrs. should do as little damage as might be, & subject to the provisions of the Act should make to all parties entitled, compensation for all damage or injury so done. By s. 45 it was provided that full compensation should from time to time, after the passing of the Act, but not beyond twenty years after the completion of the works, be made by defts. to the owners, lessees & occupiers for the time being, sustaining any damage by reason, or in any way consequential upon, the exercise of any of the powers of the Act, of the lands & hereditaments of F.; & in case of dispute as to the amount of such compensation, the same should be settled by arbn. in the manner provided in Lands Act, 1845. The local Act incorporated the Lands Act, 1845:—*Held*: the compensation clauses in the special Act did not extend to any damage, except such as would have been the proper subject of compensation under Lands Act, 1845, *viz.* damage which, in the absence of the statutory powers, would have given a right of action to the party injured.—*RHODES v. AIREDALE DRAINAGE COMRS.* (1876), 1 C. P. D. 402; 45 L. J. Q. B. 861; 35 L. T. 46; 21 W. R. 1053, C. A.

Annotations:—As to (1) *Consd. Re Bidder & North Staffordshire Ry.* (1878), 4 Q. B. D. 412; *Bexley L. B. v. West Kent Main Sewerage Board* (1882), 9 Q. B. D. 518; *Re Carpenter & Bristol Corpn.* (1907), 71 J. P. 417. *Refd. Re Harper & G. E. Ry.* (1875), L. R. 20 Eq. 39; *Warburton v. Haslingden L. B.* (1879), 48 L. J. Q. B. 451; *Knowles v. Bolton Corpn.* (1900), 69 L. J. Q. B. 481.

728. Jurisdiction of Court of Appeal—On appeal from Divisional Court.—Under Judicature Act, 1873 (c. 66), s. 19, an appeal will lie to the Ct. of Appeal from a decision of a Divisional Ct. on a special case submitted by an arbitrator appointed under Lands Act, 1845, s. 25.—*Re BIDDER & NORTH STAFFORDSHIRE RY. CO.* (1878), 4 Q. B. D. 412; 48 L. J. Q. B. 248; 40 L. T. 801; 27 W. R. 540, C. A.

Annotations:—*Mentd. Jolocy & Eden's Exors. v. N. E. Ry.*, [1907] 1 K. B. 402; *Rugby Portland Cement Co. v. L. & N. W. Ry.*, [1908] 1 K. B. 925.

729. — Over costs of appeal.—The Ct. of Appeal has power under the Arbitration Act, 1889 (c. 49), to deal with the costs of an appeal on an award stated in the form of a special case for the opinion of the ct.—*Re GONTY & MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, [1896] 2 Q. B. 439; 65 L. J. Q. B. 625; 75 L. T. 239; 45 W. R. 83; 12 T. L. R. 617, 620; 40 Sol. Jo. 715, C. A.

Annotations:—*Refd. G. E. Ry. v. L. C. C.* (1906), 51 Sol. Jo. 132. *Mentd. Cale. Ry. v. Turcan*, [1898] A. C. 256; *Stretford U. D. C. v. Manchester South Junction & Altrincham Ry.* (1903), 1 L. G. R. 683; *S. E. Ry. v. Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12; *G. C. Ry. v. Balby-with-Hexthorpe U. C.*, A.-G. v. G. C. Ry., [1912] 2 Ch. 110; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

Sect. 5.—Procedure by arbitration: Sub-sects. 8, 9

SUB-SECT. 8.—FORM AND VALIDITY OF AWARD.

See, generally, ARBITRATION, Vol. II., pp. 469–545.

730. Form—Award may include one sum for damages & price.]—*Re BRADSHAW & EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. Co. (1848), 12 Q. B. 562; 12 Jur. 998; 116 E. R. 979; sub nom. Re EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. Co. & BRADSHAW, 5 Ry. & Can. Cas. 527; 17 L. J. Q. B. 362; 12 L. T. O. S. 268.*

Annotations:—Refd. Re Beaufort & Swansea Harbour Trustees (1860), 8 C. B. N. S. 146. Mentd. Holdsworth v. Wilson (1863), 4 B. & S. 1; Re Pullen & Liverpool Corpn. (1882), 51 L. J. Q. B. 285.

731. — Award may include contingent damages.]—*Ex p. LLYNFI VALLEY RY. Co. v. BROGDEN, No. 735, post.*

732. — Award containing direction to pay—Not invalid by the informality.]—*Re HARPER & GREAT EASTERN RY. Co., No. 761, post.*

See, also, No. 769, post.

733. Validity—Award of definite amount with alternative assessment—Subject to decision of court as to principle of compensation—Valid as to definite amount.]—*Re WRIGHT & CROMFORD CANAL Co. (1841), 1 Q. B. 98; 4 Per. & Dav. 730; 113 E. R. 1066.*

Annotations:—Refd. Scott v. Van Sandau (1844), 6 Q. B. 237. Mentd. Bradbee v. Christ's Hospital (1842), 4 Man. & G. 714.

734. Award going outside submission—Compensation included for lands not within submission—Award bad but not set aside by court.]—*Re NORTH STAFFORDSHIRE RY. Co. & WOOD (1848), 2 Exch. 244; 6 Ry. & Can. Cas. 25; 17 L. J. Ex. 354; 154 E. R. 482.*

735. — But within authority of arbitrator—Valid if supported by facts.]—(1) Where the question raised by the rule is whether an arbitrator has exceeded his authority by awarding compensation, in respect of a claim for damage not within the submission to reference, the ct. will look to the facts, & where no excess of authority is proved will discharge the rule.

(2) *Semble*: the award is not necessarily bad because the arbitrator has given compensation for contingent damages.—*Ex p. LLYNFI VALLEY RY. Co. v. BROGDEN (1861), 4 L. T. 361.*

PART VII. SECT. 5, SUB-SECT. 8.

o. Validity—Award of definite amount—Subject to confirmation by bye-law.]—*Re HISLOP & STRATFORD PARK BOARD (1915), 34 O. L. R. 97; 23 D. L. R. 753.—CAN.*

p. —.]—*YAGER & WESTERN TRUST Co. v. SWIFT CURRENT CITY (1916), 34 W. L. R. 1213; 22 D. L. R. 801.—CAN.*

734 i. — Award going outside submission.]—Arbitrators awarded a sum for the owner's interest in the lands for the lumber taken by the expropriation piled upon part of the land taken:—*Held*: that the arbitrators had no power to award compensation for the lumber.—*GREAT WESTERN RY. Co. v. HUNT (1853), 12 U. C. R. 124.—CAN.*

q. — Owner not estopped from asserting rights in proper court.]—An award by a compensation ct. does not extend to matters outside its jurisdiction to decide upon, & whatever in such case be the form of an award, claimant is not thereby estopped from asserting his rights in a proper ct.—*PATERSON v. KNAPDALE ROAD BOARD (1892), 11 N. Z. L. R. 599.—N.Z.*

r. — Submission to three—Award by two.]—An award by two of three arbitrators is not sufficient.—*GRIMSHAW v. GRAND TRUNK RY. Co. (1856), 15 U. C. R. 224.—CAN.*

s. —.]—*Re SMITH & PLYMPTON TOWNSHIP CORPN. (1886), 12 O. R. 20.—CAN.*

t. Whether award severable—Power to reject invalid part.]—An award contained a reservation which was unauthorised by the submission:—*Held*: the whole award was not necessarily invalidated.—*GREAT WESTERN RY. Co. v. DODDS (1853), 12 U. C. R. 133.—CAN.*

u. — Misreception of evidence—Whether ground for setting aside award.]—An award is invalid where arbitrators admit the opinion evidence of more than the statutory number of persons.—*CANADIAN NORTHERN WESTERN RY. Co. v. MOORE (1915), 30 W. L. R. 676; 7 W. W. R. 1327.—CAN.*

w. — Claim in respect of land taken & of lands injuriously affected.]—An award allowed landowners so much as compensation for land taken & so much for other lands injuriously affected & interest on both sums:—

736. Claim in respect of several interests—Award not apportioning sums between several interests — Insufficient.]—*Re NORTH STAFFORDSHIRE RY. Co. & LANDOR (1848), 2 Exch. 235; 6 Ry. & Can. Cas. 17; 17 L. J. Ex. 350; 154 E. R. 478.*

Annotation:—Refd. Re Levick & Epsom & Leatherhead RY. (1859), 8 W. R. 66.

737. — Claim in respect of one interest—Although other interests involved—Award in respect of claim made—Valid.]—*Re BRADSHAW & EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. Co. (1848), 12 Q. B. 562; 12 Jur. 998; 116 E. R. 979; sub nom. Re EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. Co. & BRADSHAW, 5 Ry. & Can. Cas. 527; 17 L. J. Q. B. 362; 12 L. T. O. S. 268.*

Annotations:—Refd. Re Beaufort Duke & Swansea Harbour Trustees (1860), 8 C. B. N. S. 146. Mentd. Holdsworth v. Barsham (1863), 11 W. R. 738; Re Pullen & Liverpool Corpn. (1882), 51 L. J. Q. B. 285.

738. — Claim for value of premises & damages—Award of compensation for “all interests”—Void for uncertainty.]—*WAKEFIELD v. LLANELLY RY. & DOCK Co. (1865), 3 De G. J. & Sm. 11; 12 L. T. 509; 11 Jur. N. S. 456; 13 W. R. 823; 46 E. R. 542, L. J.J.*

739. Effect of—Promoters not precluded from changing original plan—Award made on footing that promoters obliged to erect two bridges on two diverging roads left undiverted—Subsequent change in plan rendering only one bridge necessary.]—*SELBY v. COINE VALLEY & HALSTEAD RY. Co. (1862), 6 L. T. 709; 10 W. R. 661.*

See, further, Part II., Sect. 3, ante.

— Final as to matters within submission.]—*See ARBITRATION, Vol. II., p. 537, No. 1728.*

SUB-SECT. 9.—TAKING UP AWARD.

See Lands Act, 1845, s. 35.

740. Court of Chancery no jurisdiction to compel promoters to take up award.]—*SUTTON HARBOUR IMPROVEMENT Co. v. HITCHENS (1853), 16 Beav. 381; 51 E. R. 826.*

741. Who may require promoters to take up award—Under Lands Act, 1845, s. 35—Persons obtaining award under s. 68.]—*Ex p. HARPER (1874), 23 W. R. 67; subsequent proceedings, sub nom. Re HARPER & GREAT EASTERN RY. Co. (1875), L. R. 20 Eq. 39.*

Held: whole sum must be taken upon the face of the award to be purchase-money of the land taken.—*Re MACPHERSON & CITY OF TORONTO (1895), 26 O. R. 558.—CAN.*

y. Effect of award—Includes all past, present, & future damage.]—On a reference being made of claims by H. against Govt. for damages arising out of the enlargement of a canal to land situated thereon, the arbitrators awarded H. \$9,216 in full & final settlement of all claims:—*Held*: it must be taken that the arbitrators dealt with every item of H.'s claim submitted to them & included in their award all past, present, & future damages.—*R. v. HUBERT (1887), 14 S. C. R. 737.—CAN.*

z. — Land taken from same owner—Owner entitled to separate certificates.]—An arbitrator made several distinct final awards in respect of lands taken under Railways (Ireland) Act, 1851, from A.:—*Held*: A. was entitled to separate certificates of the amount of compensation given him in respect of each award.—*Re DUBLIN (SOUTH) CITY MARKETS Co., Ex p. O'GRADY & ARMSTRONG (1888), 21 L. R. Ir. 245.—IR.*

742. Who must take up award—Promoters—Not claimant.]—SHREWSBURY (EARL) v. WIRRAL RAILWAYS COMMITTEE, No. 787, *post*.

743. Payment of fees condition precedent.]—*Re* BAILEY & SOUTH DEVON RY. CO. (1849), 13 L. T. O. S. 233; *subsequent proceedings, sub nom.* R. v. SOUTH DEVON RY. CO. (1850), 15 Q. B. 1043.

744. ——— Arbitrator's right of lien.]—A railway co. are bound, under Lands Act, 1845, s. 35, to take up an award of compensation for land required by the co., & forthwith to furnish a copy to the owner of the land; & it is no good return to a mandamus for that purpose, that the co. were willing to receive the award & to furnish such copy, but were prevented by reason of the arbitrator's refusal to deliver it up to them without the payment of his fees, there being nothing in the Act to affect the arbitrator's common law right of lien.—R. v. SOUTH DEVON RY. CO. (1850), 15 Q. B. 1043; 20 L. J. Q. B. 145; 16 L. T. O. S. 149; 117 E. R. 754. *Annotations:—*Consd. R. v. L. & N. W. Ry., [1899] 1 Q. B. 921. *Apld.* R. v. Barton & Immingham Light Ry., *Ex p.* Simon, [1912] 3 K. B. 72. *Refd.* L. & N. W. Ry. v. Walker (1900), 82 L. T. 93.

745. Mandamus to compel promoters to take up award—General rule—Prerogative writ—Claim under Railways Act, 1845, s. 78.]—R. v. LONDON & NORTH WESTERN RY. CO., [1894] 2 Q. B. 512; 63 L. J. Q. B. 695; 58 J. P. 719; 10 R. 359.

*Annotations:—*Refd. Smith v. Chorley District Council, [1897] 1 Q. B. 532. *Mentd.* R. v. St. Giles, Camberwell Vestry (1897), 66 L. J. Q. B. 337.

746. ——— Enforceable—On payment of fees.]—*Re* BAILEY & SOUTH DEVON RY. CO. (1849), 13 L. T. O. S. 233; *subsequent proceedings, sub nom.* R. v. SOUTH DEVON RY. CO. (1850), 15 Q. B. 1043.

747. ——— ———.]—R. v. SOUTH DEVON RY. CO., No. 744, *ante*.

748. ——— Although defects in notice of claimant—Under Lands Act, 1845, ss. 23, 68.]—R. v. SUTTON HARBOUR COMRS. (1853), 2 W. R. 10. *Annotation:—*Consd. R. v. L. & N. W. Ry., [1899] 1 Q. B. 921.

749. ——— Though promoters entered into arbitration under protest—Rights of parties to be settled subsequently by action.]—A railway co., having, though under protest, appointed an arbitrator & joined in the arbn. under Lands Act, 1845 in respect of a claim for the purchase of minerals, must take up the award & furnish a copy to claimants in accordance with s. 35, & a mandamus may be granted to compel them. The validity of the award may be contested later.—LONDON & NORTH WESTERN RY. CO. v. WALKER, [1900] A. C. 109; 69 L. J. Q. B. 367; 82 L. T. 93; 64 J. P. 483; 48 W. R. 384; 16 T. L. R. 194, H. L.; *affg.* S. C. *sub nom.* R. v. LONDON & NORTH WESTERN RY. CO., [1899] 1 Q. B. 921, C. A.; *subsequent proceedings*, [1903] A. C. 289, H. L.

750. ——— Under Light Railways Act, 1896 (c. 48) incorporating Lands Act, 1845.]—R. v. BARTON & IMMINGHAM LIGHT RY. CO., *Ex p.* SIMON, [1912] 3 K. B. 72; 81 L. J. K. B. 964; 76 J. P. 344, D. C.

751. ——— Not enforceable—Where compensation already agreed & paid.]—Mandamus to a railway co. reciting that certain premises in the occupation of R. had been injuriously affected by

the works of the co., & that, the co. declining to join in the appointment of an arbitrator to estimate the compensation due to R., he had appointed an arbitrator, *ex p.* under Lands Act, 1845, s. 35, who had duly made his award; & commanding the co. to take up the award. Return by the co. that R. also occupied certain other lands, which were taken by the co., & that before the execution of their works it was agreed between R. & the co. that the co. should pay to R. the sum of £22 10s. in full satisfaction of his claim in respect of the lands which were so taken, & of the premises which were so injuriously affected, which sum was duly paid:—*Held*: a good return.—R. v. WEST MIDLAND RY. CO. (1863), 27 J. P. 662; 11 W. R. 857. *Annotation:—*Refd. L. & N. W. Ry. v. Walker (1900), 82 L. T. 93.

752. ——— When claimant admits that his claim was not within the Act.]—Lands Act, 1845, s. 35, as to awards made under the Act by arbitrators in cases of disputed compensation, enacted that the arbitrators should deliver their award in writing to the promoters of the undertaking, & the promoters should retain it, & should forthwith on demand, at their own expense, furnish a copy to the other party to the arbn., & should at all times on demand produce the award, & allow it to be inspected or examined by such party, or any person appointed by him for that purpose. To a writ of mandamus commanding a railway co. to take up an award made under the arbn. clauses of the Act, the railway co. made return that the prosecutor's interest had not been injuriously affected by defts.' works within the Act. The prosecutor demurred to the return:—*Held*: as the demurrer admitted the truth of the statement in the return that the prosecutor's interest had not been injuriously affected within the Act, the award must be taken to be valueless, & the ct. would not compel the railway co. to take it up.—R. v. CAMBRIAN RY. CO. (1869), L. R. 4 Q. B. 320; 10 B. & S. 315; 38 L. J. Q. B. 198; 20 L. T. 437; 33 J. P. 359; 17 W. R. 667; *subsequent proceedings* (1871), L. R. 6 Q. B. 422.

*Annotations:—*Consd. R. v. L. & N. W. Ry., [1899] 1 Q. B. 921. *Refd.* L. & N. W. Ry. v. Walker (1900), 82 L. T. 93.

—[See, also, No. 787, *post*.]

SUB-SECT. 10.—SETTING ASIDE, REMITTING AND AMENDING AWARD.

See Lands Act, 1845, s. 37.

See, generally, ARBITRATION, Vol. II., pp. 545–561; R. S. C., Ord. 52, r. 2.

753. Award need not be made a rule of court—Before motion to set aside.]—*Re* BRADSHAW & EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. (1848), 12 Q. B. 562; 12 Jur. 998; 116 E. R. 979; *sub nom.* *Re* EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. & BRADSHAW, 5 Ry. & Can. Cas. 527; 17 L. J. Q. B. 362; 12 L. T. O. S. 268.

*Annotations:—*Refd. Holdsworth v. Wilson (1863), 4 B. & S. 1; *Re* Pullen & Liverpool Corpn. (1882), 51 L. J. Q. B. 285. *Mentd.* *Re* Beaufort & Swansea Harbour Trustees (1860), 8 C. B. N. S. 146.

754. Time for setting aside—Within time limited by Arbitration Act, 1698 (c. 15)—Submission

is not in time cannot prevail.—*Re* McLELLAN & CHINGUACOUSY TOWN—(1898), 18 P. R. 246.—CAN.

*c. Jurisdiction to set aside—To what court.]—*The Supreme Ct. *en banc* cannot entertain an appeal from order of judge of the Supreme Ct., made under the above Act, setting aside an award of arbitrators for lands taken for railway purposes.—ST. JOHN &

PART VII. SECT. 5, SUB-SECT. 10.

754i. Time for setting aside—Within time limited by 9 & 10 Will. 3, c. 15, s. 2.]—The time limited by above sect. is the time within which appln. to set aside awards should be made.—*Re* WARD & VICTORIA WATER WORKS (1874), 1 B. C. R. 114.—CAN.

754ii. ——— Within time limited by Railway Act, 1877.]—*Re* GRAND JUNC-

RY. CO. & MASSON (1879), 44 U. C. R. 203.—CAN.

*a. Time for remitting back—Within time limited by Land Purchase Act, 1877.]—*KELLY v. SULLIVAN (1875), 2 P. E. I. 34; 1 S. C. R. 1.—CAN.

*b. Time for appeal—Within time limited by R. S. 1897, c. 62—Award not filed nor notice thereof filed.]—*An objection that an appeal from an award

Sect. 5.—Procedure by arbitration: Sub-sects. 10 & 11.]

made rule of court under Lands Act, 1845, s. 36.]

—*Re HARPER & GREAT EASTERN RY. Co., No. 761, post.*

755. Grounds for setting aside—Umpire proceeding without notice to parties—At adjourned meeting.]—*Re HAWLEY, BRIDGEWOOD & GOODWIN & NORTH STAFFORDSHIRE RY. Co., No. 720, ante.*

756. — Not where value between several interests not apportioned.]—*Re NORTH STAFFORDSHIRE RY. Co. & LANDOR (1848), 2 Exch. 235; 6 Ry. & Can. Cas. 17; 17 L. J. Ex. 350; 154 E. R. 478.*

Annotation:—Refd. Re Levick & Epsom & Leatherhead Ry. (1859), 8 W. R. 66.

757. — Bias of umpire—Not where umpire surveyor to & shareholder in company—Closely connected in interest with promoters.]—(1) There may be circumstances in which an umpire may join in an inquiry with the arbitrators before the time of his acting arrives.

(2) The surveyor of a railway co. had in that character treated with a landowner, & offered a

price for land required by the co. He was subsequently named by the co., & acted as their arbitrator upon an arbn. under Lands Act, 1845:—*Held*: he ought not to have been selected as an arbitrator, but the landowner knowing the fact, & though protesting against the propriety of the appointment, proceeding with the arbn., was held to have waived the objection.

(3) A surveyor to, & shareholder in, a railway co., closely connected in interest with, & holding many shares in, another railway co., upon an arbn. between the latter co. & a landowner under Lands Act, 1845, was appointed umpire by the arbitrators, & as umpire made his award. The landowner first discovered that the umpire was such surveyor & shareholder after the date of the award, & obtained an order *nisi* to set aside the award on that ground:—*Held*: whatever objections there might be, in point of delicacy, to the appointment of such an umpire, they did not constitute sufficient grounds for setting aside the award.—*Re ELLIOT & SOUTH DEVON RY. Co. (1848), 2 De G. & Sm. 17; 11 L. T. O. S. 42; 12 Jur. 445; 64 E. R. 8.*

QUEBEC RY. Co. v. BULL (1913), 13 E. L. R. 294; 14 D. L. R. 190.—CAN.

d. — — — — —.]—CASSIDY v. CITY OF MOOSE JAW, [1917] 2 W. W. R. 689.—CAN.

e. *Exercise of jurisdiction.*]—An award of compensation made in an arbitration under Railway Act, 1888, was appealed from:—*Held*: the ct. rightly exercised its jurisdiction by reviewing the award as if it had been the judgment of a subordinate ct., that is, by deciding whether a reasonable estimate of the evidence had been made. It was not authorised to disregard the award & deal with the evidence *de novo* as if it had been a ct. of first instance.—ATLANTIC & NORTH WEST RY. Co. v. WOOD, [1895] A. C. 257; 18 L. N. 140.—CAN.

f. — — —.]—*Re BRENNAN & OTTAWA ELECTRIC RY. Co. (1901), 11 C. L. T. 208.—CAN.*

Re KETCHESON CANADIAN NORTHERN ONTARIO RY. Co. (1913), 29 O. L. R. 339; 5 O. W. N. 36; 25 O. W. R. 20.—CAN.

h. — — —.]—The ct. is bound to come to its own conclusion upon all the evidence, & can disregard or adopt the reasoning of the arbitrators, or support the award on any sufficient ground, whether or not that ground is relied on by the arbitrators, provided the ct. pays due regard to the award & findings & reviews them as it would that of a subordinate ct.—GREEN v. CANADIAN NORTHERN RY. Co. (1915), 30 W. L. R. 572; 7 W. W. R. 1072; 22 D. L. R. 15.—CAN.

i. — — —.]—An award of arbitrators is in the same position as the judgment of a judge at a trial, & their findings of fact will not be interfered with without some special reason, unless it can be shown that they have proceeded upon a wrong principle in their valuation.—RUDY v. TORONTO EASTERN RY. (1917), 86 L. J. P. C. 95; 33 D. L. R. 193.—CAN.

j. — — — *May decrease or increase the compensation.*]—An appellate ct. has jurisdiction to increase or diminish the amount awarded by arbitrators, appointed under Dominion Railway Act, even if only the amount of compensation allowed were in question.—*Re BILLINGS & CANADIAN NORTHERN ONTARIO RY. Co. (1914), 19 D. L. R. 811; 31 O. L. R. 329.—CAN.*

k. *Whether appeal lies—Under Dominion Railway Act, 1879.]—Re LEA & ONTARIO & QUEBEC RY. Co. 8 O. R. 222.—CAN.*

l. — — — *Under Dominion Railway Act, 1888.]—BIRELY v. TORONTO, HAMILTON & BUFFALO RY. Co. (1898), 25 A. R. 88.—CAN.*

m. — — — *Under Dominion Railway Act, 1903.]—JAMES BAY RY. Co. v. ARMSTRONG, [1909] A. C. 624; 79 L. J. P. C. 11.—CAN.*

n. — — — *Under Ontario Railway Act.]—DARLING v. MIDLAND RY. Co. (1885), 11 P. R. 32.—CAN.*

o. *Grounds for setting aside—Arbitrator misdirecting himself.*]—When it appears on the face of an award that the arbitrator has misdirected himself as to the law relating to the valuation of lands proposed to be expropriated, the award should be set aside.—*Re FALSE CREEK RECLAMATION ACT & VANCOUVER CITY (1914), 20 B. C. R. 453; 22 D. L. R. 117.—CAN.*

p. — — — *Arbitrator failing to notify one party of meeting.]—Re JOHNSON & TOWNSHIP OF GLOUCESTER (1853), 12 U. C. R. 135.—CAN.*

q. — — — *Award bad on its face—Damages not properly dealt with.*]—In an action to set aside an award made under Towns Incorporation Act, 1888, s. 177, the award was set aside as bad on its face, because the subject of damages caused by the removal of a building & fence had not been properly dealt with by the arbitrators.—McASKILL v. TOWN OF NEW GLASGOW (1895), 10 N. S. R. 58.—CAN.

r. — — —.]—Error in law on the face of an award under Municipal Drainage Act, 1914, is ground for setting it aside.—PARSONS v. EASTNOR TOWNSHIP (1915), 38 O. L. R. 110; 23 D. L. R. 790.—CAN.

s. — — — *Bias of umpire or arbitrator—What amounts to bias.*]—Bias, in the sense of strong predisposition in favour of one litigant as opposed to the other, must be contemplated as probable, if not inevitable; & real bias, caused by anything short of pecuniary interest in the result of the proceedings, cannot be treated as necessarily misconduct justifying the setting aside an award.—*Re SKENE'S AWARD (1904), 21 N. Z. L. R. 591.—N.Z.*

t. — — —.]—*Holding stock.*]—The fact of the arbiter holding stock in a co. compulsorily acquiring land is sufficient to disqualify him & his disqualification vitiated the award of an oversman.—SELLAR v. HIGHLAND RY. Co., [1919] S. C. (H. L.) 19.—SCOT.

u. — — — *Secret communication to arbitrator.*]—After evidence had been closed the construction committee of a ry. co. wrote a letter addressed to H., agreeing to certain things whereby the damage to his property would be lessened. This was delivered to the arbitrator for the co. before the award was made & by him to the umpire, but was not communicated to H. until after award, which contained recitals of the benefits proposed by the letter, & assessed compensation at the sum originally offered by the co. The award was not signed by H.'s arbitrator, who swore that the letter affected the award, & reduced the sum awarded while the other two arbitrators swore it had no effect upon their finding:—*Held*: the award was bad.—v. NAPANEE, TAMWORTH & RY. Co. (1884), 5 O. R. 349.—CAN.

v. — — — *Sum awarded excessive.*]—GREAT WESTERN RY. Co. v. DODDS (1853), 12 U. C. R. 133.—CAN.

w. — — —.]—GREAT WESTERN RY. Co. v. DOUGALL (1851), 12 U. C. R. 131.—CAN.

x. — — —.]—GREAT WESTERN RY. Co. v. BABY (1854), 12 U. C. R. 106.—CAN.

Arbitrators not appointed.]—Re HARWICH & RALEIGH TOWNSHIPS (1890), 20 O. R. 154.—CAN.

z. — — — *Arbitrators acting in of their powers.]—H v. VICTORIA CITY CORPN. (1912), 17 B. C. R. 258; 5 D. L. R. 291.—CAN.*

aa. — — — *Wrongful rejection of evidence.]—BULL v. ST. JOHN & QUEBEC RY. Co. (1913), 13 E. L. R. 294; 14 D. L. R. 190.—CAN.*

bb. — — — *Omission to define lands taken.*]—The award of arbitrators who assess compensation for lands compulsorily taken for ry. purposes must describe by metes & bounds the lands for which the sum assessed is compensation, & if this is not done the award will be set aside.—BULL v. ST. JOHN & QUEBEC RY. Co. (1913), 13 E. L. R. 294; 14 D. L. R. 190.—CAN.

a. — — — *Omission to set out undisputed fact material to the award.]—Re CITY OF TORONTO GROSVENOR STREET PRESBYTERIAN CHURCH TRUSTEES (1918), 41 O. L. R. 352; 13 O. W. N. 302; 45 D. L. R. 327.—CAN.*

b. *Grounds for interference—General rule.*]—The ct. will not interfere with an award upon the merits unless it is clearly wrong; & where there was

758. Not that umpire has given evidence on behalf of one party—In another inquiry as to value of other land taken for same purposes.]—*Re HAIGH & LONDON & NORTH WESTERN & GREAT WESTERN RY. COS.*, [1896] 1 Q. B. 649; 65 L. J. Q. B. 511; 74 L. T. 655; 44 W. R. 618; 12 T. L. R. 298, D. C.

759. — Not improper service of notice of appointment of arbitrators—Objection not taken in time.]—*R. v. METROPOLITAN RY. CO.*, *Ex p. KNOCK* (1867), 17 L. T. 291.

760. — Variance from terms of submission insufficient—Award as to purchase of land—Omission as to damage for severance.]—By a submission to arbn. under Lands Act, 1845, of a question of disputed compensation, the arbitrator was to determine what sum should be paid for the purchase of certain land, & what other, if any, sum for severance damage. The arbitrator by his award after reciting the submission, & that he had considered the matters so referred to him, awarded a sum to be paid for the purchase of the land, without saying anything as to any severance damage:—*Held*: the award was final & good, & the arbitrator by his silence negatived any right to compensation in respect of severance damage.—*Re BEAUFORT (DUKE) & SWANSEA HARBOUR TRUSTEES* (1860), 8 C. B. N. S. 146; 29 L. J. C. P. 241; 1 L. T. 370; 6 Jur. N. S. 979; 8 W. R. 188; 141 E. R. 1121.
Annotations:—*Refd. Jewell v. Christie* (1867), 15 L. T. 580; *R. v. Met. Ry.* (1883), 48 L. T. 367.

761. — Not on mere error of form—Award containing order for payment—Recitals showing extent of arbitrator's authority.]—(1) Although it has been held that an arbn. under Lands Act, 1845, is not a submission by consent within Common Law Procedure Act, 1854 (c. 125), nevertheless, when an award is made a rule of Ct. under Lands Act, s. 36, the Ct. has the same jurisdiction with respect to setting it aside & enforcing it as in other cases, that is to say, the jurisdiction conferred by Arbitration Act, 1698 (c. 15), is let in.

(2) A motion to set aside the award must be made before the end of the term next after the publication of the award.

(3) When an arbitrator appointed under Lands Act, 1845, & having power to assess the amount of damage, but no power to decide the question of liability, made an award containing an order for payment, but the recitals showed the extent of the arbitrator's authority:—*Held*: this was an error of form only, & the award could not be set aside

no imputation against the arbitrators, who had examined the property, & seen & heard the witnesses, whose evidence as to the value of the land was extremely contradictory, the Ct. refused to interfere on the ground that the sum given was too small.—*Re HAMILTON & NORTH WESTERN RY. CO. & BOYS* (1879), 44 U. C. R. 626.—**CAN.**

c. — — —.]—It is in the discretion of the Ct. whether the award should be set aside, or remitted to the arbitrator.—*ODLUM v. CITY VANCOUVER* (1915), 85 L. J. P. C. 95.—**CAN.**

e. — — —.]—*Must be misconduct—Or disregard of legal principle.*—Some misconduct, legal or otherwise, or the disregard of some legal principle, must be shown.—*Re CANADA SOUTHERN RY. CO. & NORVALL* (1877), 41 U. C. R. 195.—**CAN.**

fraud—Or mistake.—*Re HUMBERSTONE & CITY OF EDMONTON* (1910), 14 W. L. R. 492.—**CAN.**

m. *Grounds for non-interference—Evidence conflicting.*—Where the evi-

dence is conflicting as to whether damage or benefit has resulted to the party affected, the Ct. will not interfere with an award merely because it may think the weight of evidence to be against the view taken by the arbitrators.—*Re COLQUHOUN & TOWN OF BERLIN* (1879), 44 U. C. R. 631.—**CAN.**

n. — — —.]—*Evidence properly considered.*—*CALGARY & EDMONTON RY. CO. v. MACKINNON* (1910), 30 C. L. T. 742; 43 S. C. R. 379.—**CAN.**

o. — — —.]—*Evidence to support finding.*—Where there was ample testimony to warrant arbitrator in his findings; it is not for the Ct. to say that he should have preferred the evidence of one set of witnesses to that of the other, where much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions.—*Re MACPHERSON & CITY OF TORONTO* (1895), 26 O. R. 558.—**CAN.**

p. — — —.]—*Award not based on wrong principle—Or contrary to evidence.*—Where arbitrators have not proceeded upon a wrong principle, nor arrived at an estimate of value not warranted by

on account of it.—*Re HARPER & GREAT EASTERN RY. CO.* (1875), L. R. 20 Eq. 39; 44 L. J. Ch. 507; 32 L. T. 214; 23 W. R. 371.

Annotations:—*As to (1) Refd. Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 402. *As to (3) Consd. Re Stoker & Morpeth Corpn.* (1914), 84 L. J. K. B. 1169.

SUB-SECT. 11.—ENFORCING AWARD.

See, generally, ARBITRATION, Vol. II., pp. 567–584.

762. General rule—By action for specific performance—Promoters in same position as ordinary purchasers.]—(1) A railway co., after notice to treat for land has been given to the landowner, & the price of the land has been fixed by arbitrators under Lands Act, 1845, is in the same position with regard to the landowner as an ordinary purchaser, & will be compelled by a Ct. of equity to complete the purchase.

(2) A railway co. which, after giving notice to treat, has paid the purchase-money for leaseholds, & has, with the consent of the lessee, been admitted into possession, will, at the suit of the lessee within a reasonable time, be compelled to accept an assignment, containing the usual covenants.—*HARDING v. METROPOLITAN RY. CO.* (1872), 7 Ch. App. 154; 41 L. J. Ch. 371; 26 L. T. 109; 36 J. P. 340; 20 W. R. 321, L. C.

Annotations:—*As to (2) Refd. Mills v. East London Grdns.* (1872), L. R. 8 C. P. 79; *Curling v. Matthey* (1921), 37 T. L. R. 717. *Generally, Refd. Re Cary-Elwes' Contract*, [1906] 2 Ch. 143.

763. Condition precedent to action—Execution of conveyance by landowner—Not when payment to precede conveyance.]—By a deed of submission made between L. & a railway co., after reciting that the co. were authorised to take certain lands, of which L. was, or claimed to be, owner, that they had given him notice that they required his lands, & that it was agreed that they should become the purchasers thereof in the mode pointed out, it was covenanted that it should be referred to W. to determine the value to be paid for the lands; that the purchase-money should be paid within three days after the making of the award; & thereupon L. should execute a conveyance; subject to the payment of the amount of such purchase-money into the Ch. Ct. under the circumstances & in the manner provided for by Lands Act, 1845. The arbitrator found the value of the land at a certain sum, & directed it to be

the evidence, the Ct. ought not to disturb the award.—*FELLOWS v. R.* (1888), 2 Exch. C. R. 428.—**CAN.**

q. — — —.]—*GLASGOW CITY & DISTRICT RY. CO. v. MACGEORGE, COWAN & GALLAWAY* (1886), 13 R. (Ct. of Sess.) 609; 23 Sc. L. R. 414.—**SCOT.**

r. — — —.]—*Finding not clearly erroneous.*—*LEVIS TOWN CORPN. v. R.* (1892), 21 S. C. R. 31.—**CAN.**

s. — — —.]—*Not omission of statutory statement.*—*Re WATSON & TORONTO CITY* (1916), 38 O. L. R. 103.—**CAN.**

t. *Amendment.*—An arbitrator may, under Municipal Arbitration Act amend his award.—*Re WHITE & CITY OF TORONTO* (1917), 38 O. L. R. 337.—**CAN.**

u. — — —.]—*Power of court of appeal.*—Under Judicature Act, 1887, ss. 47, 48, the Court of Appeal has power to increase the amount of damages awarded under a statutory arbitration, & the Supreme Court has the like power under rules of procedure.—*Re TORONTO JUNCTION TOWN CORPN. & CHRISTIE* (1895), 25 S. C. R. 551.—**CAN.**

**Sect. 5.—Procedure by arbitration: Sub-sects. 11
12, A. & B.]**

paid within three days after, etc. The submission having been made a rule of ct., & a rule having been obtained, calling upon the co. to show cause why they should not pay the sum of money:—**Held:** (1) assuming even that the arbitrator had exceeded his jurisdiction in ordering the money to be paid, the rest of the award was good, & as the award ascertained the amount of the purchase-money, which the co. by their deed of submission had agreed to pay, there was sufficient to enable the ct. to make an order on them to pay it; (2) the payment of the money & the execution of the conveyance by L. were not dependent conditions, but the payment was to precede the conveyance, & it was no answer to the present rule that a conveyance had not been tendered; (3) it was no objection that it was not shown that the co. had taken possession of the land.—*Re LINDSAY & DIRECT LONDON & PORTSMOUTH RY. CO.* (1850), 1 L. M. & P. 529; 19 L. J. Q. B. 417; 15 Jur. 224.

764. ———.]—*EAST LONDON UNION v. METROPOLITAN RY. CO.* (1869), L. R. 4 Exch. 309; 38 L. J. Ex. 225.

Annotations:—*Consd.* *Howell v. Met. Dist. Ry.* (1881), 19 Ch. D. 508. *Refd.* *Capell v. G. W. Ry.* (1882), 9 Q. B. D. 459. *Mentd.* *Colley v. Overseas Exporters*, [1921] 3 K. B. 302.

765. ——— **Investigation and acceptance of title by promoters.]—***Re MILFORD DOCKS CO., LISTER'S PETITION* (1883), 23 Ch. D. 292; 52 L. J. Ch. 774; 48 L. T. 560; 31 W. R. 715.

766. **Time limit for action to enforce—Six years from date of award.]—***TURNER v. MIDLAND RY. CO.*, [1911] 1 K. B. 832; 80 L. J. K. B. 516; 104 L. T. 347; 75 J. P. 283, D. C.

767. **When court will enforce by action—Arbitrator exceeding jurisdiction in ordering payment—Where agreement by submission to pay sum awarded—Promoters taking possession.]—***Re LINDSAY & DIRECT LONDON & PORTSMOUTH RY. CO.*, No. 763, *ante*.

768. ——— **Not when award does not apportion sum awarded.]—**Action to recover the amount of an award, which did not apportion the sum awarded, made by an umpire under Lands Act, 1845, in respect of certain sandhills:—**Held:** the award could not be enforced.—*NESBITT v. MABLETHORPE URBAN DISTRICT COUNCIL*, [1917] 2 K. B. 568; 86 L. J. K. B. 1401; 117 L. T. 365; 81 J. P. 289; 15 L. G. R. 647; *revsd.* on other grounds, [1918] 2 K. B. 1, C. A.

769. **Defences available to promoters—That**

lands not injuriously affected—Award of uncertain amount.]—To an action against a railway co. upon an award of an arbitrator, appointed to determine a claim under Lands Act, 1845, whereby the arbitrator found that claimant had sustained damage by reason of his messuage being injuriously affected by the execution of the works mentioned in & authorised by the co.'s special Act, *viz.*, by the erection of an embankment & by the narrowing of the road in front of the messuage, to the amount of £80, which sum he directed the co. to pay to claimant. Defts. pleaded that pltf.'s messuage was not, nor was his interest therein, injuriously affected by the narrowing of the road, & that the sum awarded included money of uncertain amount which the arbitrator awarded for compensation for damage sustained by pltf. by reason of his messuage being, as the arbitrator erroneously supposed, injuriously affected by the narrowing of the road, by reason whereof the award was void:—**Held:** a good plea.—*BECKETT v. MIDLAND RY. CO.* (1866), L. R. 1 C. P. 241; Har. & Ruth. 189; 35 L. J. C. P. 163; 13 L. T. 672; 12 Jur. N. S. 231; 14 W. R. 393; *subsequent proceedings* (1867), L. R. 3 C. P. 82.

Annotations:—*Consd.* *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221. *Refd.* *Falkingham v. Victorian Rys. Comrs.*, [1900] A. C. 452; *Long Eaton Recreation Grounds Co. v. Mid. Ry.*, [1902] 2 K. B. 574.

See, also, Nos. 896-900, *post*.

770. **What evidence admissible—Evidence of arbitrator—To show matters he considered—Not to show reasons for award.]—***BUCCLEUCH (DUKE) v. METROPOLITAN BOARD OF WORKS*, No. 215, *ante*.

771. **Suit in equity and action at law in respect of award—Suit as to claims not included in award—Action to enforce award—Action restrained by injunction.]—***METROPOLITAN BOARD OF WORKS v. SALISBURY (MARQUIS)* (1872), 26 L. T. 390; 20 W. R. 507.

772. **Where question of title in dispute—Award under Public Health Act, 1875 (c. 55), s. 308—Not enforced by motion—Though made rule of court.]—**An award in an arbn. under Public Health Act, 1875 (c. 55), s. 308, in respect of a claim for compensation for damages caused by the carrying of sewers by a local board through lands, is not enforceable by motion, although duly made a rule of ct.; the board have a right to compel claimant to bring an action & prove his title to the lands.—*Re WALKER & BECKENHAM, KENT LOCAL BOARD* (1884), 50 L. T. 207; 48 J. P. 264, D. C.

PART VII. SECT. 5, SUB-SECT. 11.

764.i. Condition precedent to action—Tender of conveyance by landowner.]—An owner to whom compensation has been awarded for land taken by a ry. co. cannot sue upon the award before tendering a conveyance of the land.—*CAWTHRA v. HAMILTON & N. W. RY. CO.* (1877), 41 U. C. R. 187.—**CAN.**

764.ii. ——— **Railway Acts, 1906 & 1913—Expropriation Act, 1913.]—**Where land is expropriated under the above Acts it is not necessary for the owner to tender a conveyance to the co. in order to make the compensation awarded an absolute debt for which the expropriator can be sued at law.—*HANEY v. CANADIAN NORTHERN RY. CO.*, [1918] 2 W. W. R. 834; 42 D. L. R. 41; 29 Man. L. R. 61.—**CAN.**

w. ——— **Confirmation of award by judge.]—***WRIGHT v. WINNIPEG CITY* (1886), 4 Man. L. R. 46.—**CAN.**

y. Whether summary enforcement proper—Arbitration Act.]—*Re NORTHERN COUNTIES INVESTMENT TRUST, LTD. & VANCOUVER CITY* (1901), 8 B. C. R. 338.—**CAN.**

z. Whether rule to enforce award proper—Municipal Corporations Act, 1876—Public Works Act, 1876.]—*Exp.* *WATSON* (1879), O. B. & F. 152.—**N.Z.**

a. Defences available to promoters—Previous conveyance.]—Pltf. conveyed land to W. & E. Ry. Co., which they abandoned; & pltf. retook possession, & continued to hold it for more than 20 years. Defts. were incorporated by a statute empowering them to acquire the lands & roadway of W. & E. Ry. Co.; & after acquiring the lands they were entitled to all rights over the same theretofore possessed by W. & E. Ry. Co.; without having attempted to acquire the land under the Acts, defts., with full know-

ledge of all the circumstances, dealt with pltf. as the owner, went to arbn. with him, & received possession; & compensation was awarded to pltf.:—**Held:** the pltf. was entitled to recover on the award, the previous conveyance to the old co. forming no defence.—*PARSONS v. PORT DOVER & LAKE HURON RY. CO.* (1877), 28 C. P. 84.—**CAN.**

b. By order of a judge in chambers—Dominion Railway Act.]—The proper mode of enforcing an award of compensation for lands expropriated under above Act is by an order of a judge in chambers.—*CANADIAN PACIFIC RY. CO. v. LITTLE SEMINARY OF STE. THERESE* (1889), 16 S. C. R. 606.—**CAN.**

c. Resumption of possession by owner—A means of enforcing award.]—*DAVIE v. CITY OF VICTORIA* (1912), 20 W. L. R. 544; 1 W. W. R. 10; 17 B. C. R. 102; 2 D. L. R. 287.—**CAN.**

SUB-SECT. 12.—COSTS OF ARBITRATION.

See Lands Act, 1845, s. 34.

A. In General.

See, generally, ARBITRATION, Vol. II., pp. 585-613.

773. Award for costs generally—Valid.]—HOLDSWORTH v. WILSON, No. 704, *ante*.

774. Whether to be included in award—Must be included—Not enforced under subsequent certificate of arbitrators.]—*Re* LONDON & NORTH WESTERN RY. CO. & QUICK (1849), 5 Dow. & L. 685; 5 Ry. & Can. Cas. 520; *sub nom.* QUICK v. LONDON & NORTH WESTERN RY. CO., 18 L. J. Q. B. 89; 13 L. T. O. S. 102; 13 Jur. 408.

Annotations:—*Consd.* *Re* Wilts, Somerset & Weymouth Ry. & Fooks (1849), 3 Exch. 728. *Dttd.* Gould v. Staffordshire Potteries Waterworks Co. (1850), 5 Exch. 214.

775. ——— Need not be included—Ascertainable subsequently by arbitrators—Not necessarily within three months after time of reference.]—GOULD v. STAFFORDSHIRE POTTERIES WATERWORKS CO. (1850), 5 Exch. 214; 1 L. M. & P. 264; 6 Ry. & Can. Cas. 568; 19 L. J. Ex. 281; 15 L. T. O. S. 117; 14 Jur. 528; 155 E. R. 92.

Annotations:—*Refd.* Fitzhardinge v. Gloucester & Berkeley Canal Co. (1872), 27 L. T. 196. *Mentd.* Martin v. Leicester Waterworks Co. (1858), 31 L. T. O. S. 265.

776. ——— Award not providing for—Claimant agreeing to refer to arbitration instead of proceeding by jury—Not entitled to costs though award made in his favour.]—*Ex p.* REYNAL (1847), 5 Ry. & Can. Cas. 60; 16 L. J. Q. B. 304; 9 L. T. O. S. 83.

777. ——— Owner adopting award by applying for investment of sum awarded—Not entitled to costs.]—*Ex p.* HARRISON (1849), 13 Jur. 381.

——— Remitted back to arbitrator on admission of mistake.]—See ARBITRATION, Vol. II., p. 525, No. 1624.

778. By whom settled—Arbitrators or umpire.]—GOULD v. STAFFORDSHIRE POTTERIES WATERWORKS CO. (1850), 5 Exch. 214; 1 L. M. & P. 264; 6 Ry. & Can. Cas. 568; 19 L. J. Ex. 281; 15 L. T. O. S. 117; 14 Jur. 528; 155 E. R. 92.

Annotations:—*Mentd.* Martin v. Leicester Waterworks Co. (1858), 31 L. T. O. S. 265; Fitzhardinge v. Gloucester & Berkeley Canal Co. (1872), 27 L. T. 196.

779. By what Act governed—Lands taken by local board under Public Health Act, 1875 (c. 55), incorporating Lands Clauses Acts—Costs governed by Lands Clauses Acts.]—*Ex p.* RAYNER (1878), 3 Q. B. D. 446; 47 L. J. Q. B. 660; 39 L. T. 232; 42 J. P. 807.

780. ——— ———.]—R. v. SMITH (1878), 26 W. R. 812.

781. Finality of arbitrators' certificate—Order by consent in suit against promoters—Reference to determine costs & expenses.]—ROWCLIFFE v. DEVON & SOMERSET RY. CO. (1873), 21 W. R. 433.

782. Arbitrators' fees not included in award by umpire—Implied promise to pay by vendor—In letter appointing arbitrator.]—HUGH-JONES v. NORTH (1895), 39 Sol. Jo. 220.

783. First award set aside—Arbitrator directed to make second award, costs being reserved—Second award directing each party to bear own costs—Promoters liable for costs of first award.]—*Re* SURBITON URBAN DISTRICT COUNCIL & UPJOHN (1899), *Times*, Jan. 19, D. O.

784. Includes costs of preparing award—Solicitor employed by umpire.]—Upon a reference under Lands Clauses Acts between a co. & a landowner relative to the value of land taken compulsorily by the co., the umpire directed that the co. should pay the costs of the award, including therein the costs of preparing the award. The co. took up the award & paid the amount fixed by the arbitrator for so doing. This amount included a bill of costs of solrs. employed by the umpire to draw up the award. The co. applied in the K. B. Div. for an order for taxation of the solrs.' bill of costs under Solrs. Act, 1843 (c. 73), s. 38:—*Held*: the umpire being chargeable with the bill & the co. having paid it, the case came within the words of the Act & the bill was taxable, but that the order should be to tax it in the Ch. Div.—*Re* COLLYER-BRISTOW & CO., [1901] 2 K. B. 839; 70 L. J. K. B. 941; 50 W. R. 4; 45 Sol. Jo. 724; *sub nom.* *Re* COLLYER-BRISTOW & CO., CROSSLEY v. LOWESTOFT WATER & GAS CO., 85 L. T. 208; 17 T. L. R. 741, C. A.

785. Where arbitration & award ultra vires—Promoters entitled to costs.]—LONDON & NORTH WESTERN RY. CO. v. WALKER, No. 749, *ante*.

B. For what Costs Promoters liable.

786. Arbitrators' & umpire's fees.]—R. v. SOUTH DEVON RY. CO., No. 744, *ante*.

787. ——— Not when landowner takes up award & makes payment—No right of recovery from promoters—As part of costs of arbitration.]—A landowner whose claim against a railway co. for the purchase-money of land compulsorily taken had been allowed, & who was entitled to the costs of the arbn., paid the umpire's fees himself, & took up the award instead of waiting for this to be done by the co.:—*Held*: (1) the landowner could not recover the sum paid by him to the umpire in an action against the co.; (2) the decision of the taxing master who had disallowed the sum so paid by the landowner as costs in the arbn. was conclusive & was not subject to review by the ct.

(3) The real truth of the case is that pltf. went the wrong way to work. He ought to have proceeded under [Lands Act, 1845] s. 35; I mean he ought to have held his hand & left it to the co. to take up this award. If they had not taken it up in a reasonable time, he might have gone for a writ of mandamus to compel them to take it up (LOPES, L.J.).—SHREWSBURY (EARL) v. WIRRAL RAILWAYS COMMITTEE, [1895] 2 Ch. 812; 64 L. J. Ch. 850; 73 L. T. 234; 44 W. R. 19; 11 T. L. R. 561; 12 R. 546, C. A.

Annotation:—*As to* (2) *Refd.* *Re* Cannings & Middlesex County Council, [1907] 1 K. B. 51.

PART VII. SECT. 5, SUB-SECT. 12.—A.

d. Power of arbitrators to award or disallow—At their discretion—Municipal Act, 1914.]—*Re* HISLOP & STRATFORD PARK BOARD (1915), 8 O. W. N. 425; 34 O. L. R. 97; 23 D. L. R. 753.—CAN.

e. ——— Where claimant has raised point of law.]—Where claimant not unreasonably raises a question of law which, if decided in his favour, would probably have entitled him to at least three-fourths of the amount claimed, a decision against him, & an award of much less than three-fourths

of the amount claimed, will not wholly deprive him of costs.—BORTON v. MINISTER OF MINES (1892), 12 N. Z. L. R. 217.—N.Z.

f. Costs awarded not limited to the amount of compensation—Dominion Railway Act, s. 199.]—CALGARY & EDMONTON RY. CO. v. SASKATCHEWAN LAND & HOMESTEAD CO., LTD., [1919] 3 W. W. R. 1011.—CAN.

g. Inserted after filing award.]—The insertion of costs in the award, after being signed, is bad.—WILKIN'S CLAIM (No. 2) (1882), 1 N. Z. L. R. 141.—N.Z.

PART VII. SECT. 5, SUB-SECT. 12.—B

788 i. Arbitrator's & umpire's fees—Lands (Scot.) Act, 1845, s. 32.]—Expenses to be borne by the promoters include the reasonable remuneration of the arbiters & oversman.—MURRAY v. NORTH BRITISH RY. CO. (1900), 37 Sc. L. R. 370, 460.—SCOT.

h. ——— Include expenses incurred to their clerk—Lands (Scot.) Act, 1845.]—An account incurred to the clerk to a submission under above Act is part of the expenses of the arbiters, & payable by the promoters.—BURNET v. HENRY (1866), 39 Sc. Jur. 119.—SCOT.

Sect. 5.—Procedure by arbitration: Sub-sect. 12, B. & C.; sub-sect. 13, A

788. Costs of special case.]—SIDNEY v. NORTH EASTERN RY. CO., [1916] 2 K. B. 760; 86 L. J. K. B. 142; 116 L. T. 444; 61 Sol. Jo. 28.

C. Liability dependent on Previous Offer.

See Lands Act, 1845, s. 34.

789. Lands Act, 1845, s. 34 applicable to offers under s. 38—Offer not abrogated by notice under s. 23.]—LASCELLES v. SWANSEA SCHOOL BOARD (1899), 69 L. J. Q. B. 24; 63 J. P. 742.

790. Offer must be plain, clear & unconditional—Not of sum of money & making of road—Or conditional upon making of road.]—FISHER v. GREAT WESTERN RY. CO., [1911] 1 K. B. 551; 80 L. J. K. B. 299; 103 L. T. 885; 27 T. L. R. 96; 55 Sol. Jo. 76, C. A.

791. Offer may be withdrawn—Effect of withdrawal—Promoters liable for costs.]—FOSTER v. SHEFFIELD CORPN. (1895), 72 L. T. 549; 59 J. P. 404; 14 R. 450, C. A.

792. Time of making offer—May be made before appointment of arbitrator—May be after twenty-one days from date of claim.]—YATES v. BLACKBURN CORPN., No. 700, *ante*.

793. — — —.]—A canal co., requiring to purchase claimant's land, received a notice from claimant claiming £28,000 as compensation. On Aug. 18, the co., under Lands Act, 1845, s. 38, gave claimant notice of their intention to issue their warrant for summoning a jury, & offering £15,237 as the sum they were willing to give. On Aug. 28 claimant gave the co. notice, under s. 23, of his desire to have the compensation settled by arbn. On Oct. 26, the co. gave claimant notice that they had appointed an arbitrator, & offered £17,000 as compensation. On Nov. 8 claimant appointed an arbitrator. On Nov. 18 the two arbitrators appointed an umpire. The umpire awarded claimant £16,400;—*Held*: (1) the offer of £17,000, having been made when the arbitrator was appointed, & before the beginning of the arbn., was a good offer, & was not invalidated by the previous offer of £15,237; (2) the sum awarded being a less sum than £17,000, claimant was not entitled to the costs of the arbn. under s. 34.

(3) The master is not bound, under Lands Act, 1869, s. 1, to tax the costs of an arbn. unless claimant is entitled to costs under Lands Act, 1845, s. 34.—*FITZHARDINGE v. GLOUCESTER & BERKELEY CANAL CO.* (1872), L. R. 7 Q. B. 776; 41 L. J. Q. B. 316; 27 L. T. 196; 20 W. R. 800.

otions:—As to (1) Apld. Gray v. N. E. Ry. (1876), 1 Q. B. D. 696. Consd. Lascelles v. Swansea School Board (1899), 69 L. J. Q. B. 24. Refd. Re Westfield & Met. Dist. Ry., R. v. Smith (1883), 12 Q. B. D. 481; Ashton

Vale Iron Co. v. Bristol Corpn. (1901), 83 L. T. 694; R. v. Westminster, Ex p. L. C. C. (1903), 52 W. R. 10; Fisher v. G. W. Ry., [1911] 1 K. B. 551.

794. — Too late if made after appointment of arbitrators & umpire—& time for making award enlarged on two occasions.]—A co. was empowered to take land for their undertaking & gave to the owner notice to treat under Lands Act, 1845, & he gave notice, under s. 23, of his desire to have the compensation settled by arbn., naming his arbitrator & the co. named their arbitrator. The arbitrators appointed an umpire & on two occasions enlarged the time for making their award. The co. after this made an offer which was not accepted; & the arbn. proceeded. The umpire having awarded a less sum than that offered;—*Held*: the offer was too late, & claimant was entitled to costs under s. 34.—*GRAY v. NORTH EASTERN RY. CO.* (1876), 1 Q. B. D. 696; 45 L. J. Q. B. 818; 34 L. T. 757; 24 W. R. 758.

Annotation:—Refd. Fisher v. G. W. Ry., [1911] 1 K. B. 551.

795. Award less than previous offer—Claimant not entitled to costs.]—YATES v. BLACKBURN CORPN., No. 700, *ante*.

796. — — —.]—FITZHARDINGE v. GLOUCESTER & BERKELEY CANAL CO., No. 793, *ante*.

797. — Award not in respect of same subject-matter as offer—Promoters liable for costs.]—A railway co. seeking to acquire land under Lands Act, 1845, an arbn. took place under the Act to determine the amount of compensation to be paid by them to the owner of the land. The co. had previously made an offer of the sum of £11,000. Part of the landowner's claim was in respect of damage that would be caused to the residue of his land, which was building land, by cutting it off from the natural outfall for its drainage. When the parties came before the arbitrator, it was agreed between them that a right should be reserved to the landowner of making a sewer, for the purpose of draining his land, under the railway & land of the co., & consequently no claim in respect of such damage as before mentioned was ultimately submitted to the arbitrator. The arbitrator awarded the sum of £10,029 to the landowner;—*Held*: although the sum awarded was less than the amount of the co.'s offer, the co. were liable under Lands Act, 1845, s. 34, to pay the costs of the arbn. to the landowner on the ground that the award was not in respect of same subject-matter as that in respect of which the offer was made.—*MILES v. GREAT WESTERN RY. CO.*, [1896] 2 Q. B. 432; 65 L. J. Q. B. 619; 75 L. T. 290, C. A.

Annotation:—Refd. Fisher v. G. W. Ry., [1911] 1 K. B. 551.

798. Offer not less than sum awarded—Offer under Lands Act, 1845, s. 38—Vendors liable for costs.]—LASCELLES v. SWANSEA SCHOOL (1899), 69 L. J. Q. B. 24; 63 J. P. 742.

was less than the sum offered;—*Held*: neither party was entitled to costs.—*ONTARIO & QUEBEC RY. CO. v. PHILBRICK* (1886), 12 S. C. R. 288.—*CAN.*

l. Award equal to previous offer—Owner not entitled to costs—Public Works Act, 1900, s. 99.]—PUBLIC WORKS MINISTER v. HART, [1904] A. C. 259; 73 L. J. P. C. 53; 19 N. S. W. W. N. 190.—*AUS.*

m. Compensation fixed by jury—Greater than tender but less than award—Owner not entitled to costs—Public Works Act, 1900, s. 116.]—PACIFIC CO-OPERATIVE STEAM COAL CO., LTD. v. NEW SOUTH WALES RAILWAY COMRS., [1904] A. C. 795; 20 N. S. W. W. N. 186.—*AUS.*

PART VII. SECT. 5, SUB-SECT. 12. C.

790 i. Offer must be plain, clear & unconditional—Not of damages & of way—Promoters liable for
The promoters had offered claimants damages, & a right of way over lands, in exchange for the lands taken;—*Held*: (1) as the offer of the co. was not of a definite sum of money, they were not entitled to costs under Dominion Railway Act; (2) claimants had not waived their rights to oppose the payment of costs to the company by their acquiescence in the award.—*Re GRAND TRUNK RY. CO. & ASH, Re GRAND TRUNK RY. CO. & ANDERSON* (1913), 24 O. W. R. 522; 4 O. W. N. 985; 10 D. L. R. 824.—*CAN.*

795 i. Award less than previous offer—Owner not entitled to costs.]—*Re VANCOUVER, VICTORIA & EASTERN RY.*

& NAVIGATION CO. & MILSTED (1907), 13 B. C. R. 187.—*CAN.*

*j. — — — When rule does not apply.]—*The rule that, when the sum awarded is less than tender, the costs shall be borne by the owner, does not apply to the costs of an appeal to the ct., they being then in its discretion.—*Re CREDIT VALLEY RY. CO. & SPRAGGE* (1876), 24 Gr. 231.—*CAN.*

*k. — Promoters agree to crossing over land taken—Neither party allowed costs.]—*A ry. co. made an offer which was not accepted & the matter was referred to arbn. On the day the arbitrators met the co. agreed to a crossing over the land taken in addition to the money offered & this was considered by the arbitrators in their award, in which the amount awarded

799. Award greater than amount offered—Award in respect of claim including offer & no offer—Promoters liable for costs on claim for which compensation awarded.]—In an arbn. under Lands Act, 1845, ss. 25-37, if the umpire award, in respect of part of the landowner's claim for compensation, a larger sum than the co. offer in respect of that part, & at the same time award, as to another distinct part of the claim, in respect of which the co. offer nothing, that the landowner has suffered no damage, the landowner is entitled, under s. 34, to those costs only of the arbn. which are incident to that part of his claim in respect of which compensation has been awarded.—*R. v. BIRAM* (1852), 17 Q. B. 969; 117 E. R. 1552; *sub nom. R. v. BYROM, Re MILLS v. MIDLAND RY. CO.*, 16 Jur. 640.

800. — Sole arbitrator appointed on death of umpire—Vendor entitled to costs as from initiation of arbitration.]—*R. v. MANLEY-SMITH* (1893), 63 L. J. Q. B. 171; 37 Sol. Jo. 841; 10 R. 611, D. C.

801. — In respect of lands taken compulsorily under Public Health Act, 1875 (c. 55), ss. 175-178—Incorporating Lands Clauses Acts—Vendor entitled to costs under Lands Clauses Acts.]—*R. v. SMITH* (1878), 26 W. R. 812, D. C.

799 i. Award greater than amount offered—Promoters liable—Public Works Act, 1912, s. 118.]—*RAILWAYS & TRAMWAYS CHIEF COMR. v. HUTCHINSON*, [1914] A. C. 581; 31 N. S. W. W. N. 47.—**AUS.**

n. — Tender reasonable—Claim extravagant.]—Where the tender was not unreasonable & the claim very extravagant, claimant was not given costs although the amount of award exceeded amount tendered.—*McLEOD v. R.* (1889), 2 Exch. C. R. 106.—**CAN.**

o. — Promoters liable—No discretion in arbitrators—Railway Act, s. 199.]—*Re TVERT & CANADIAN NORTHERN RY. CO.* (1913), 25 W. L. R. 188.—**CAN.**

p. — — — — —.]—*DAGENAIS v. CANADIAN NORTHERN RY. CO.* (1913), 25 W. L. R. 960; 11 D. L. R. 494.—**CAN.**

q. — Award in respect of claim & interest.]—A ry. co., after notice to treat, entered into possession by arrangement, the co. undertaking to pay interest on the compensation when ascertained from the date of possession. The co. made a tender in full of all claims of every description, which was refused, & the question referred to arbn. The umpire fixed compensation at a less sum than tender with interest until payment. No award was made as to costs:—*Held*: tender included not only compensation, but also interest which the co. had undertaken to pay, & as sum awarded by the umpire, with interest, exceeded the tender, the co. were liable for pursuer's costs.—*RIDDELL v. LANARKSHIRE & AYLESFIRE RY.* (1904), 6 F. (Cl. of Sess.) 432.—**SCOT.**

r. Award not greater than amount offered—Owner not entitled to costs—Railway Act, 1888.]—*Re SHIBLEY & NAPANEL, TAMWORTH & QUEBEC RY. CO.* (1889), 13 P. R. 237.—**CAN.**

PART VII. SECT. 5, SUB-SECT. 13.—A.

s. Court can review master's taxation—Under Dominion Railway Act, s. 8.]—Under above sect. an appeal lies from the taxing officer to the judge.—*Re McRAE & ONTARIO & QUEBEC RY. CO.* (1887), 12 P. R. 327.—**CAN.**

t. Power of judge to tax—Reference to taxing officer—Railway Act, 1888.]—Under the above Act it is not for the judge to tax in the first instance, but to refer the bill to an officer conversant with taxation practice to ascertain what has been properly

incurred; & his conclusions may be adopted or varied by the judge.—*Re OLIVER & BAY OF QUINTE RY. CO.* (1901), 7 O. L. R. 567; 24 C. L. T. 296; 2 O. W. R. 953; 3 O. W. R. 318.—**CAN.**

u. Judge when taxing—Acts ministerially—Cannot decide right to costs.]—In taxing costs of an arbn. under Railway Act, 1906, the judge acts ministerially & cannot decide as to the right to costs.—*BLACKWOOD v. CANADIAN NORTHERN RY. CO.* (1910), 20 Man. L. R. 161.—**CAN.**

w. Taxing master—Acts ministerially.]—The function of the Master in taxing costs under Lands (Taxation of Costs) Act, 1895, is ministerial only, & not judicial, & his certificate, allowing such costs, cannot be quashed on *certiorari*.—*R. (SECRETARY OF STATE FOR WAR) v. GOTT*, [1905] 2 I. R. 121.—**IR.**

y. When no offer made—Claimant accepts a certain sum as compensation—No jurisdiction in court to order taxation.]—*MAHER v. GREAT SOUTHERN & WESTERN RY. CO.* (1849), 13 I. L. R. 364.—**IR.**

z. Costs of re-appraisalment.]—Comrs. were appointed under an Act to re-appraise lands taken for ry. purposes in D. Cy., & the Act provided that the re-appraisalment, together with costs theretofore incurred should be a county charge:—

Held: costs for services before the comrs. for re-appraisalment could not be taxed, as the Act provided only for those incurred prior to its passing.—*Re WESTERN COUNTIES RY. CO., Ex p. HARDY* (1879), 13 N. S. R. (1 R. & G.) 176.—**CAN.**

a. Fees to expert witnesses.]—Fees actually paid to expert witnesses should not necessarily be allowed, but only fair & reasonable fees for the time occupied in attending before the arbitrators & in qualifying themselves to give evidence.—*Re CANADIAN NORTHERN RY. CO. & ROBINSON* (1908), 8 W. L. R. 137; 17 Man. L. R. 579; 8 Can. Ry. Cas. 244.—**CAN.**

b. Arbitrator's fees.]—The owner was entitled to tax the fees paid to the arbitrators on taking up the award.—*Re CANADIAN NORTHERN RY. CO. & ROBINSON* (1908), 8 W. L. R. 137; 17 Man. L. R. 579.—**CAN.**

c. Tariff prescribed for ordinary litigation—Taxing officer not bound by.]—The tariff of costs prescribed for

802. When no offer made—In consequence of claimant not giving notice under Lands Act, 1845, s. 68, of amount claimed—Agreement to appoint sole arbitrator—Claimant entitled to costs.]—*MARTIN v. LEICESTER WATERWORKS CO.* (1858), 3 H. & N. 463; 27 L. J. Ex. 432; 31 L. T. O. S. 265; 157 E. R. 553.

Annotation:—*Mentd. Rhodes v. Airedale Drainage Comrs.* (1874), 43 L. J. C. P. 323.

SUB-SECT. 13.—TAXATION AND RECOVERY OF COSTS.

A. Taxation.

See Lands Clauses (Taxation of Costs) Act, 1895 (c. 11), s. 1.

See, generally, ARBITRATION, Vol. II., pp. 605-610.

803. When taxing master bound to tax—Under Lands Act, 1869, s. 1—Not when arbitration before 1869.]—*DOULTON v. METROPOLITAN BOARD OF WORKS* (1870), L. R. 5 Q. B. 333; 39 L. J. Q. B. 165; 18 W. R. 790.

Annotations:—*Reid. Wombwell v. Barnsley Corpn.* (1877), 36 L. T. 708; *Re Burdekin*, [1895] 2 Ch. 136.

ordinary litigation may be accepted as a general guide for taxing the costs of an arbn.; but when, in the opinion of the taxing officer, the fees fixed by that tariff are inadequate compensation for the services necessarily & reasonably rendered, he is not bound by it & should not follow it.—*Re CANADIAN NORTHERN RY. CO. & ROBINSON* (1908), 17 Man. L. R. 579.—**CAN.**

d. As between party & party—On liberal scale—Railway Act, 1911, s. 58.]—The "costs of the arbn." mentioned in above sect. are to be taxed as between party & party, but on a liberal scale.—*Re CANADIAN NORTHERN PACIFIC RY. CO. & BRADSHAW* (1914), 19 B. C. R. 236.—**CAN.**

e. — Winnipeg Charter.]—The costs of the arbn. which under above Charter arbitrators may award are ordinary costs between party & party; a direction by the ct. that the "full costs of & incidental to the arbn. are to be taxed" does not go beyond that.—*RIPSTEIN v. WINNIPEG*, [1919] 3 W. W. R. 730.—**CAN.**

f. Taxation as between solicitor & client—Municipal Act, 1887, s. 399.]—Arbitrators directed that costs of owners should be taxed on the scale of the high ct. "as between solr. & client":—*Held*: (1) the judicial discretion of the arbitrators was exercised when costs were adjudged according to a certain scale; (2) the arbitrators had no power to give costs "between solr. & client."—*Re BEATY & CITY OF TORONTO* (1889), 13 P. R. 316.—**CAN.**

g. — Dominion Railway Act.]—In expropriation cases costs should be taxed liberally in favour of the proprietor; but where the Acts mention "costs" only, & not "full costs," costs as between solr. & client are not intended.—*Re BRONSON & CANADA ATLANTIC RY. CO.* (1890), 13 P. R. 440.—**CAN.**

h. — — — — —.]—On the principle that where land is compulsorily taken, costs should be taxed on a larger scale than in ordinary litigation, they should be taxed on solr. & client basis.—*Re FALSE CREEK FLATS (No. 2)* (1912), 17 B. C. R. 376; 8 D. L. R. 422.—**CAN.**

i. — Railway Act, 1906, s. 2.]—Under above sect. the costs of an owner who succeeds in an arbn. should be taxed as between solr. & client.—*Re CANADIAN NORTHERN RY. CO. & ROBINSON* (1908), 17 Man. L. R. 579; 8 Can. Ry. Cas. 244.—**CAN.**

Sect. 5.—Procedure by arbitration: Sub-sect. 13, A. ct. 1.]

804. ——— Not unless claimant entitled to costs under s. 34.]—*FITZHARDINGE v. GLOUCESTER & BERKELEY CANAL CO.*, No. 793, *ante*.

805. ——— Lands taken under Public Health Act, 1875 (c. 55)—Award silent as to costs—Taxation ordered.]—*Ex p. RAYNER* (1878), 3 Q. B. D. 446; 47 L. J. Q. B. 660; 39 L. T. 232; 42 J. P. 807.

806. Court cannot review master's taxation—Under Lands Act, 1845—Where vendor takes up award—& has paid umpire's fees.]—*SHREWSBURY (EAIL) v. WIRRAL RAILWAYS COMMITTEE*, No. 787, *ante*.

807. ——— Under Lands Act, 1869.]—*SANDBACK CHARITY TRUSTEES v. NORTH STAFFORDSHIRE RY. CO.* (1877), 3 Q. B. D. 1; 47 L. J. Q. B. 10; 37 L. T. 391; 26 W. R. 229, C. A.

Annotations:—Distd. Hayward v. Mutual Reserve Assn., [1891] 2 Q. B. 236. *Refd. Shrewsbury v. Wirral Ry. Committee*, [1895] 2 Ch. 813; *Malvern U. D. C. v. Malvern Link Gas Co.* (1900), 83 L. T. 326; *Re Cannings & Middlesex County Council*, [1907] 1 K. B. 51. *Mentd. Rangoon Botatoung Co. v. Rangoon Collector* (1912), 28 T. L. R. 540.

808. ——— Under Lands Clauses (Taxation of Costs) Act, 1895 (c. 11)—Taxation by master as persona designata on request of either party—Not in official capacity.]—*Re CANNINGS, LTD. & MIDDLESEX COUNTY COUNCIL*, [1907] 1 K. B. 51; 76 L. J. K. B. 44; 95 L. T. 766; 71 J. P. 46; 23 T. L. R. 43; 51 Sol. Jo. 45; 5 L. G. R. 442, C. A.

809. Surveyors' fees—Ryde's Scale not customary.]—*DERENHAM v. KING'S COLLEGE, CAMBRIDGE* (1884), Cab. & El. 438; 1 T. L. R. 170.

810. ———.]—*BROCKLEBANK v. LANCASHIRE & YORKSHIRE RY. CO.* (1887), 3 T. L. R. 575, C. A.

811. Umpire's solicitors' costs of preparing award—Promoters may tax after payment under Solicitors Act, 1843 (c. 73), s. 38.]—*Re COLLYER-BRISTOW & CO.*, No. 784, *ante*.

812. Umpire's fees—Scale fees contrary to practice of court.]—*Re JAMES (FRANK) & SONS* (1903), 38 L. J. N. C. 264.

Annotations:—Distd. Re Porter, Amphlett & Jones, [1912] 2 Ch. 98. *Mentd. Re Evans*, [1905] 1 Ch. 290.

813. Arbitrators' & umpires' fees—Payment by promoters to take up award—Promoters must show that fees are unreasonable & extortionate—Certificate of taxing master not evidence that amounts disallowed are unreasonable.]—*Pltfs.*, who were parties to an arbn., paid the sum of £476 12s. to the arbitrators & umpire for their fees, in order to take up the award. Upon taxation of the costs of the arbn. the taxing master disallowed £119 5s. of that sum. In an action brought by *pltfs.* to recover back from the arbitrators & umpire the amount so disallowed:—*Held*: (1) in order to succeed *pltfs.* must show that the fees charged were unreasonable & extortionate; (2) the certificate of the taxing master was not evidence that the amounts disallowed by him were unreasonably charged. — *LLANDRINDOD WELLS WATER CO. v. HAWKSLEY* (1904), 68 J. P. 242; 20 T. L. R. 241, C. A.

814. Special case stated by arbitrator—Under Arbitration Act, 1889 (c. 49), s. 19—Costs may be taxed under Lands Act, 1845, s. 34.]—*SIDNEY v. NORTH EASTERN RY. CO.*, [1916] 2 K. B. 760; 86 L. J. K. B. 142; 116 L. T. 444; 61 Sol. Jo. 28.

Annotation:—Mentd. Fraser v. Fraserville City, [1917] A. C. 187.

B. Recovery.

See, generally, ARBITRATION, Vol. II., pp. 610-612.

815. By action—Although no notice to company of compensation claimed—& no offer by promoters.]—*MARTIN v. LEICESTER WATERWORKS CO.* (1858), 3 H. & N. 463; 27 L. J. Ex. 432; 31 L. T. O. S. 265; 157 E. R. 553.

Annotation:—Mentd. Rhodes v. Airedale Drainage Comrs. (1874), 43 L. J. C. P. 323.

816. Condition precedent to recovery—Not taxation—Under Public Health Act, 1848.]—*HOLDSWORTH v. WILSON*, No. 704, *ante*.

817. ——— Under Lands Act, 1845.]—Lands Act, 1845, contained special provisions with regard to claims for compensation for lands affected by the works of a railway, & directed that, except in certain specified cases, compensation should be awarded with costs. A special Act declared that the provisions of the general Act were, except where expressly varied by the special Act, incorporated with it. The general Act provided the forms of proceedings in arbn., such as the appointment of arbitrators by the contending parties, & the appointment of an umpire by the arbitrators, & declared that compensation might be recovered with costs. The special Act directed that arbn. conducted under its provisions should be conducted by an arbitrator appointed by the Board of Trade, but contained no specific directions as to the award of costs. An arbn. of this sort took place under the special Act. The arbitrator awarded compensation, but said nothing as to costs:—*Held*: (1) claimant was entitled to costs, for that the substitution of one form of proceeding in the arbn. different from that in the general statute expressly varied the provisions of the general statute as to that matter, but did not repeal the provision as to costs in the general statute, nor affect the general rule that the party succeeding in such an arbn. should recover costs; (2) the right to costs was entirely independent of the taxation of them, & an action could be maintained for the costs though the amount of such costs had not been previously settled or ascertained by taxation, & consequently an order for the taxation was a valid order.

In construing Acts of Parliament of this kind, & adjusting the general provisions in the general Act to the particular provisions of the special Act, considerations of reason & justice & the universal analogy of such provisions in similar Acts of Parliament, ought to have much weight & force (*LORD SELBORNE, C.*).—*METROPOLITAN DISTRICT RY. CO. v. SHARPE* (1880), 5 App. Cas. 425; 50 L. J. Q. B. 14; 43 L. T. 130; 44 J. P. 716; 28 W. R. 617, H. L.

Annotations:—As to (1) Refd. Capell v. G. W. Ry. (1883), 11 Q. B. D. 345. *As to (2) Refd. Fletcher v. Birkenhead Corp.*, [1906] 1 K. B. 605. *Generally, Mentd. G. W. Ry. v. Swindon & Cheltenham Extension Ry.* (1882), 22 Ch. D. 677; *Shrewsbury v. Wirral Ry. Committee*, [1895] 2 Ch. 812; *West Ham Grdus. v. St. Matthew, Bethnal Green*, [1896] A. C. 477; *Re Barker's Settltmt. Klocker v. Vernon-Jones*, [1920] 1 Ch. 527.

818. ——— Not execution of conveyance—Taxed costs payable within reasonable time.]—Where the amount of compensation payable to the owner of land compulsorily taken under the Lands Acts, 1845 & 1869, is settled by arbn., & the amount & the costs of the arbn. are awarded to the owner, the taxed costs of the arbn. become payable to him within a reasonable time, & the execution of the conveyance by him of the lands taken is not a condition precedent to payment of such costs.—*CAPELL v. GREAT WESTERN RY. CO.* (1883), 11 Q. B. D. 345; 52 L. J. Q. B. 345; 48 L. T. 505; 31 W. R. 555, C. A.

Annotations:—Consd. L. C. C. v. Campbell (1890), 6 T. L. R. 420. *Refd. Davis v. Witney U. D. C.* (1899), 63 J. P. 279; *L. & N. W. Ry. v. Walker*, [1903] A. C. 289.

819. Vendors not entitled to lien on land sold—For costs payable by promoters.]—FERRERS (EARL) *v.* STAFFORD & UTTOXETER RY. CO. (1872), L. R. 13 Eq. 524; 41 L. J. Ch. 362; 26 L. T. 652; 20 W. R. 478.

*Annotation:—*Reid. *Capell v. G. W. Ry.* (1882), 9 Q. B. D. 459.

820. Solicitor not qualified to act—Costs not recoverable by solicitor or client—Attorneys & Solicitors Act, 1874 (c. 68), s. 12.]—Re FOWLER *v.* MONMOUTHSHIRE RY. & CANAL CO. (1879), 4 Q. B. D. 334; 48 L. J. Q. B. 457; 41 L. T. 159; 27 W. R. 659.

*Annotations:—*Consd. *Irvin v. Sanger* (1888), 58 L. J. Q. B. 64; *Williams v. Vere* (1894), 10 T. L. R. 477; *Re Sweeting*, [1898] 1 Ch. 268; *Browne v. Barber*, [1913] 2 K. B. 553.

821. Promoters cannot recover costs paid to claimant—On subsequent discovery that claimant has not title or interest claimed.]—LONDON COUNTY COUNCIL *v.* CAMPBELL (1890), 6 T. L. R. 420.

822. Settlement during arbitration—Undertaking by counsel to pay arbitrators' fees—Arbitrators can fix fees and recover from party liable.]—TUCKETT *v.* ISLE OF THANET ELECTRIC TRAMWAYS & LIGHTING CO., LTD. (1901), *Times*, Dec. 21.

SECT. 6.—PROCEDURE BY JURY.

See Lands Act, 1845, ss. 38–58.

SUB-SECT. 1.—NOTICE OF INTENTION TO SUMMON JURY.

See Lands Act, 1845, s. 38.

823. Must be given under Lands Act, 1845, s. 38—When land about to be taken or injuriously affected—Not when compensation sought under s. 68 for land already taken or injuriously affected.]—Lands Act, 1845, s. 38, applies only to case where the promoters of an undertaking are about to take or injuriously affect land in the possession of claimant & in such case they are bound to give claimant ten days' notice of their intention to cause a jury to be summoned to assess compensation, but such notice is not required where the promoters have already taken possession of or injuriously affected land, but for which no compensation has been made. Such a case is regulated by s. 68, & if claimant desires the question to be settled by a jury & states the amount which he claims, the promoters are bound to pay the whole amount so claimed, or to issue their warrant for summoning a jury within twenty-one days.—*RAILSTONE v. YORK, NEWCASTLE & BERWICK RY. CO.* (1850), 15 Q. B. 404; 19 L. J. Q. B. 464; 14 Jur. 1021; 117 E. R. 512.

*Annotations:—*Consd. *Richardson v. S. E. Ry.* (1851), 11 C. B. 154; *Re Hayward & Met. Ry.* (1864), 4 B. & S. 787. *Reid. S. E. Ry. v. Richardson* (1852), 15 C. B. 810; *Falconer v. Aberdeen Ry.* (1853), 1 W. R. 268; *Met. Ry. v. Turnham* (1863), 14 C. B. N. S. 212.

824. ———.]—(1) An offer of compensation in respect of lands injuriously affected by the execution of works coming within Lands Act, 1845, may be made at any time before the notice of the time & place of inquiry is given to the person claiming compensation under s. 68,

such notice being given as required by s. 46, not less than ten days before the inquiry is to take place.

(2) S. 51, which provides for the costs of inquiries before a jury, applies to inquiries taken under s. 68 as to lands injuriously affected.

(3) S. 38, which provides for giving notice of the summoning of the jury, does not apply to inquiries taken under s. 68 as to lands injuriously affected.

(4) The promoters of the undertaking may make fresh offers of compensation so long as they make them before giving the requisite notice of the time & place of inquiry.

(5) Where claimant, under s. 68 claims one sum as compensation for premises having been injuriously affected & another in respect of loss of business, it is not necessary in the offer to mention one lump sum, but the promoters may offer one sum as compensation in respect of the premises having been injuriously affected & another as compensation in respect of loss of business, & if the jury give the same sum in the aggregate as the sum offered, although they reverse the position of the two sums, claimant cannot get the costs of the inquiry.—*Re HAYWARD & METROPOLITAN RY. CO.* (1864), 4 B. & S. 787; 33 L. J. Q. B. 73; 9 L. T. 680; 28 J. P. 182; 10 Jur. N. S. 418; 12 W. R. 577; 122 E. R. 655.

*Annotations:—*As to (2) *Reid. Cobb v. Mid-Wales Ry.* (1866), 30 J. P. 584. As to (4) *Reid. Healey v. Thames Valley Ry.* (1864), 5 B. & S. 769; *Re Fitzhardinge & Gloucester & Berkeley Canal Co.* (1872), 41 L. J. Q. B. 316. As to (5) *Reid. Re Balls & Metropolitan Board of Works* (1866), 7 B. & S. 177.

See, further, Part IX., Sect. 1, post.

825. Waiver of notice—Claimant appearing & not protesting.]—An Act of Parliament authorised a railway co. to take lands necessary for the railway works, on payment or tender of such sums of money as should have been agreed upon, or awarded by a jury in the manner directed by the Act; by the sect. of the Act for settling differences between the co. & owners & occupiers of, or persons interested in, lands to be taken, it was enacted that if any such person should not agree with the co. as to the amount of purchase-money, or should refuse to accept such purchase-money as should be offered by the co., or should, for twenty-one days after notice to him in writing, neglect or refuse to treat, or should not agree with the co. for the sale of his interest, etc., the co. might issue a warrant to the sheriff to summon a jury to assess the sum to be paid for the purchase of the lands, & the sheriff should give judgment for such sum. The co. issued a warrant, purporting to be pursuant to the powers given by the Act & requiring the sheriff to summon a jury to assess the value of pltf.'s land, etc. The jury was summoned & assessed the value; the owner of the land attending & protesting that the co. had no right to take his lands, as not being described in the schedule to the Act. An inquisition was recorded, purporting to be taken pursuant to the Act, on the oaths of jurors duly impanelled, in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid for the property particularised in the warrant & authorised by the Act to be taken for the railway; whereupon the sheriff, in pursuance of the Act, gave judgment for that sum.

PART VII. SECT. 6, SUB-SECT. 1.

k. Must be given under Lands (Scot.) Act, 1845, s. 40.]—Above sect. is imperative & not merely directory, & applies to special as well as common juries.—*LANG v. GLASGOW COURT HOUSE COMRS.* (1871), 9 Macph. (Ct. of Sess.) 768; 43 Sc. Jur. 422.—SCOT.

825 i. Waiver of notice—Claimant appearing & not protesting.]—A person entitled to compensation in respect of premises taken under Lands (Scot.) Act, 1845, objected to the trial proceeding on day fixed because he had not received 10 days' notice in writing under Lands (Scot.) Act, 1845, s. 40:—

Held: he was barred from maintaining his objection by appearing before the Sheriff & agreeing to the fixing of the day, & by otherwise implying that he dispensed with the statutory notice.—*LANG v. GLASGOW COURT HOUSE COMRS.* (1871), 9 Macph. (Ct. of Sess.) 768; 43 Sc. Jur. 422.—SCOT.

Sect. 6.—Procedure by jury: Sub-sects. 1 & 2, A., B. (a), (b) & C.]

Neither the warrant nor inquisition stated that the owner had refused to treat, or had not agreed with the co. for the sale of his land, nor that the co. had served on him the notice required by the Act to be given: but it appeared *aliunde* that he did not agree with the co., & that he had received the requisite notices:—*Held*: (1) sufficient facts were stated in the inquisition & warrant to show the jurisdiction of the sheriff & jury; (2) the impaneling a jury & an assessment by them, being facts inconsistent with an agreement, necessarily imply non-agreement, & no inquisition is defective for not stating a fact which is necessarily implied by those that are stated; (3) notice was waived by the party's appearing & not protesting for want of notice.—*TAYLOR v. CLEMSON* (1844), 11 Cl. & Fin. 610; 8 Jur. 833; 8 E. R. 1233, H. L.

Annotations:—*As to* (1) *Refd.* *Ostler v. Cooke* (1849), 13 Q. B. 143; *Ostler v. Cooke* (1852), 18 Q. B. 831; *Sparrow v. Oxford, etc. Ry.* (1852), 2 De G. M. & G. 94. *As to* (2) *Refd.* *R. v. Pomfret* (1844), 8 J. P. 676; *R. v. Stainforth* (1847), 11 Q. B. 66; *R. v. Hodgson* (1852), 7 Exch. 915. *As to* (3) *Refd.* *R. v. Preston* (1848), 12 Q. B. 816; *R. v. Aberdare Canal Co.* (1850), 14 Jur. 735.

826. — Effect of—Claimant cannot object to inquisition for not setting out notice or waiver.]—*R. v. SOUTH HOLLAND DRAINAGE COMMITTEE MEN* (1838), 8 Ad. & El. 429; 1 Per. & Dav 79; 1 Will. Woll. & Il. 647; 8 L. J. Q. B. 64; 112 E. R. 901.

Annotations:—*Consd.* *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610. *Refd.* *R. v. Swansea Harbour Trustees* (1839), 8 Ad. & El. 439; *R. v. Stainforth* (1847), 11 Q. B. 66; *R. v. Surrey JJ.* (1870), L. R. 5 Q. B. 466; *R. v. Williams, Ex p. Phillips*, [1914] 1 K. B. 608. *Mentd.* *R. v. Manchester & Leeds Ry.* (1838), 1 Per. & Dav. 164; *R. v. Salop J.J.* (1859), 29 L. J. M. C. 39; *R. v. Sheward* (1880), 5 Q. B. D. 179.

SUB-SECT. 2.—ISSUE OF WARRANT FOR JURY.

See Lands Act, 1845, s. 38.

A. By whom Application made.

827. Owners of land damaged—Commissioners empowered to apply for issue on landowners refusing to treat—Special Act.]—*Re EAU BRINK DRAINAGE* (1830), 3 Sim. 435; 57 E. R. 1061.

B. To whom Warrant addressed.

(a) When Sheriff Interested Party.

See Lands Act, 1845, s. 39.

828. General rule—Disqualifying interest must be direct or certain—Not merely remote or contingent.]—The interest which at common law disqualifies an officer from acting in a judicial inquiry must be direct & certain & not merely remote or contingent, & same principle must be applied to Lands Act, 1845, s. 39. Where, at the time of the summoning of a jury & the taking of an inquisition before the sheriff as to the amount of compensation to be paid for land taken by a railway co. under the powers of their Act of Parliament, there was an executory agreement not yet carried out, by which the co. would ultimately become amalgamated with another railway co., & the sheriff was a shareholder in the latter co.:—*Held*: the sheriff was not interested in the matter in dispute within the above sect. so as to invalidate the proceedings.—*R. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1867), L. R. 2 Q. B. 336; 36 L. J. Q. B. 171; 16 L. T. 173; 31 J. P. 453; 15 W. R. 676.

829. To coroner—Unless disqualification of sheriff waived by claimant—No objection made till

after verdict.]—*Ex p. BADDELEY* (1849), 5 Ry. & Can. Cas. 542; 5 Dow. & L. 575.

Annotations:—*Refd.* *Grand Junction Canal Co. v. Dimes* (1850), 2 H. & Tw. 92; *Ex p. Stoeple Morden Overseers* (1855), 19 J. P. Jo. 292.

830. — — —.]—*R. v. WARWICKSHIRE (SHERIFF), ALSTON ESQ., & BIRMINGHAM TOWN COUNCIL.* (1855), 24 L. T. O. S. 211; 3 W. R. 164.

831. — — Disqualification not taken away by local Act.]—*Ex p. LANT* (1855), 19 J. P. Jo. 36.

832. — Sheriff shareholder in company requiring land—Not when request made by applicant after promoters' refusal.]—(1) By a railway Act it was enacted that if any person interested in lands affected by the execution of the Act should not agree with the co. as to the amount of purchase-money or compensation, etc., & should request that the matter in dispute be submitted to the determination of a jury, the co. should issue a warrant to the sheriff or sheriffs of the county or city where the lands in question should be situate, etc.; & if such sheriff or sheriffs should be a shareholder or shareholders in the co., then to any of the coroners of the county, etc., commanding such sheriff, etc. to impanel a jury, to inquire & assess, etc.:—*Qu.*: whether this enactment would apply in a case where the office of sheriff was constituted of two persons, & where one only of such persons was a shareholder in the co.

By a subsequent Act extending the line of railway, it was enacted, that in cases of dispute between the co. & parties claiming compensation, wherein the co. did not upon request, etc., within twenty-one days, issue their warrant to the sheriff or sheriffs of the county or city where, etc., it should be lawful for the party so having given notice himself to send a request in writing to the sheriff, etc., according to the tenor of the former Act; & the sheriff, etc. should thereupon impanel a jury, etc.:—*Held*: (2) the former enactment did not apply in a case where a party proceeded under the latter Act, so as to render void the proceedings held before the sheriff, the former enactment being confined to cases where the co. themselves issued their warrant, which they were not to direct to one of their own shareholders, & the latter embracing cases in which the co. having neglected to issue the warrant, the party in dispute with them might call upon the sheriff to hold an inquisition, as such party would have no means of knowing whether or not the sheriff was a shareholder; (3) where the co. appeared by their counsel before the sheriff & jury at the holding of the inquisition, without objection, they had waived any such objection; (4) *Qu.*: whether such proceedings would have been avoidable if objected to at the proper time.

By the first Act it was further enacted, that the jury should inquire, etc., & give a verdict for the sum to be paid for the purchase of land, & also the sum to be paid by way of satisfaction, etc. for goodwill, etc., & that such satisfaction should be inquired into, & assessed, separately & distinctly from the value of the land. By the second Act it was further enacted, that in case any dwelling house, etc., within fifty feet from the railway should be deteriorated in value, & the owner, etc. should require the co. to purchase same, the co. should treat for the purchase & for the compensation, etc., for any loss, etc. in respect of any tenant's fixtures, etc.; & in case the parties could not agree as to the value of such dwelling house, etc., or as to the amount of such compensation, etc., then the amount should be ascertained by the verdict of a jury in the manner described in the former Act, etc., provided that no party should be entitled to

receive compensation unless the jury should by their verdict determine that the property had been deteriorated in value by the construction of the railway. Pltf., in an action upon a judgment founded upon an inquisition to recover, under the last-mentioned sect., the purchase-money of a house, & compensation for tenant's fixtures, etc., stated that the jury gave a verdict for £250 for the purchase of the house, & also by way of satisfaction, etc., for all damage in respect of the tenant's fixtures. Deft. pleaded that pltf. adduced evidence at the inquisition, not only of the loss & damage in respect of goodwill, tenant's fixtures, etc., but also of certain loss & damage in respect of the dwelling house, by reason of the construction of the railway; that the jurors did assess & give a verdict for the sum of £250 for the purchase of the dwelling house, & also by way of satisfaction, etc. for the several losses, etc. in the plea mentioned, whereby the inquisition, verdict & judgment were void:—*Held*: (5) the mere fact of pltf.'s adducing such evidence, & the receiving thereof by the sheriff, did not affect the validity of the verdict, as such evidence might have been given to show that the house had been deteriorated, which was necessary to give jurisdiction to the sheriff & jury; (6) the verdict, as stated in the declaration, excluded the possibility of any damages being given for the deterioration of the house by the construction of the railway; (7) the enactment in the first Act as to separate assessments, was directory only, & not in the nature of a condition.

By the first Act it was provided, that if the jury gave the same or a greater sum than the co. had previously offered, the co. should pay all the costs of the inquisition; if less than had been previously offered, that each party should pay half the costs, & that if, by reason of absence abroad or any other disability, any person should have been prevented from treating with the co., they, the co., should pay the whole costs; the second Act was silent as to costs:—*Held*: (8) a party proceeding under the second Act, in a case not falling within the cases mentioned in the first, was not entitled to costs. —*CORRIGAL v. LONDON & BLACKWALL RY. CO.* (1813), 5 Man. & G. 219; 2 Dowl. N. S. 851; 3 Ry. & Can. Cas. 111; 6 Scott. N. R. 241; 12 L. J. C. P. 209; 134 E. R. 545.

Annotations:—*As to* (5) *Refd.* East & West India Docks & Birmingham Ry. v. Gatlke (1851), 20 L. J. Ch. 217; South Staffordshire Ry. v. Hall (1851), 17 L. T. O. S. 2; R. v. L. & N. W. Ry. (1854), 3 E. & B. 443; Mortimer v. South Wales Ry. (1859), 1 E. & E. 375; Long Eaton Recreation Grounds Co. v. Mid. Ry., [1902] 2 K. B. 574. *As to* (7) *Refd.* Re Bradshaw & East & West India Docks & Birmingham Junction Ry. (1848), 12 Q. B. 562. *As to* (8) *Consd.* R. v. London & Blackwall Ry. (1845), 4 Ry. & Can. Cas. 119. *Refd.* Cobb v. Mid-Wales Ry. (1866), 35 L. J. Q. B. 117.

833. — Certiorari will issue to bring up inquisition—Notwithstanding Lands Act, 1845, s. 145.]—By Lands Act, 1845, s. 39, the coroner should summon a jury to take an inquisition if the sheriff be interested in the transaction, as being a shareholder in the co. requiring the land, & a *certiorari* will issue to bring up the inquisition although by s. 145 no proceeding, etc., shall be quashed for want of form, nor shall same be removed by *certiorari*.—*R. v. LONDON & NORTH WESTERN RY. CO.* (1863), 3 New Rep. 140; 9 L. T. 423; 12 W. R. 208.

When certiorari will issue.]—*See, generally*, Subsect. 8, C., (a), *post*.

834. Where one of two sheriffs interested—To disinterested sheriff—Not coroner.]—*LETSON v. BICKLEY* (1816), 5 M. & S. 144; 105 E. R. 1004. *Annotation*:—*Refd.* Worsley v. South Devon Ry. (1851), 16 Q. B. 539.

(b) *When Under-Sheriff Interested Party.*

835. To sheriff—Sheriff appointing another person to act—Appointment delayed till day before inquisition—Inquisition vitiated.]—*Re WORSLEY, R. v. DEVONSHIRE (SHERIFF)* (1849), 13 L. T. O. S. 130.

836. — Warrant properly addressed—Under-sheriff wrongly proceeding to execute—Promoters not liable.]—*WORSLEY v. SOUTH DEVON RY. CO.* (1851), 16 Q. B. 539; 20 L. J. Q. B. 254; 16 L. T. O. S. 363; 17 L. T. O. S. 60; 15 Jur. 970; 117 E. R. 986.

Annotations:—*Mentd.* R. v. York, Newcastle & Berwick Ry. (1851), 17 L. T. O. S. 153; Salisbury v. G. N. Ry. (1852), 17 Q. B. 840; Tiverton & North Devon Ry. v. Loosmore (1884), 9 App. Cas. 480; Mercer v. Liverpool, St. Helens & South Lancashire Ry., [1903] 1 K. B. 652.

C. Form and Sufficiency of Warrant.

837. Precept must conform to notice upon which issued—Cannot issue to assess value of part—When notice to take whole of land.]—*STONE v. COMMERCIAL RY. CO.* (1839), 4 My. & Cr. 122; 1 Ry. & Can. Cas. 375; 3 Jur. 946; 41 E. R. 48, L. C.

Annotations:—*Refd.* Haynes v. Haynes (1861), 1 Drew. & Sm. 426; Eccl. Comrs. v. City of London Sewers Comrs. (1880), 14 Ch. D. 305. *Mentd.* Adams v. London & Blackwall Ry. (1850), 2 Mac. & G. 118; Hill v. G. N. Ry. (1854), 3 Eq. Rep. 324; Stretton v. Great Western & Brentford Ry. (1870), 40 L. J. Ch. 50; Richardson v. Elmit (1876), 2 C. P. D. 9.

838. Precept differing from requisition to promoters—Sufficiently correct for sheriff to act on.]—*WALKER v. LONDON & BLACKWALL RY. CO.* (1842), 3 Q. B. 744; 12 L. J. Q. B. 88; 7 Jur. 323; 114 E. R. 692; *sub nom.* R. v. MIDDLESEX (SHERIFF), *Re WALKER & LONDON & BLACKWALL RY.*, 3 Gal. & Dav. 549; 3 Ry. & Can. Cas. 396.

839. Variance in description of hereditaments in notice to treat & precept—Mere irregularity—Waived by appearing before jury summoned.]—*Ex p. BAILEY* (1852), Bail Ct. Cas. 66.

840. Form of warrant differing from wording of special Act—Addition of words “if any”—Jury authorised to find whether any damage sustained.]—*R. v. LANCASTER & PRESTON JUNCTION RY. CO.*, No. 653, *ante*.

841. Omission of specific identification of lands to be taken—Omission of notice of intention to take lands—Warrant sufficient if lands identified.]—A local drainage Act created the lords or ladies of three manors, or, in his, her or their absence, their agents appointed in writing under their hands, comrs. for executing the Act; it authorised the comrs. to take lands for the purposes of the drainage; & it contained clauses for that purpose to same effect as those in Lands Act, 1845, subsequently passed; & it provided that no person should be capable of acting as a comr. or agent for a comr. till he had made a declaration that he would duly execute the powers in the exercise of which he should act as comr. or agent. The three lords of the manors, by writing under their hands respectively, appointed defts. their agents, but without having first made the declaration. Defts. acted as comrs., first making the declaration, & gave pltf. a written notice that they required to take for the purposes of the Act, 3 acres, 1 r., 25 p., of his land; describing the specific acres, rood & perches. Pltf. refused to treat; & the comrs. thereupon issued a warrant to the sheriff of the county to summon a jury to assess the sum to be paid to pltf. for the purchase of 3 a., 1 r., 25 p. of land, required for the purposes of the Act; but the warrant did not recite or refer to the notice, nor describe specifically which 3 a., 1 r., 25 p. were required. Pltf. had two hundred acres of land in the district. Both the

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notice & warrant were in defts.' names as comrs. A jury was impanelled, & assessed the price of 3 a., 1 r., 25 p. pointed out to them, which were in fact the land specifically described in the notice. An inquisition was drawn up, reciting the warrant but not the notice, & not showing specifically in respect of which 3 a., 1 r., 25 p. of pliffs.' land the price was assessed. Pltf., who had throughout protested against the proceedings, refused to receive the price so assessed. Defts. paid it into the bank under the local Act, & entered on the land. Pltf. having brought an action against them:—*Held*: (1) the lords & ladies of the manors were comrs. by virtue of the local Act & if they did not choose to officiate might appoint agents for such time as they thought proper, which agents thereupon became comrs., & might issue notices & warrants in their own names, & were not bound to show on the face of their proceedings for what lord or lady they respectively acted; (2) such appointment of an agent was well executed though the lord or lady had not previously made the declaration required by the local Act; (3) the inquisition was good, though it did not, directly or by reference, specify the particular acres, rood & perches for which the comrs. were to pay.—*OSTLER v. COOKE* (1852), 18 Q. B. 831; 22 L. J. Q. B. 71; 19 L. T. O. S. 286; 17 Jur. 370; 118 E. R. 313, Ex. Ch.

Annotation:—Mentd. R. v. Aberdare Canal Co. (1850). 14 Jur. 735.

D. Mandamus to compel Issue.

842. General rule—Promoters compelled though funds exhausted.]—*R. v. CLERKENWELL IMPROVEMENT COMRS.* (1848), 12 L. T. O. S. 241; 12 J. P. Jo. 803.

843. — Lands Act, 1845, s. 68, applicable when possession taken under s. 85.]—*ADAMS v. LONDON & BLACKWALL RY. CO.*, No. 1097, *post*.

844. — Assessment by jury under Lands Act, 1845, s. 23—Mandamus proper remedy—On arbitration proceedings proving abortive.]—*LIND v. ISLE OF WIGHT FERRY CO.* (1862), 1 New Rep. 13; 7 L. T. 416.

Annotations:—Reid. Tiverton & North Devon Ry. v. Loosemore (1884), 9 App. Cas. 480. *Mentd. Nesbitt v. Mablethorpe U. D. C.*, [1918] 2 K. B. 1.

845. — Right not lost because no claim made—Or because company proceeding under s. 85.]—*R. v. METROPOLITAN RY. CO.* (1865), 13 L. T. 444.

846. Granted—Though condition precedent not performed—Bond to pursue claim & bear proportionate part of expenses not entered into—No evidence of demand & refusal.]—*R. v. NORTH UNION RY. CO.* (1840), 1 Ry. & Can. Cas. 729; 9 L. J. Q. B. 53.

847. — Provision for delivery of claims not complied with—Clause providing for summoning of jury in case of disagreement.]—*Re CLERKENWELL IMPROVEMENT COMRS.* (1847), 9 L. T. O. S. 197.

848. — When private Act entitles individuals to compensation for injury—To try whether any & what extent of damage.]—*R. v. BIRMINGHAM CANAL CO.* (1840), 4 Jur. 193.

849. —]—*R. v. PORTSMOUTH CORPN.* (1846), 7 L. T. O. S. 112; 10 J. P. Jo. 293.

850. — Previous mandamus proceedings discontinued on agreement to pay—Agreement by agent not under seal—Promoters ceasing to pay after part payment.]—*R. v. BRISTOL & EXETER RY. CO.* (1845), 3 Ry. & Can. Cas. 777; 5 L. T. O. S. 215.

851. —*R. v. MANCHESTER, BURY & ROSINDALE RY. CO.* (1846), 6 L. T. O. S. 326.

852. — When notice of intention to take lands given—Though no actual taking.]—*R. v. WOODS & FORESTS COMRS., Re BUDGE* (1848), 17 L. J. Q. B. 341; 11 L. T. O. S. 433; 12 Jur. 915; *subsequent proceedings* (1850), 15 Q. B. 761.

Annotations:—Consd. Birch v. St. Marylebone Vestry (1869), 33 J. P. 501. *Reid. Guest v. Poole & Bournemouth Ry.* (1870), L. R. 5 C. P. 553; *Re Nathan, R. v. I. R. Comrs.* (1884), 12 Q. B. D. 461; *R. v. Income Tax Special Purposes Comrs.* (1888), 21 Q. B. D. 313. *Mentd. Steele v. Liverpool Corpn.* (1866), 7 B. & S. 261.

853. — On proof of refusal or neglect—No particular form or service of notice necessary—Previous arbitration proceedings proving abortive.]—*Re SOUTH YORKSHIRE, DONCASTER & GOOLE RY. CO., Ex p. SENIOR* (1849), 7 Dow. & L. 36; 18 L. J. Q. B. 333; 14 Jur. 1093.

854. —]—*R. v. SOUTH EASTERN RY. CO.* (1849), cited in 18 L. J. Q. B. 334.

Annotation:—Consd. Re South Yorkshire, Doncaster & Goole Ry., Ex p. Senior (1849), 18 L. J. Q. B. 333.

855. — After service of notice to treat—Though claim made after expiration of compulsory powers.]—Where within the prescribed period the promoters of a railway co. gave notice to a landowner on the intended line of railway, that they required to purchase his lands & the landowner served them with a notice of the amount of his claim & demanded that the amount of compensation should be settled by a jury & no further steps were taken to complete the purchase until after the expiration of the period prescribed for the exercise of the powers of the co. for the compulsory purchase & letting of lands:—*Held*: the co. might, on the application of the landowner, notwithstanding the lapse of time, be compelled by mandamus to issue their warrant to the sheriff to summon a jury to assess the amount of compensation.—*R. v. BIRMINGHAM & OXFORD JUNCTION RY. CO.* (1851), 15 Q. B. 634; 6 Ry. & Can. Cas. 628; 117 E. R. 599; *sub nom. BIRMINGHAM & OXFORD JUNCTION RY. CO. v. R.*, 20 L. J. Q. B. 304, Ex. Ch. *Annotations:—Consd. Tiverton & North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480. *Reid. Pinchin v. London & Blackwall Ry.* (1854), 3 Eq. Rep. 433; *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426. *Mentd. R. v. L. & N. W. Ry.* (1851), 6 Ry. & Can. Cas. 634; *Salisbury v. G. N. Ry.* (1852), 17 Q. B. 840; *Sparrow v. Oxford, Worcester & Wolverhampton Ry.* (1852), 7 Ry. & Can. Cas. 92.

856. —]—An action for a mandamus may lie even when no actual damage has been sustained. The neglect by a railway co. to issue a warrant to the sheriff to summon a jury to assess the value of land which they have given notice that they will require for the purposes of their Act, within a reasonable time after such notice, is an actionable wrong, & the issue of such warrant may be enforced by an action for a mandamus under Common Law Procedure Act, 1854 (c. 125), s. 68.—*FOTHERBY v. METROPOLITAN RY. CO.* (1866), L. R. 2 C. P. 188; 36 L. J. C. P. 88; 15 L. T. 243; 12 Jur. N. S. 1005; *sub. nom. FETHERBY v. METROPOLITAN RY. CO.*, 15 W. R. 112. *Annotation:—Folld. Morgan v. Met. Ry.* (1868), L. R. 4 C. P. 97.

857. —]—*R. v. METROPOLITAN RY. CO.* (1868), 32 J. P. Jo. 101.

858. — Though distinct joint & separate claims in one notice.]—*R. v. EAST LONDON RY. CO., Ex p. BARNES & BARNES* (1867), 17 L. T. 291.

859. Refused—Delay in application—Alternative remedy of ejectment.]—*R. v. STAINFORTH & KEADLY CANAL CO.* (1813), 1 M. & S. 32; 105 E. R. 12.

Annotations:—Mentd. R. v. Cockermouth Inclosure Act Comrs. (1830), 1 B. & Ad. 378; *Dines v. Grand Junction Canal Co.* (1846), 9 Q. B. 469; *R. v. All Saints, Wigan* (1874), L. R. 9 Q. B. 317.

860. —.]—*Re* EASTERN COUNTIES RY. Co. (1845), 9 J. P. Jo. 115.

861. —. Though work delayed & discontinued—Bonâ fide intention of making alterations involving further injury—Additional works in actual progress.]—*Ex p.* PARKES (1841), 10 L. J. Q. B. 359; 5 Jur. 435.

Annotation :—*Mentd.* Fetherby v. Met. Ry. (1866), 15 W. R. 112.

862. Form of writ—Claim for damages must be specific.]—*R. v.* DUDLEY IMPROVEMENT ACT COMRS. (1848), 10 L. T. O. S. 372; 12 J. P. Jo. 54.

SUB-SECT. 3.—SUMMONING OF COMMON JURY.

See Lands Act, 1845, ss. 40, 41.

863. When first verdict quashed—Original warrant remaining unimpeached—Fresh jury summoned under original warrant—New warrant not necessary.]—Pltf. having given notice to defts. a railway co. under Lands Act, 1845, s. 68, that his premises had been injuriously affected by the execution of their works & that he demanded compensation & an assessment before a jury, defts. issued their warrant, & a jury was summoned, who found that pltf. was not entitled to any compensation. Pltf. thereupon obtained a rule to quash the inquisition & the verdict & judgment thereon & gave the co. a fresh notice, & the co. not issuing another warrant, pltf. brought this action :—*Held* : the original warrant remaining unimpeached, the sheriff was bound to go on under it, by summoning a fresh jury, & the co. were in no default.—*HORROCKS v. METROPOLITAN RY. CO.* (1863), 4 B. & S. 315; 2 New Rep. 452; 27 J. P. 694; 11 W. R. 910; 122 E. R. 477; *sub nom.* *R. v. METROPOLITAN RY. CO.*, 32 L. J. Q. B. 367; 8 L. T. 663; 10 Jur. N. S. 204; *subsequent proceedings, sub nom.* *HORROCKS v. METROPOLITAN RY. CO.* (1865), 19 C. B. N. S. 139.

Annotations :—*Consd.* Tanner v. Swindon, etc. Ry. (1881), 45 L. T. 209. *Mentd.* Buccleuch v. Metropolitan Board of Works (1870), L. R. 5 Exch. 221.

864. Where execution of precept postponed—Certiorari to quash order for postponement proper remedy.]—*GALLOWAY v. LONDON CORPN.* (1866), 12 Jur. N. S. 182.

865. Jury to be summoned by commissioners appointed by special Act—Commissioners having ceased to exist—Damages assessable by county court.]—*WALKER v. CANAL CO., LTD.* (1913), 2 L. J. C. C. 112.

SUB-SECT. 4.—SUMMONING OF SPECIAL JURY.

See Lands Act, 1845, ss. 54, 55.

866. Where want of qualification—Remedy by challenge—Proceedings cannot be questioned in default—Substituted juror.]—*COOLING v. GREAT NORTHERN RY. CO.* (1850), 15 Q. B. 486; 19 L. J. Q. B. 529; 15 L. T. O. S. 226; 14 Jur. 875; 117 E. R. 544.

867. —. —. —. Supplemental jurors.]—*Re* CHELSEA WATERWORKS CO., *Ex p.* PHILLIPS (1855), 10 Exch. 731; 24 L. J. Ex. 79; 24 L. T. O. S. 223; 19 J. P. 103; 1 Jur. N. S. 143; 3 W. R. 174; 3 C. L. R. 329; 156 E. R. 635.

868. Omission to strike jury in sufficient time—To allow three days before day of taking inquisition—Proceedings not vitiated by irregularity.]—*Re* GLOUCESTERSHIRE (SHERIFF), *Ex p.* GREAT WESTERN RY. CO. (1851), 18 L. T. O. S. 92.

SUB-SECT. 5.—PROCEDURE AT INQUIRY.

See Lands Act, 1845, s. 43.

869. Terms of precept not carried out—Mandamus granted to execute precept—Precept differing from requisition to promoters to summon jury.]—*WALKER v. LONDON & BLACKWALL RY. CO.* (1842), 3 Q. B. 744; 12 L. J. Q. B. 88; 7 Jur. 323; 114 E. R. 692; *sub nom.* *R. v. MIDDLESEX (SHERIFF), Re WALKER v. LONDON & BLACKWALL RY. CO.*, 3 Gal. & Dav. 549; 3 Ry. & Can. Cas. 396.

870. Sheriff's direction to jury—To assess value of unexpired term—Within sheriff's jurisdiction.]—*Re* SPENCER, *Ex p.* GREAT NORTHERN RY. CO. (1849), 13 L. T. O. S. 256.

871. Previous offer may be accepted during proceedings—Jury must return verdict for amount offered.]—*R. v. WESTMINSTER (HIGH BAILIFF), Ex p. LONDON COUNTY COUNCIL*, [1903] 2 K. B. 189; 72 L. J. K. B. 600; 88 L. T. 834; 67 J. P. 302; 52 W. R. 10, 109; 19 T. L. R. 506; 47 Sol. Jo. 548; 1 L. G. R. 569, D. C.

SUB-SECT. 6.—THE VERDICT.

See Lands Act, 1845, s. 50.

872. Jury may award more than amount claimed—In respect of any particular item—Whether total award may be more than total amount claimed doubtful.]—*ROBERTSON v. CITY & SOUTH LONDON RY. CO.* (1904), 68 J. P. 280; 20 T. L. R. 395.

873. Form of—Verdict for lump sum valid—Separate assessments directed by Act—Parties not stipulating for distinct assessments.]—*Re* LONDON & GREENWICH RY. CO. (1835), 2 Ad. & El. 678; 1 Har. & W. 81; 4 Nev. & M. K. B. 458; 4 L. J. K. B. 103; 111 E. R. 261.

Annotations :—*Reid.* Corrigan v. London & Blackwall Ry. (1843), 5 Man. & G. 219; *Re* Bradshaw & East & West India Docks & Birmingham Junction Ry. (1848), 12 Q. B. 562.

874. —. —. —. Statutory provisions directory only.]—*CORRIGAN v. LONDON & BLACKWALL RY. CO.*, No. 832, *ante*.

875. —. —. Taken by consent—Not representative of actual interest of claimant.]—*Re* NORTH LONDON RY. CO., *Ex p.* HAYNE (1865), 12 L. T. 200.

876. —. Verdict for amount of promoters' offer—Accepted by claimant before verdict.]—*R. v. WESTMINSTER (HIGH BAILIFF), Ex p. LONDON COUNTY COUNCIL*, [1903] 2 K. B. 189; 72 L. J. K. B. 600; 88 L. T. 834; 67 J. P. 302; 52 W. R. 10, 109; 19 T. L. R. 506; 47 Sol. Jo. 548; 1 L. G. R. 569, D. C.

877. Finality of—Conclusive as to amount—Not as to lands being damaged or injuriously affected.]—*CHAPMAN v. MONMOUTHSHIRE RY. & CANAL CO.*, No. 656, *ante*.

878. —. —. —.]—*READ v. VICTORIA STATION & PIMLICO RY. CO.*, No. 657, *ante*.

879. —. —. Not as to whether claimant entitled under private Act.]—*BARBER v. NOTTINGHAM CANAL CO.*, No. 663, *ante*.

Jurisdiction of assessing tribunals limited to ascertaining amount.]—*See, generally*, Sect. 2, subsect. 2, *ante*.

880. Proof of—Parol evidence admissible—Where verdict not recorded as directed.]—*MANNING v. EASTERN COUNTIES RY. CO.* (1843), 12 M. & W. 237; 3 Ry. & Can. Cas. 637; 13 L. J. Ex. 265; 2 L. T. O. S. 152; 8 J. P. 107; 152 E. R. 1185.

Annotations :—*Consd.* Williams v. Eyton (1858), 27 L. J. Ex. 176. *Reid.* Williams v. Eyton (1859), 5 Jur. N. S. 770.

Enforcement of—Defences available to promoters.]—*See* Sub-sect. 8, B., *post*.

Sect. 6.—Procedure by jury: Sub-sects. 7 & 8, A., B. & C. (a).]

SUB-SECT. 7.—THE INQUISITION.

881. Nature of—Substantial & final part of proceedings—Cannot be altered by order of turnpike trustees—Certiorari lies to remove before order made.]—R. v. NORWICH & WATTON ROAD TRUSTEES (1836), 5 Ad. & El. 563; 2 Har. & W. 385; 1 Nev. & P. K. B. 32; 6 L. J. K. B. 41; 111 E. R. 1278.

Annotations:—Distd. R. v. Bristol & Exeter Ry. (1838), 11 Ad. & El. 202, n. Refd. Taylor v. Clemson (1844), 11 Cl. & Fin. 610.

882. What should be set out in—Notice to treat given by promoters.]—R. v. NORWICH & WATTON ROAD TRUSTEES (1836), 5 Ad. & El. 563; 2 Har. & W. 385; 1 Nev. & P. K. B. 32; 6 L. J. K. B. 41; 111 E. R. 1278.

Annotations:—Refd. Taylor v. Clemson (1844), 11 Cl. & Fin. 610. Mentd. R. v. Bristol & Exeter Ry. (1838), 11 Ad. & El. 202, n.

883. — — — Not notice only made necessary by way of proviso.]—TAYLOR v. CLEMSON, No. 825, ante.

884. Sufficiency of form—Disagreement as to price—Statement that each party appeared by counsel sufficient—Not necessary to find proportion of sum awarded to sum offered.]—R. v. SWANSEA HARBOUR TRUSTEES (1839), 8 Ad. & El. 439; 1 Per. & Dav. 512; 8 L. J. Q. B. 69; 3 Jur. 85; 112 E. R. 905.

Annotations:—Consd. Taylor v. Clemson (1844), 11 Cl. & Fin. 610. Mentd. R. v. Stainforth (1847), 11 Q. B. 66.

885. — — — Warrant & inquisition taken together—Jurisdiction appearing on face of proceedings.]—TAYLOR v. CLEMSON, No. 825, ante.

886. — — — Recital that notice given & failure to agree within twenty-one days—Sufficient without stating that whole capital subscribed.]—DOE d. PAYNE v. BRISTOL & EXETER RY. CO. (1840), 6 M. & W. 320; 2 Ry. & Can. Cas. 75; 9 L. J. Ex. 232; 151 E. R. 432.

Annotations:—Refd. Taylor v. Clemson (1844), 11 Cl. & Fin. 610; R. v. Ambergate, etc. Ry. (1853), 1 E. & B. 372. Mentd. R. v. Stainforth (1847), 11 Q. B. 63; Doe d. Armitstead v. North Staffordshire Ry. (1851), 16 Q. B. 526; R. v. L. & Y. Ry. (1852), 1 E. & B. 228; Dowling v. Pontypool, Caerleon & Newport Ry. (1874), L. R. 18 Eq. 714.

887. — — — Not defective for omission of fact—The truth of which party taking inquisition could not have known.]—TAYLOR v. CLEMSON, No. 825, ante.

888. — — — Sufficient if lands identified sufficiently—Lands in respect of which price assessed need not be shown specifically.]—OSTLER v. COOKE, No. 841, ante.

889. Objection to form—Must be positively sworn to—On application for certiorari to quash.]—R. v. MANCHESTER & LEEDS RY. CO., No. 902, post.

890. — — — Cannot be maintained when irregularities waived.]—R. v. SOUTH HOLLAND DRAINAGE COMMITTEE MEN (1838), 8 Ad. & El. 429; 1 Per. & Dav. 79; 1 Will. Woll. & H. 647; 8 L. J. Q. B. 112; 112 E. R. 901.

Annotations:—Distd. R. v. Manchester & Leeds Ry. (1838), 1 Per. & Dav. 164. Consd. Taylor v. Clemson (1844), 11 Cl. & Fin. 610; R. v. Sheward (1880), 5 Q. B. D. 179. Refd. R. v. Swansea Harbour Trustees (1839), 8 Ad. & El. 439; R. v. Williams, Ex p. Phillips, [1914] 1 K. B. 608. Mentd. R. v. Stainforth (1847), 11 Q. B. 66; R. v. Salop JJ. (1859), 29 L. J. M. C. 39; R. v. Surrey JJ. (1870), L. R. 5 Q. B. 466.

PART VII. SECT. 6, SUB-SECT. 8.—A.

1. Specific performance.]—Where a jury has assessed a sum for compensation & a sum for purchase money, the owner may proceed by action for specific performance.—DOWNEY v.

WATERFORD & LIMERICK RY. CO. (1850), 13 L. Eq. R. 538.—IR.

PART VII. SECT. 6, SUB-SECT. 8.—B.

m. Right of defendant to question plaintiff's right to damages under judgment.]—Verdict & judgment on an

891. —
825, ante.

—.]—TAYLOR v. CLEMSON, No.

SUB-SECT. 8.—ENTERING, ENFORCING AND VACATING JUDGMENT.

A. Entering Judgment.

See Lands Act, 1845, s. 50.

892. Must be in terms given by jury—Though they considered matters & assessed damages outside their jurisdiction.]—R. v. WEST RIDING OF YORKSHIRE JJ. (1834), 1 Ad. & El. 563; 3 Nev. & M. K. B. 802; 3 L. J. M. C. 117; 110 E. R. 1322.

Annotations:—Consd. Jubb v. Hull Dock Co. (1846), 9 Q. B. 443. Refd. R. v. Bristol & Exeter Ry. (1838), 2 Ry. & Can. Cas. 99; R. v. Sheffield Ry. (1839), 11 Ad. & El. 194.

893. Verdict not recorded as directed by special Act—Parol evidence admissible—To prove finding & grounds for.]—MANNING v. EASTERN COUNTIES RY. CO. (1843), 12 M. & W. 237; 3 Ry. & Can. Cas. 637; 13 L. J. Ex. 265; 2 L. T. O. S. 152; 8 J. P. 107; 152 E. R. 1185.

Annotation:—Mentd. Williams v. Eyton (1859), 5 Jur. N. S. 770.

894. Prohibition to restrain—Refused—Verdict & judgment valid & conclusive.]—CHABOT v. MORPETH (LORD) (1850), 15 Q. B. 446; 19 L. J. Q. B. 377; 15 L. T. O. S. 364; 117 E. R. 528.

Annotations:—Refd. R. v. L. & N. W. Ry. (1854), 3 E. & B. 443. Mentd. Williams v. Admiralty Lords Comrs. (1851), 11 C. B. 420; R. v. Kensington Income Tax Comrs., [1913] 3 K. B. 870; Clifford & O'Sullivan, [1921] 2 A. C. 570.

B. Enforcing Judgment by Action against Promoters.

895. Execution or tender of conveyance condition precedent—Purchase-money not attachable after verdict—"As debt due or accruing due in hands of garnishee."—HOWELL v. METROPOLITAN DISTRICT RY. CO. (1881), 19 Ch. D. 508; 51 L. J. Ch. 158; 45 L. T. 707; 30 W. R. 100.

Annotation:—Refd. Capell v. G. W. Ry. (1882), 9 Q. B. D. 459.

—.]—See, also, Nos. 763, 764, 765, ante.

896. Defences available to promoters—Not that one of two sheriffs interested—Or that sum awarded as purchase-price & satisfaction.]—CORRIGAL v. LONDON & BLACKWALL RY. CO., No. 832, ante.

897. — — — On verdict under Lands Act, 1845, s. 68—That subject-matter of claimant within s. 68—Verdict not conclusive that lands damaged or injuriously affected.]—CHAPMAN v. MONMOUTHSHIRE RY. & CANAL CO., No. 656, ante.

898. — — — — —.]—READ v. VICTORIA STATION & PIMLICO RY. CO., No. 657, ante.

Jurisdiction of assessing tribunals limited to ascertaining amount, see, generally, Sect. 2, sub-sect. 2, ante.

899. — — — — — Not quantum of damages when injurious affection proved—No excess of jurisdiction.]—MORTIMER v. SOUTH WALES RY. CO. (1859), 1 E. & E. 375; 28 L. J. Q. B. 129; 32 L. T. O. S. 270; 5 Jur. N. S. 784; 7 W. R. 292; 120 E. R. 950.

Annotations:—Consd. R. v. Met. Ry. (1863), 32 L. J. Q. B. 367; Road v. Victoria Station & Pimlico Ry. (1863), 1 H. & C. 826. Refd. Horrocks v. Met. Ry. (1863), 4 B. & S. 315; Howard v. Metropolitan Board of Works (1888), 4 T. L. R. 591; Long Eaton Recreation Grounds v. Mid. Ry., [1902] 2 K. B. 574.

900. — — — That claimant not entitled to compensation under private Act—Verdict conclusive

inquisition do not preclude debt, in an action to enforce such judgment from questioning, not its validity but plff.'s right to any damages awarded by it.—LEE v. MELBOURNE & SUBURBAN RY. CO. (1861), 1 W. & W. 34.—AUS.

only as to amount.]—*BARBER v. NOTTINGHAM CANAL CO.*, No. 663, *ante*.

Jurisdiction of assessing tribunals limited to ascertaining amount, *see, generally*, Sect. 2, subsect. 2, *ante*.

901. — When damages claimed & awarded exceed £50—Not that plaintiffs not entitled to compensation exceeding £50.]—*READ v. VICTORIA STATION & PIMLICO RY. CO.*, No. 657, *ante*.

C. Vacating Judgment.

(a) *Certiorari* to quash.

See, generally, CROWN PRACTICE.

902. General rule—Defects in inquisition must be positively sworn to.]—A *certiorari* will not be granted to bring up the inquisition of a compensation jury unless defects in the inquisition be positively sworn to. If the objection be to the form of the inquisition, a copy should be set out, or it should be sworn that the deponent could not procure a copy; & he should in the latter case swear positively on information & belief. It is not enough to swear that he objects that the inquisition does not contain certain requisites pointed out. The granting a *certiorari* is matter of discretion, though there are fatal defects on the face of the proceedings which it is sought to bring up. It is an almost invariable rule that, where a party applying for a *certiorari* fails from incompleteness in his affidavits, he will not have a *certiorari* granted to him upon fresh affidavits supplying the defect. Especially if he appears to have suffered no injury, or to have assented to the proceeding below.

Semble: the rule requiring that, in proceedings by an inferior jurisdiction, the facts giving the jurisdiction should appear on the face of such proceedings, is not confined to facts necessarily within the knowledge of the party exercising the jurisdiction (*LORD DENMAN, C.J.*).—*R. v. MANCHESTER & LEEDS RY. CO.* (1838), 8 Ad. & El. 413; 3 Nev. & P. K. B. 439; 1 Per. & Dav. 164; 1 Will. Woll. & H. 458, 651; 7 L. J. Q. B. 192; 8 L. J. Q. B. 66; 2 Jur. 857; 112 E. R. 895.

Annotations:—*Distd.* *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610. *Refd.* *R. v. Pickles* (1842), 12 L. J. Q. B. 40; *R. v. G. W. Ry.* (1844), 5 Q. B. 597; *Tilt v. Dickson* (1847), 4 C. B. 736. *Mentd.* *Cordon v. Universal Gas Light Co.* (1848), 5 Ry. & Can. Cas. 677; *Dodgson v. Scott* (1848), 2 Exch. 457.

903. — Statutory prohibition against *certiorari* does not apply—Excess of jurisdiction.]—*R. v. SOUTH WALES RY. CO.* (1849), 13 Q. B. 988; 116 E. R. 1540; *sub nom. Re SOUTH WALES RY. CO. v. RICHARDS*, 6 Ry. & Can. Cas. 197; 18 L. J. Q. B. 310; 13 L. T. O. S. 446; 14 J. P. 6; *sub nom. Re RICHARDS v. SOUTH WALES RY. CO.*, 13 Jur. 1095.

Annotations:—*Refd.* *Re Penny* (1857), 7 E. & B. 660; *Mortimer v. South Wales Ry.* (1859), 5 Jur. N. S. 784.

904. — Time for application—Within time allowed for setting aside award.]—*R. v. SHEWARD* (1880), 9 Q. B. D. 741; 49 L. J. Q. B. 716, C. A.

905. — *Certiorari* proper remedy—When objection taken to jurisdiction of sheriff's jury.]—*MORTIMER v. SOUTH WALES RY. CO.* (1859), 1 E. & B. 375; 28 L. J. Q. B. 129; 32 L. T. O. S. 270; 5 Jur. N. S. 784; 7 W. R. 292; 120 E. R. 950.

Annotations:—*Refd.* *Howard v. Metropolitan Board of Works* (1888), 4 T. L. R. 591; *Long Eaton Recreation Grounds Co. v. Mid. Ry.*, [1902] 2 K. B. 574. *Mentd.* *Horrocks v. Met. Ry.* (1863), 4 B. & S. 315; *Read v. Victoria Station & Pimlico Ry.* (1863), 1 H. & C. 826.

906. Granted—Certiorari not taken away by Act—Inquisition not apportioning value among parties interested—Defect in form.]—*R. v. NORWICH & WATTON ROAD TRUSTEES* (1836), 5 Ad. &

El. 563; 2 Har. & W. 385; 1 Nev. & P. K. B. 32; 6 L. J. K. B. 41; 111 E. R. 1278

Annotations:—*Expld.* *R. v. Bristol & Exeter Ry.* (1838), 11 Ad. & El. 202, n. *Consd.* *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610.

907. —.]—*Re MARYPORT & CARLISLE RY. CO.* (1849), 13 L. T. O. S. 139.

908. — Excess of jurisdiction—Partial excess—Award in matters within exclusive jurisdiction of justices.]—*R. v. SOUTH WALES RY. CO.* (1849), 13 Q. B. 988; 116 E. R. 1540; *sub nom. Re SOUTH WALES RY. CO. v. RICHARDS*, 6 Ry. & Can. Cas. 197; 18 L. J. Q. B. 310; 13 L. T. O. S. 446; 14 J. P. 6; *sub nom. Re RICHARDS v. SOUTH WALES RY. CO.*, 13 Jur. 1095.

Annotations:—*Refd.* *Re Penny* (1857), 7 E. & B. 660; *Mortimer v. South Wales Ry.* (1859), 5 Jur. N. S. 784.

909. — — — — — Though not *prima facie* apparent—Proof by extrinsic evidence.]—*Re PENNY*, No. 289, *ante*.

910. — — — — — Sheriff interested party.]—*R. v. LONDON & NORTH WESTERN RY. CO.*, No. 655, *ante*.

911. — — — — — Error apparent on face of inquisition.]—*R. v. HALIFAX CORPN. (ACTING AS HALIFAX LOCAL BOARD OF HEALTH)* (1866), 14 L. T. 447.

912. — Preliminary requisites of Act not complied with.]—*R. v. MARYPORT & CARLISLE RY. CO.* (1850), 15 L. T. O. S. 134.

913. — Compensation for particular item awarded twice over.]—*R. v. SCARD* (1894), 10 T. L. R. 545, D. C.

914. Refused—Though jury award less than amount agreed on.]—*Re RAMSGATE HARBOUR TRUSTEES* (1855), 25 L. T. O. S. 82.

915. — Prohibition against *certiorari* in private Act—Considered as embodied in later Act.]—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1834), 3 Nev. & M. K. B. 86.

916. — — — — — Proceedings void if not in pursuance of Act.]—*R. v. BRISTOL & EXETER RY. CO.* (1838), 11 Ad. & El. 202, n.; 2 Ry. & Can. Cas. 99; 1 Per. & Dav. 170; 1 Will. Woll. & H. 655; 113 E. R. 391.

Annotations:—*Consd.* *R. v. Sheffield, Ashton-under-Lyne, & Manchester Ry.* (1839), 11 Ad. & El. 194. *Expld.* *Ex p. Legh v. Sheffield & Manchester Ry.* (1840), 4 Jur. 268.

917. — — — — — Irregular proceedings in pursuance of Act.]—*Ex p. LEGH v. SHEFFIELD & MANCHESTER RY. CO.* (1840), 4 Jur. 268.

918. — — — — — Irregularities waived by claimant.]—*R. v. SOUTH HOLLAND DRAINAGE COMMITTEE MEN* (1838), 8 Ad. & El. 429; 1 Per. & Dav. 79; 1 Will. Woll. & H. 647; 8 L. J. Q. B. 64; 112 E. R. 901.

Annotations:—*Refd.* *R. v. Manchester & Leeds Ry.* (1838), 1 Per. & Dav. 164; *R. v. Salop JJ.* (1859), 29 L. J. M. C. 39; *R. v. Sheward* (1880), 5 Q. B. D. 179. *Mentd.* *R. v. Swansea Harbour Trustees* (1838), 8 Ad. & El. 439; *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610; *R. v. Stainforth* (1847), 11 Q. B. 66; *R. v. Surrey JJ.* (1870), 1 L. R. 5 Q. B. 466; *R. v. Williams, Ex p. Phillips*, [1914] 1 K. B. 608.

919. — — — — — Supposed defect in constitution of tribunal.]—*EMANUEL HOSPITAL, WESTMINSTER, TRUSTEES v. METROPOLITAN DISTRICT RY. CO.* (1869), 19 L. T. 692.

920. — — — — — Mere irregularity—Warrant containing surplus words “if any.”]—*R. v. MANCHESTER & PRESTON RY. CO.* (1845), 4 L. T. O. S. 291.

921. — — — — — Omission to strike special jury insufficient time.]—*Re GLOUCESTERSHIRE (SHERIFF)*, *Ex p. GREAT WESTERN RY. CO.* (1851), 18 L. T. O. S. 92.

922. — — — — — Inquisition taken before two persons appointed by sheriff—Not being persons specially named in Act.]—*R. v. SHEFFIELD RY. CO.* (1839),

Sect. 6.—Procedure by jury: Sub-sect. 8, C. (a) & (b); sub-sect. 9, A. & B.; sub-sect. 10.]

11 Ad. & El. 194; 1 Ry. & Can. Cas. 537; 3 Per. & Dav. 111; 9 L. J. Q. B. 13; 113 E. R. 388.

923. — Non-statement of preliminary requisites—Objection not maintainable by harbour trustees instituting proceedings—Inquisition sufficient in form.]—R. v. SWANSEA HARBOUR TRUSTEES (1839), 8 Ad. & El. 439; 1 Per. & Dav. 512; 8 L. J. Q. B. 69; 3 Jur. 85; 112 E. R. 905. Annotations:—Consd. Taylor v. Clemson (1844), 11 Cl. & Fin. 610. Refd. R. v. Stainforth (1847), 11 Q. B. 66.

924. — Delay in application.]—R. v. LINCOLN WATERWORKS (1849), 13 J. P. Jo. 745.

925. — —.]—R. v. SHEWARD (1880), 9 Q. B. D. 741; 49 L. J. Q. B. 716, C. A.

926. — Language of sheriff possibly amounting to misdirection.]—STREATHAM & GENERAL ESTATES CO., LTD. v. WORKS & PUBLIC BUILDINGS COMRS., No. 188, ante.

927. Objection to jurisdiction of tribunal—Assessment before under-sheriff instead of justices—Objection maintainable in action for compensation.]—Re LONDON SCHOOL BOARD (1892), Times, March 1.

(b) Other Cases.

928. Mandamus to compel issuing of new precept—When verdict made final & conclusive by Act—Refused.]—R. v. EASTERN COUNTIES RY. CO. (1843), 2 Dowl. N. S. 945; 3 Ry. & Can. Cas. 466; 12 L. J. Q. B. 271; 7 J. P. 434; 7 Jur. 628; sub nom. R. v. EASTERN COUNTIES RY. CO., Ex p. FINCH, 1 L. T. O. S. 151.

Annotation:—Expld. Re Penny & S. E. Ry. (1857), 26 L. J. Q. B. 225.

SUB-SECT. 9.—COSTS OF INQUIRY.

A. Under Lands Act, 1845.

See Lands Act, 1845, ss. 51, 52.

929. “Such inquiry”—Does not include inquiries under s. 94.]—COBB v. MID WALES RY. CO. (1866), L. R. 1 Q. B. 342; 7 B. & S. 267; 35 L. J. Q. B. 117; 30 J. P. 584; 12 Jur. N. S. 228; 14 W. R. 775.

930. — Means whole inquiry from issuing of promoters’ warrant to sheriff.]—R. v. MANLEY SMITH (1881), 30 W. R. 272.

931. “Sum previously offered”—Time of making offer—Claim under Lands Act, 1845, s. 68—Before ten days’ notice of trial.]—(1) A. claimed compensation under s. 68 for injury done to his house, & the jury gave him a less sum than the promoters had offered six days before the inquiry:—*Held*: the offer must be made before the ten days’ notice of trial, to entitle the promoters to have half the costs of the inquiry paid by claimant.

(2) The decision of the master under s. 52 can only be reviewed by the ct. of which he is a master, & if not so reviewed is final.—METROPOLITAN RY. CO. v. TURNHAM (1863), 14 C. B. N. S. 212; 2 New Rep. 77; 32 L. J. M. C. 249; 8 L. T. 280; 11 W. R. 695; 143 E. R. 427.

Annotations:—As to (1) Consd. Re Hayward v. Met. Ry. (1864), 4 B. & S. 787; Cobb v. Mid-Wales Ry. (1866), 30

J. P. 584. As to (2) Consd. Owen v. L. & N. W. Ry. (1867), L. R. 3 Q. B. 54. Refd. Froeman v. Springham (1863), 14 C. B. N. S. 197.

932. — — — — —.]—Re HAYWARD & METROPOLITAN RY. CO., No. 824, ante.

933. — — — — — Doubtful whether good if made after costs of nominating special jury incurred—& before notice of inquiry under s. 46.]—BALLS v. METROPOLITAN BOARD OF WORKS (1866), L. R. 1 Q. B. 337; 7 B. & S. 177; 35 L. J. Q. B. 101; 13 L. T. 702; 30 J. P. 167; 12 Jur. N. S. 183; 14 W. R. 370.

Annotations:—Refd. Cobb v. Mid-Wales Ry. (1866), 12 Jur. N. S. 228. Mentd. Re Fitzhardinge & Gloucester & Berkeley Canal Co. (1872), 41 L. J. Q. B. 316.

934. — — — — — Before issuing of warrant for summoning jury.]—PEARSON v. GREAT NORTHERN RY. CO. (1869), L. R. 7 Q. B. 785, n.; 18 W. R. 259.

Annotations:—Consd. Fitzhardinge v. Gloucester & Berkeley Canal Co. (1872), L. R. 7 Q. B. 776. Foll’d. R. v. Smith, Re Westfield & Met. Rys. (1883), 12 Q. B. D. 481. Mentd. Re Gray & N. E. Ry. (1876), 24 W. R. 758.

935. — — — — — May be fresh or amended offer.]—Re HAYWARD & METROPOLITAN RY. CO., No. 824, ante.

936. — — — — — Must be unconditional—Bad if offer of one sum for compensation & costs.]—BALLS v. METROPOLITAN BOARD OF WORKS (1866), L. R. 1 Q. B. 337; 7 B. & S. 177; 35 L. J. Q. B. 101; 13 L. T. 702; 30 J. P. 167; 12 Jur. N. S. 183; 14 W. R. 370.

Annotations:—Refd. Cobb v. Mid-Wales Ry. (1866), 12 Jur. N. S. 228. Mentd. Re Fitzhardinge & Gloucester & Berkeley Canal Co. (1872), 41 L. J. Q. B. 316.

937. — — — — — Must be under s. 38.]—PEARSON v. GREAT NORTHERN RY. CO. (1869), L. R. 7 Q. B. 785, n.; 18 W. R. 259.

Annotations:—Consd. Fitzhardinge v. Gloucester & Berkeley Canal Co. (1872), L. R. 7 Q. B. 776. Foll’d. R. v. Smith, Re Westfield & Met. Rys. (1883), 12 Q. B. D. 481. Mentd. Re Gray & N. E. Ry. (1876), 24 W. R. 758.

938. — — — — —.]—R. v. MANLEY SMITH, Re WESTFIELD & METROPOLITAN RY. COS. (1883), 12 Q. B. D. 481; 53 L. J. Q. B. 115; 32 W. R. 275.

Annotations:—Consd. R. v. Westminster High Bailiff, Ex p. L. C. C., [1903] 2 K. B. 189. Refd. Lascelles v. Swansea School Board (1899), 69 L. J. Q. B. 24.

939. — — — — — How amount of ascertained—Totals only considered—Promoters may offer separate sums for injurious affection.]—Re HAYWARD & METROPOLITAN RY. CO., No. 824, ante.

940. When verdict for same or less amount than previous offer—Costs borne equally by parties.]—BRAY v. SOUTH EASTERN RY. CO. (1849), 7 Dow. & L. 307; 19 L. J. Q. B. 11; 14 L. T. O. S. 184.

941. — — — — — Claim under s. 68.]—Re HAYWARD & METROPOLITAN RY. CO., No. 824, ante.

942. — — — — — Not where promoters not actually entering upon lands—& proceedings regulated by s. 38.]—R. v. MANLEY SMITH, Re CHURCH & LONDON SCHOOL BOARD (1892), 67 L. T. 197; 56 J. P. 729; 40 W. R. 333; sub nom. CHURCH v. LONDON SCHOOL BOARD, 8 T. L. R. 310, D. C.

943. When verdict for greater sum than amount of offer—Claimant entitled to full costs of inquiry—Claim under s. 68.]—SOUTH EASTERN RY. CO. v. RICHARDSON (1852), 15 C. B. 810; 21

PART VII. SECT. 6, SUB-SECT. 8.—C. (b).

n. Order for new trial—Lands Compensation Statute, 1869.]—The ct. has power to order a new trial, in case of an inquiry to determine compensation under above Act.—AUSTIN v. DUNMUNKLE (PRESIDENT, ETC.) (1882), 8 V. L. R. 224.—AUS.

o. Verdict set aside—Assessment on

wrong principle.]—Where a jury assessed damages on a wrong principle:—

Held: the verdict would be set aside.—FENERTY v. COUNTY OF HALIFAX (1856), 3 N. S. R. (2 Thom.) 412.—CAN.

p. Refusal of jury to award damages—Special Act.]—A jury, summoned under an Act, providing damages

suffered by an owner of land & the proper price of the land should be ascertained by a jury, returned a verdict finding the price to be paid, & declining to give any finding on his claim of damages:—Held: not a verdict under the Act.—LEITH HARBOUR COMRS. v. TRINITY HARBOUR CO. (1842), 4 Dunl. (Cl. of Sess.) 1056.—SCOT.

L. J. C. P. 122; 16 Jur. 151; 139 E. R. 645, Ex. Ch.

Annotations:—*Consd.* Met. Ry. v. Turnham (1863), 14 C. B. N. S. 212; *Re* Hayward & Met. Ry. (1864), 4 B. & S. 787. *Mentd.* Cobb v. Mid-Wales Ry. (1866), 7 B. & S. 267.

944. ——— Promoters not entitled to rely upon second larger offer—Not within s. 38.]—*R. v. MANLEY SMITH, Re WESTFIELD & METROPOLITAN RY. COS.* (1883), 12 Q. B. D. 481; 53 L. J. Q. B. 115; 32 W. R. 275.

Annotations:—*Consd.* Lascelles v. Swansea School Board (1899), 69 L. J. Q. B. 24; *R. v. Westminster High Bailiff, Ex p. L. C. C.*, [1903] 2 K. B. 189.

945. Settlement during proceedings before jury—Agreement to pay costs, damages & expenses—Promoters liable for costs of assessment by jury.]—*Ex p. MORRIS* (1871), L. R. 12 Eq. 418; 40 L. J. Ch. 543; 19 W. R. 943; *sub nom. Re MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, *Ex p. MORRIS*, 25 L. T. 20.

Annotation:—*Mentd.* *Re* Mutlow's Trusts (1878), 27 W. R. 245.

946. When no offer made—Claimant not entitled to compensation—Not entitled to costs.]—*TODD v. METROPOLITAN DISTRICT RY. CO.* (1871), 24 L. T. 435; 19 W. R. 720.

Annotations:—*Refd.* Capell v. G. W. Ry. (1883), 11 Q. B. D. 345; L. & N. W. Ry. v. Walker, [1903] A. C. 289. *Mentd.* L. C. C. v. Campbell (1890), 6 T. L. R. 420; *Mercer v. Liverpool, St. Helen's & South Lancashire Ry.*, [1903] 1 K. B. 652.

947. What costs included in—Formal inquiry—Not costs incurred in respect of witnesses, counsel or attorney.]—*BRAY v. SOUTH EASTERN RY. CO.* (1849), 7 Dow. & L. 307; 19 L. J. Q. B. 11; 14 L. T. O. S. 184.

948. ——— Successful & abortive inquiries.]—*R. v. MANLEY SMITH* (1881), 30 W. R. 272.

B. Under Other Acts.

949. Whether claimant entitled to—Not when no provision in Act for costs.]—*Ex p. TURNER* (1838), 1 Will. Woll. & H. 305.

950. ——— Costs of mandamus—Occasioned by misdirection of sheriff—Parties opposing not liable.]—*R. v. MIDDLESEX (SHERIFF)* (1843), 5 Q. B. 365; 13 L. J. Q. B. 14; 2 L. T. O. S. 167; 7 Jur. 1154; 114 E. R. 1287.

Annotation:—*Mentd.* *R. v. Cheshire JJ.* (1846), 12 Jur. 161.

951. ——— To assess compensation—Assessment prior to return to mandamus.]—*R. v. GREAT NORTH OF ENGLAND RY. CO.*, *Ex p. DODDS* (1844), 3 L. T. O. S. 101; 8 J. P. Jo. 309.

952. What costs claimant entitled to—When award more than offer—To general costs—Not to expenses of surveying.]—*R. v. YORK JJ.* (1834), 1 Ad. & El. 828; 3 Nev. & M. K. B. 685; 110 E. R. 1424.

Annotations:—*Consd.* *R. v. London JJ.*, [1895] 1 Q. B. 214. *Refd.* *R. v. Gardner* (1837), 6 Ad. & El. 112; *R. v. Warwickshire Sheriff* (1842), 2 Ry. & Can. Cas. 661.

953. ——— Not to general costs—Such as recoverable in action by successful party.]—*R. v. GARDNER* (1837), 6 Ad. & El. 112; 1 Nev. & P. K. B. 308; Will. Woll. & Dav. 7; 6 L. J. K. B. 130; 1 J. P. 124; 112 E. R. 43.

Annotation:—*Consd.* *R. v. Warwickshire Sheriff* (1841), 2 Ry. & Can. Cas. 661.

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q. What costs claimant entitled to—Costs of attending inquiry as to value of lands—6 Geo. 4, c. 193, s. 29.]—*Re ULSTER CANAL CO.* (1840), Fl. & K. 16, n.—IR.

r. ——— When award less than offer—Not to costs of mandamus to compel issue of warrant for jury.]—*O'DONNELL v. WATERFORD & LIMERICK RY. CO.* (1849), 1 Ir. Jur. 128.—IR.

s. ——— Arbitrator's award increased by jury—Lump sum given for

costs—Fees of special jury included.]—The owner of premises in D., which the Corpn. required for purposes, an owner traversed the award of the arbitrator & served notice requiring the traverse to be tried by a special jury. The amount awarded by the arbitrator was considerably increased, & the judge gave the owner £20 for costs, under Railways (Ireland) Act, 1851, s. 26. The owner paid the usual fees for a special jury, & applied to have the amount repaid by deft.:—*Held*: the £20 covered all costs, &

954. When no offer made—Not to costs of attorney—Nor expenses of plans paid to surveyors not called as witnesses.]—*R. v. WARWICKSHIRE (SHERIFF)* (1841), 2 Ry. & Can. Cas. 661.

SUB-SECT. 10.—TAXATION AND RECOVERY OF COSTS.

See Lands Act, 1845, ss. 52, 53.

955. Under Lands Act, 1845, s. 52—Who may tax—Masters of Queen's Bench.]—*OWEN v. LONDON & NORTH WESTERN RY. CO.* (1867), L. R. 3 Q. B. 54; 7 B. & S. 758; 37 L. J. Q. B. 35; 17 L. T. 210; 32 J. P. 228; 16 W. R. 125.

Annotations:—*Consd.* Sandback Charity Trustees v. North Staffordshire Ry. (1877), 3 Q. B. D. 1. *Distd.* Hayward v. Mutual Reserve Assn., [1891] 2 Q. B. 236. *Consd.* Shrewsbury v. Wirral Rys. Committee, [1895] 2 Ch. 812. *Consd. & Apld.* Covington v. Met. Dist. Ry., [1903] 1 K. B. 231.

956. ——— Chancery taxing masters.]—*COVINGTON v. METROPOLITAN DISTRICT RY. CO.*, [1903] 1 K. B. 231; 72 L. J. K. B. 93; 87 L. T. 649; 51 W. R. 428; 19 T. L. R. 142; 47 Sol. Jo. 160, D. C.

Annotation:—*Folld.* *Re* Cannings & Middlesex County Council (1906), 5 L. G. R. 442.

957. ——— Decision of taxing master not subject to review.]—*Re* ROSS & YORK, NEWCASTLE & BERWICK RY. CO. (1849), 5 Dow. & L. 695; 5 Ry. & Can. Cas. 516; 18 L. J. Q. B. 199; 13 L. T. O. S. 102; 13 Jur. 610.

Annotations:—*Consd.* Met. Ry. v. Turnham (1863), 14 C. B. N. S. 212. *Folld.* Owen v. L. & N. W. Ry. (1867), L. R. 3 Q. B. 54. *Refd.* Bray v. S. E. Ry. (1849), 19 L. J. Q. B. 11. *Mentd.* Gray v. N. E. Ry. (1876), 34 L. T. 757.

958. ———.]—*OWEN v. LONDON & NORTH WESTERN RY. CO.* (1867), L. R. 3 Q. B. 54; 7 B. & S. 758; 37 L. J. Q. B. 35; 17 L. T. 210; 32 J. P. 228; 16 W. R. 125.

Annotations:—*Apprvd.* Sandback Charity Trustees v. North Staffordshire Ry. (1877), 3 Q. B. D. 1. *Distd.* Hayward v. Mutual Reserve Assn., [1891] 2 Q. B. 236. *Folld.* Shrewsbury v. Wirral Rys. Committee, [1895] 2 Ch. 812. *Consd.* Covington v. Met. Dist. Ry., [1903] 1 K. B. 231.

959. ——— Decision of taxing master subject to review—By court of which master is an officer.]—*METROPOLITAN RY. CO. v. TURNHAM*, No. 931, ante.

960. Under special Act—Decision of taxing master not subject to review—When taxation in accordance with special Act.]—*Re* SHEFFIELD WATERWORKS ACT, 1864 (1865), L. R. 1 Exch. 54; 4 H. & C. 74; 35 L. J. Ex. 60; 13 L. T. 440; 14 W. R. 143; *sub nom. Re WRAITHBY'S CLAIM*, 11 Jur. N. S. 954.

Annotation:—*Consd.* Owen v. L. & N. W. Ry. (1867), L. R. 3 Q. B. 54.

961. ——— Mode of recovery—Application to sheriff to ascertain amount—Demand upon promoters—Procedure by distress on refusal.]—*R. v. LONDON & BLACKWALL RY. CO.* (1845), 4 Ry. & Can. Cas. 119; 15 L. J. Q. B. 42; *sub nom. WALKER v. LONDON & BLACKWALL RY. CO.*, 6 L. T. O. S. 159; 9 J. P. Jo. 774.

expenses, & deft. was not bound to pay the special jury.—*SCRIVEN v. CORPN. OF DUBLIN* (1883), 12 L. R. Ir. 389.—IR.

PART VII. SECT. 6, SUB-SECT. 10.

957 i. Under Lands Act, 1845, s. 52—Decision of taxing master not subject to review.]—The ct. has no jurisdiction to review the taxation of costs by the master, under above Act.—*TENNANT v. BOROUGH OF BELFAST* (1847), 11 L. L. R. 290.—IR.

SECT. 7.—INQUIRY IN HIGH COURT.

962. Under Regulation of Railways Act, 1868 (c. 119), s. 41—Time for making application—Before issuing of warrant to sheriff—Not after previous verdict of sheriff & jury set aside.]—TANNER v. SWINDON, ETC. RY. CO. (1881), 45 L. T. 209, D. C.

963. ——— To whom application made—Jurisdiction now vested in judges of High Court—May be exercised by master except as to settling of claims.]—Re DONISTHORPE & MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO., [1897] 1 Q. B. 671; 66 L. J. Q. B. 399; 76 L. T. 371; 45 W. R. 386; 13 T. L. R. 311; 41 Sol. Jo. 403, C. A.

Jurisdiction of master, *see, now*, R. S. C. Ord. 54, r. 12.

964. ——— Mode of trial—By judge & jury—Not judge alone.]—Re EAST LONDON RY. CO., OLIVER'S CLAIM, No. 664, *ante*.

965. ——— Jurisdiction on trial—Limited to determining amount—Not to title to compensa-

tion.]—Re EAST LONDON RY. CO., OLIVER'S CLAIM, No. 664, *ante*.

966. ——— Appeal—From order on application—Lies to Divisional Court—Not direct to Court of Appeal.]—LONG v. GREAT NORTHERN & CITY RY. CO., [1902] 1 K. B. 813; 71 L. J. K. B. 598; *sub nom. Re GREAT NORTHERN & CITY RY. CO.*, 86 L. T. 440; 50 W. R. 402; 18 T. L. R. 478, C. A. *Annotations:—Reid. Re Frere & Staveley Taylor & Co. & North Shore Mill Co.*, [1905] 1 K. B. 366; *Colman v. Watson* (1907), 77 L. J. K. B. 121; *Re Marchant*, [1908] 1 K. B. 998. *Mentd. Re Jackson*, [1915] 1 K. B. 371.

967. ——— From verdict & judgment—Time for making—Not limited to twenty-one days.]—NEW RIVER CO. v. MIDLAND RY. CO., No. *ante*.

968. ——— Court has no jurisdiction to grant new trial.]—BIRMINGHAM & DISTRICT LAND CO. v. LONDON & NORTH WESTERN RY. CO. (1889), 22 Q. B. D. 435; 58 L. J. Q. B. 587; 60 L. T. 317; 37 W. R. 285, D. C.

Annotation:—Consd. Re East London Ry., Ex p. Oliver (1889), 61 L. T. 723.

Part VIII.—Entry on Lands by Promoters.

See Lands Act, 1845, ss. 84-92.

SECT. 1.—CONDITIONS NECESSARY TO ENTRY.

SUB-SECT. 1.—PRELIMINARIES TO ENTRY.

See Lands Act, 1845, ss. 84, 85.

969. Payment of purchase-money or compensation necessary.]—RAMSDEN v. MANCHESTER, SOUTH JUNCTION & ALTRINCHAM RY. CO. (1848), 1 Exch. 723; 5 Ry. & Can. Cas. 552; 10 L. T. O. S. 464; 12 Jur. 293; 154 E. R. 307.

Annotations:—Consd. Pinchin v. London & Blackwall Ry. (1854), 2 Eq. Rep. 1172; *Souch v. East London Ry.* (1874), 22 W. R. 566. *Reid. Reddie v. N. W. Ry., Hobbit v. N. W. Ry.* (1849), 13 Jur. 659; *Abraham v. G. N. Ry.* (1851), 20 L. J. Q. B. 322; *Re Met. Dist. Ry. & Cosh* (1880), 23 Ch. D. 607.

970. ——— Unless entry by "consent of owners"—Who deemed "owners"—Tenant with option to charge land for cost of buildings—On termination of tenancy by landlord.]—An agreement to let land, in which no term was specified, was made determinable on six months' notice to quit on either side, & there was this further provision, that in case the tenants erected any buildings on the land, they were to have the privilege of removing them at any time during their occupation,

or otherwise they were to be allowed a beneficial interest in same to the amount of the sum expended in the erection of the buildings, such beneficial interest to extend over twenty years from the date thereof, *i.e.* if the tenants were required by the landlord to give up possession of the land before the expiration of the term of twenty years, they were to be allowed one twentieth part of the amount expended for each remaining year of the unexpired term of twenty years:—*Held*: under this agreement the tenants had such an interest in the land as to constitute them "owners" within Lands Act, 1845, & a co. could not enter on the land as against the tenants without having previously compensated them for their interest in the manner provided by s. 81 of the Act. — *ROGERS v. KINGSTON-UPON-HULL DOCK CO.* (1861), 5 New Rep. 26; 34 L. J. Ch. 165; 11 L. T. 463, L. C.

Annotations:—Mentd. Morgan v. Davies (1878), 39 L. T. 60; *Barlow v. Teal* (1885), 15 Q. B. D. 501.

— **What amounts to consent.]—See Sub-sect. 2, D., *post*.**

971. Approval of Secretary of State—That other accommodation provided—Before "taking" of land.]—By Metropolitan Street Improvements Act, 1877, incorporating Lands Act, 1845, the Board of Works were empowered to enter upon,

PART VII. SECT. 7.

t. Under Land Acquisition Act, 1906—Discretion of taxing master—Costs of view.]—On taxation of costs of proceedings in the High Ct. to determine compensation under above Act, the taxing officer has discretion to allow a fee to counsel to view the land acquired.—MINISTER FOR HOME AFFAIRS v. BEALE (1916), 22 C. L. R. 98.—AUS.

u. Reference to master to assess compensation—Statutory remedies ineffectual.]—Statutory remedies for settling claims of land owners to compensation for lands taken becoming ineffectual, the ct. will direct a reference to the master for that purpose.—MALLOCH v. GRAND TRUNK RY. CO. (1857), 6 Gr. 348.—CAN.

w. ——— Masters disqualified—Independent persons to assess.]—All the Masters were disqualified to act, & therefore no reference could be made to them:—*Held*: a commission under

the seal of the Ct. of Chancery should issue to five independent persons to assess compensation, & to return their proceedings to the ct., when it would be open to either party to take exception to the return in the same manner as to a Master's report.—*DEBLOIS v. R.* (1872), 1 P. E. I. 398.—CAN.

PART VIII. SECT. 1, SUB-SECT. 1.

969 i. Payment of purchase-money or compensation necessary—Consolidated Railway Act, 1879.]—Under above Act the payment of compensation by the ry. co. is a condition precedent to its right of interfering with the possession of land or the rights of individuals.—PARKDALE CORPN. v. WEST (1887), 12 App. Cas. 602, P. C.—CAN.

969 ii. ——— Newfoundland Railway Acts.]—Under Newfoundland Railway Act there is no power conferred to appropriate lands for the purpose of the ry. without as a condition precedent compensating the party owning

the land.—*BODEN v. SHEA* (1881), 6 Nfld. L. R. 328.—NFLD.

969 iii. ———.]—JEHAN v. NEWFOUNDLAND RY. CO. (1884), 7 Nfld. L. R. 16.—NFLD.

969 iv. ——— & deposit of map—Nova Scotia Railway Act.]—DOMINION IRON & STEEL CO., LTD. v. BURE, [1917] A. C. 179; 86 L. J. P. C. 97.—CAN.

969 v. ——— Unless by consent of owner—R. S. M. 1902, c. 141.]—SMITH v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE (1905), 15 Man. L. R. 249; 1 W. L. R. 237.—CAN.

969 vi. ——— Or order from judge—R. S. M. 1902, c. 141.]—BANNATYNE v. SUBURBAN RAPID TRANSIT CO. (1904), 15 Man. L. R. 7; 24 C. L. T. 380.—CAN.

y. Whether arbitration & award conditions precedent—60 Vict. c. 4.]—Under above Act an arbitration & award are not conditions precedent to entry.—PENNY v. REID (1900), 8 Nfld. L. R. 352.—NFLD.

take, use, & hold lands specified in the deposited plans. By s. 33 it was provided that before the board should, without certain consents, take for the purposes of the Act more than fifteen houses in one parish occupied wholly or partially by persons of the labouring classes, they should satisfy one of the Secretaries of State that they had provided accommodation elsewhere for the same number of persons as had occupied the houses to be taken. The board, without obtaining the requisite consent, & before providing such accommodation, served pltf. with notice to treat for the purchase of more than fifteen houses of his occupied by the labouring classes, & also served notice of their intention to summon a jury. Pltf. thereupon claimed an injunction to restrain the board from proceeding with their notices until they had complied with the conditions: *Held*: the land in question was land which the board were authorised to purchase or take within Lands Act, 1845, s. 18, & the conditions in s. 33 being such as the board were able & could be compelled to perform, did not prohibit the board from proceeding with all necessary steps preliminary to acquiring a title, & they were entitled to serve a notice to treat & summon a

The word "take" could not be confined to the mere taking possession of (BOWEN, L.J.).—SPENCER v. METROPOLITAN BOARD OF WORKS (1882), 22 Ch. D. 142; 52 L. J. Ch. 249; 47 L. T. 159; 31 W. R. 317, C. A.
Annotation: *Refd.* G. W. Ry. v. Swindon & Cheltenham Extension Ry. (1882), 52 L. J. Ch. 306.

SUB-SECT. 2. UNAUTHORISED ENTRY.

A. What amounts to.

972. Entry without taking necessary steps—Prescribed by special Act.—Action against the trustees under a road Act for having, in the occupation of pursuer's grounds, deviated from the line prescribed by the Act, & entered upon his lands without taking the proper previous steps, in terms of the Act, to give him notice, & settle the compensation:—*Held*: the line taken was authorised by the Act.

The trustees, under these road & canal Acts, ought to be kept strictly within their powers; they ought not to deviate in the smallest degree from the line prescribed by the Act; though an injunction would not be granted where there was laches in applying for it, the trustees, if they deviated, would be liable in damages, & if they entered on a person's lands without taking the previous steps incumbent on them under the Act, they would be liable upon trespass in damages & costs (LORD ELDON, C.).—GOLDIE v. OSWALD (1811), 2 Dow, 531; 3 E. R. 957, H. L.

973. — Prescribed by Lands Act, 1845 — Promoters trespassers.—THOMPSON v. WEST SOMERSET MINERAL RY. CO. (1857), 29 L. T. O. S. 7; 21 J. P. 278; 5 W. R. 296.

PART VIII. SECT. 1, SUB-SECT. 2. —A.

972 i. Entry without taking necessary steps—Prescribed by special Act.—The compulsory powers given to Govt. to expropriate lands required for any public work can only be exercised after compliance with Government Ry. Act, 1881.—KEARNEY v. OAKES (1890), 18 S. C. R. 148.—CAN.

972 ii. — — — — ——WHITE N.) CO. v. SANDON WATERWORKS & LIGHT CO. (1903), 10 B. C. R. 361; varied 35 S. C. R. 389.—CAN.

972 iii. — — — — ——*Re* MASON &

CANADIAN PACIFIC RY. CO. (1914), 28 W. L. R. 692.—CAN.

z. Without consent of owner — Or reference under statute.—JANNETTE v. GREAT WESTERN RY. CO. (1854), 4 C. P. 488.—CAN.

a. — — — Or expropriation proceedings begun.—WICHER v. CANADIAN PACIFIC RY. CO. (1906), 16 Man. L. R. 313.—CAN.

b. Entry for purpose solely of surveying—No breach of injunction against permanent operations.—An interdiction having been granted against

974. Deviation from prescribed limits—Liability in trespass.—GOLDIE v. OSWALD, No. 972, *ante*.

975. — — — — — Continuing trespass—Restrained by injunction.—HOLMES v. UPTON (1840), 9 Ch. App. 214, n., L. C.

Annotations:—*Refd.* City of London Brewery Co. v. Tennant (1873), 9 Ch. App. 212; Stanley of Alderley v. Shrewsbury (1875), 23 W. R. 678.

Damages for trespass.—*See, further*, Sub-sect. 2, B. (b), *post*.

976. Entry under agreement to purchase—Before acceptance of title—Or payment or deposit of price.—Great Western Railway Act, s. 39, provided for the payment into the Exch. Ct. of the money agreed or awarded to be paid for the purchase of lands to which a title should not be made out to the satisfaction of the co. S. 42 provided that upon payment, tender or deposit of such purchase-money the co. should be entitled to enter upon such lands. The co. entered into an agreement with a landholder for the purchase of lands on the line of the railway, & before acceptance of title or payment, tender or deposit of the purchase-money, entered upon the land:—*Held*: (1) this was not a case within the Act; (2) on payment of the purchase-money into the ct. in which the bill was filed, the co. were entitled to enter; (3) an injunction, which had been obtained *ex parte*, should be dissolved.

This is not a case under the Act, but a case of specific performance. The co. have taken possession as purchasers, & the whole question is, whether they have or not accepted the title. The ordinary course is to direct, either that the purchase-money be paid into ct., or that the possession be given up. The vendor by filing this bill has elected his ct., & in a case of specific performance he can require nothing more than that the purchase-money should be secured (LORD COTTENHAM, C.).—HYDE v. GREAT WESTERN RY. CO. (1839), 1 Ry. & Can. Cas. 277, L. C.

977. Appropriation & user of subsoil—To form embankment.—INNOCENT v. NORTH MIDLAND RY. CO. (1839), 1 Ry. & Can. Cas. 212.

978. — — — By commencing borings.—v. WATERLOO & CITY RY. CO., [1895] 1 Ch. 527; 64 L. J. Ch. 338; 72 L. T. 225; 59 J. P. 295; 43 W. R. 363; 11 T. L. R. 210; 13 R. 306.

979. Entry on additional land agreed to be taken—Without payment—Amount of damage by severance not ascertained.—(1) By an agreement between pltf. & the agent of a railway co., the former agreed to sell to the co. a certain portion of a field for the price of £220 in the whole, being £120 for the land & £100 for compensation for damage by severance to the remaining portion. The agreement contained a stipulation that in case additional land should be wanted by the co., same should be taken & paid for after the same rate per acre. The co. subsequently took possession of a second portion of the field for purposes authorised by their Act, & entered upon same without having previously paid the purchase-money

permanent operations by a ry. co. on the lands of a party through whose property the line ran, until he should be paid the price of his lands; & the ry. co. having commenced to sink pits & excavate the ground:—*Held*: these acts did not amount to a violation of the interdiction.—FLEMING v. CALEDONIAN RY. CO. (1847), 9 Dunt. (Cl. of Sess.) 792; 19 Sc. Jur. 319.—SCOT.

c. Entry under Act subsequently disallowed—Owner not acting bona fide.—BROWNING v. RYAN (1887), 4 Man. L. R. 486.—CAN.

Sect. 1.—Conditions necessary to entry: Sub-sect. 2, A. & B. (

for that second portion after the rate specified in the agreement, & without having previously agreed upon or ascertained by reference to a jury the damage occasioned by the severance of the second portion from the remaining portion of the field. A bill having been filed for an injunction:—*Held*: the agreement only provided for the amount to be paid to pl'ts. for the value of the second portion of the field, & neither by intention nor legal construction did such value include the amount of damage by severance to the remaining portion of the field, which amount was either to be agreed upon by the parties or ascertained by a jury & until such amount was agreed upon or ascertained, the co. were not entitled to enter upon the second portion.

(2) Upon the undertaking of the co. to pay the amount of damage to the land by the severance, & to take proper proceedings, if necessary, for ascertaining the amount of such damage, the injunction was withheld.

I shall use the jurisdiction of this ct. for the purpose of compelling the company to do justice to individuals. I will not do so unnecessarily, so as to interfere with the works, but I will take care to reserve to myself the power of doing so, in order that justice may be done (LORD COTTENHAM, C.).—*JONES v. GREAT WESTERN RY. Co.* (1840), 1 Ry. & Can. Cas. 684, L. C.

980. Entry for public safety—Removal of soil—Promoters undertaking to pay value of land into court—Injunction refused.—*TOWER v. EASTERN COUNTIES RY. Co.* (1843), 3 Ry. & Can. Cas. 374.

981. Entry solely for purposes of surveying—Without notice—Injunction refused.—*FOOKS v. WILTS, SOMERSET & WEYMOUTH RY. Co.* (1846), 5 Hare, 199; 4 Ry. & Can. Cas. 210; 6 L. T. O. S. 520; 67 E. R. 885; *subsequent proceedings, sub nom. Re WILTS, SOMERSET & WEYMOUTH RY. Co. & FOOKS* (1849), 3 Exch. 728.

982. Entry on mortgaged land—Mortgagee's rights disregarded—Injunction granted.—*RANKEN v. EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. Co.* (1849), 12 Beav. 298; 19 L. J. Ch. 153; 15 L. T. O. S. 81; 14 Jur. 7; 50 E. R. 1075.

983. Entry under bonâ fide mistake—Tenant for life believed to be absolute owner—Agreement with supposed agent.—*PERKS v. WYCOMBE RY. Co.*, No. 147, *ante*.

984. — Question of value only in dispute—Injunction refused.—*WOOD v. CHARING CROSS RY. Co.* (1863), 33 Beav. 290; 55 E. R. 379.

Annotations:—Refd. Dowling v. Pontypool Caerleon & Newport RY. (1874), L. R. 18 Eq. 714; Parkdale Corpn. v. West (1887), 12 App. Cas. 602.

Entry on land of which purchase omitted by mistake.—*See Part XIII., sect. 7, post.*

985. Filling up river in front of wharf—To which applicant had right to free access from river.—*MACEY v. METROPOLITAN BOARD OF WORKS*, No. 273, *ante*.

986. Temporary diversion of pier—Promoters not bound to comply with Lands Act, 1845, s. 84.—*TEMPLE PIER CO. LTD. v. METROPOLITAN BOARD*

983i. Entry under bonâ fide mistake—Permission of one believed to be true owner—Promoters not trespassers.—*Re RUTAN & DREIFUS & CANADIAN NORTHERN RY. Co.* (1906), 12 O. L. R. 187; 7 O. W. R. 568.—**CAN.**

d. Entry under invalid warrant—Technical trespass—Nominal

—Deft. applied for warrant of possession under Ry. Act, which was granted on facts not sufficient to give jurisdiction, & the order was invalid. Deft. entered:—*Held*: deft., having acted under the invalid warrant of possession, had committed a technical trespass.—*GIROUARD v. GRAND TRUNK*

OF WORKS (1865), 34 L. J. Ch. 262; 12 L. T. 369; 11 Jur. N. S. 337; 13 W. R. 535.

Annotation:—Distd. Warr v. L. C. C. (1903), 88 L. T. 689.

See, also, Part III., Sect. 3, sub-sect. 4, A., ante; Sub-sect. 2, B. (d), post.

B. Remedies for.

(a) In General.

987. When damages awarded—General rule.—*GOLDIE v. OSWALD*, No. 972, *ante*.

988. — Necessity for injunction ceasing—Pending proceedings—Inquiry as to damages ordered.—*M'RAE v. LONDON, BRIGHTON & SOUTH COAST RY. Co.* (1868), 37 L. J. Ch. 267; 18 L. T. 226.

989. Who entitled to relief—Reversioner.—*HOSKING v. PHILLIPS* (1848), 3 Exch. 168; 5 Ry. & Can. Cas. 560; 18 L. J. Ex. 1; 12 L. T. O. S. 198; 12 Jur. 1030; 154 E. R. 801.

Annotations:—Refd. Morgan v. Hardy (1886), 17 Q. B. D. 770; *Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co.* (1887), 36 Ch. D. 113. *Mentd. Davis v. Underwood* (1857), 22 J. P. 8; *Cotter v. Met. Ry.* (1864), 10 Jur. N. S. 1014; *Joyner v. Weeks*, [1891] 2 Q. B. 31.

990. — Tenant holding under building agreement.—*A.*, in occupation of land under a building agreement determinable if the buildings were not completed by Nov. 30, 1885, was informed in 1880 of the promotion of a bill for a railway which would affect the land. *A.* thereupon had an interview with his landlord's agent, who told him to suspend building operations till the result of the railway scheme was known, no express agreement to extend the time for building being come to. In 1883, the co. obtained their Act, & on July 31, 1883, purchased from the landlord such part of the land as was required, the purchase being made expressly subject to the building agreement. On Sept. 16, 1884, the co. gave *A.* notice to treat. *A.* sent in no claim, & in Jan., 1886, the co. took possession without making a deposit or giving a bond, as required by Lands Act, 1845, insisting that *A.* had no interest in the land. *A.* thereupon commenced his action for an injunction, & to have it declared that the building agreement was subsisting & that he was entitled to have his interest assessed on that footing:—*Held*: as the co. had, without complying with the provisions of Lands Act, 1845, entered upon land of which *A.* was lawfully in occupation, he had ground for an action, & the action being brought to trial, the ct. had jurisdiction to make a declaration as to his interest in the property, & although the term named in the agreement had expired, he had an interest in the land, for that the agent's direction to suspend building raised an equity against the landlord to prevent his ejecting *A.* at the end of the term until he had a reasonable time after notice to complete the building, & the railway co. took subject to that liability.—*BIRMINGHAM & DISTRICT LAND CO. v. LONDON & NORTH WESTERN RY. Co.* (1888), 40 Ch. D. 268; 60 L. T. 527, C. A.

Annotation:—Refd. L. & N. W. Ry. v. Boulton (1890), 62 L. T. 393.

Effect of delay in applying for relief.—*See Sub-sect. 2, D., post.*

PACIFIC RY. Co. (1909), 2 Alta. L. R. 51; 10 W. L. R. 531.—**CAN.**

e. — Action of Justification under warrant.—*SANDERS v. EDMONTON, DUNVEGAN BRITISH COLUMBIA RY. Co.* (1913), 25 W. L. R. 540; 14 D. L. R. 89.—**CAN.**

(b) *Damages for Trespass.*

When liability in trespass arises.]—See Nos. 972, 975, *ante*.

991. Who entitled to sue—Reversioner.]—HOSKING v. PHILLIPS (1848), 3 Exch. 168; 5 Ry. & Can. Cas. 560; 18 L. J. Ex. 1; 12 L. T. O. S. 198; 12 Jur. 1030; 154 E. R. 801.

Annotations:—*Reid*. Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co. (1887), 36 Ch. D. 113. *Mentd.* Davis v. Underwood (1857), 22 J. P. 8; Cotter v. Met. Ry. (1864), 10 Jur. N. S. 1014; Morgan v. Hardy (1886), 17 Q. B. D. 770; Joyner v. Weeks, [1891] 2 Q. B. 31.

992. Pleading—Designation of locus in quo—By abutments or other description—At time of trespass.]—HUMFREY v. LONDON & NORTH-WESTERN RY. CO. (1852), 7 Exch. 325; 22 L. J. Ex. 149; 155 E. R. 971.

993. Measure of damages—Amount by which value of land diminished.]—HOSKING v. PHILLIPS (1848), 3 Exch. 168; 5 Ry. & Can. Cas. 560; 18 L. J. Ex. 1; 12 L. T. O. S. 198; 12 Jur. 1030; 154 E. R. 801.

Annotations:—*Reid*. Davis v. Underwood (1857), 22 J. P. 8; Cotter v. Met. Ry. (1864), 10 Jur. N. S. 1014; Morgan v. Hardy (1886), 17 Q. B. D. 770; Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co. (1887), 36 Ch. D. 113. *Mentd.* Joyner v. Weeks, [1891] 2 Q. B. 31.

994. Awarded instead of injunction—When legal right only in question—Qualified consent & acquiescence—Removal of boundary wall.]—LOCKWOOD v. LONDON & NORTH-WESTERN RY. CO. (1868), 19 L. T. 68.

See, also, Part III., Sect. 3, sub-sect. 5, *ante*; Sub-sect. 2, B. (d), *post*.

PART VIII. SECT. 1, SUB-SECT. 2.—
B. (b).

f. When liability in trespass arises—Non-compliance with special Act.]—Non-compliance with the terms of the special Act & not obtaining an order-in-council, where necessary, under a contractor with the Crown who enters upon land to construct a public work liable in trespass.—KEARNEY v. OAKES (1890), 18 S. C. R. 148.—CAN.

g. ——— Entry without permission or notice.]—Defts. entered upon plff.'s land & took timber for road repairs. They did not obtain permission or give notice before entering. On action for trespass & conversion of timber:—*Held*: not a case for arbitration & action should not be stayed pending an arbitration under Municipal Clauses Act.—COOK v. NORTH VANCOUVER (1911), 18 W. L. R. 319; 16 B. C. R. 129.—CAN.

h. ——— Entry before expropriation proceedings.]—The filing of a plan, profile & book of reference under Railway Act, 1902, showing the land required for the ry., does not warrant the co. in taking possession before proceedings for expropriation are commenced, unless by agreement with the owner; &, if such possession is taken, the co. is a trespasser, & the owner is not limited to remedy by arbitration provided by the Act, but may proceed by action at law against the co.—WICHER v. CANADIAN PACIFIC RY. CO. (1906), 16 Man. L. R. 343.—CAN.

i. ——— ———.]—Where a ry. co. entered upon lands adjoining their ry. & laid down certain sidings without taking expropriation proceedings, the ct. refused to draw presumptions in favour of an easement or larger right subsisting in the co.'s predecessor in title, & on failure of proof thereof found co. liable in trespass.—CANADIAN PACIFIC RY. CO. v. CARR (1913), 13 E. L. R. 559; 15 D. L. R. 295.—CAN.

j. ——— Entry before payment or warrant giving leave to enter.]—A ry. co. entering upon land without pay-

ment of the price agreed upon or fixed by arbitration, or without a warrant giving leave to enter, is liable to trespass.—HANEY v. CANADIAN NORTHERN RY. CO., [1919] 1 W. W. R. 131.—CAN.

k. Entry under local Act—No remedy in trespass.]—*Held*: under 4 Wm. IV. c. 29 the G. W. Ry. Co. might enter upon land for the purposes of their road, & could not be treated as trespassers, though they must make compensation.—SOMMERVILLE v. GREAT WESTERN RY. CO. (1854), 11 U. C. R. 304.—CAN.

l. Measure of damages—Liability in trespass.]—A ry. co. notified plff. that they required a portion of his land & notified him of their appointment of an arbitrator. Defts., contractors under the co., entered & commenced the work after. An arbn. was held; but before the award plff. brought trespass, & refused to accept the sum awarded:—*Held*: neither the price nor damage could be recovered in this action, but only damages caused by the entry & commencement of the work, which were premature.—MARTINI v. GZOWSKI (1855), 13 U. C. R. 298.—CAN.

award under 14 & 15 Vict. c. 51 will not cover injuries done by the co. in entering upon lands before filing their map & plan, when they had no legal right to enter.—JEASLER v. BELL (1855), 13 U. C. R. 176.—CAN.

n. ——— Breach of agreement to erect station.]—Plffs. agreed to give the ry. co. land for its right of way, upon the oral promise that the co. would construct & maintain a station. The station was not built, & plffs. brought actions, claiming damages for trespass, &, in the alternative, compensation for land taken & damages for non-construction of the station. The co. then took expropriation proceedings, & obtained an order staying the actions. After awards had been made, plffs., who refused to accept them, proceeded with the actions:—*Held*: while the awards were an answer to the claim for

(c) *Ejectment.*

995. Proper remedy—Conflicting claims—Injunction after expiration of powers refused.]—WEBSTER v. SOUTH-EASTERN RY. CO. (1851), 1 Sim. N. S. 272; 6 Ry. & Can. Cas. 678; 7 Ry. & Can. Cas. 979; 20 L. J. Ch. 194; 15 Jur. 73; 61 E. R. 105.

996. Whether remedy barred—Not by Lands Act, 1845, s. 124.]—SALISBURY (MARQUIS) v. GREAT NORTHERN RY. CO. (1858), 5 C. B. N. S. 174; 28 L. J. C. P. 40; 32 L. T. O. S. 175; 23 J. P. 22; 5 Jur. N. S. 70; 7 W. R. 75; 141 E. R. 69.

Annotations:—*Distd.* Jolly v. Wimbledon & Dorking Ry. (1861), 1 B. & S. 815. *Mentd.* Berridge v. Ward (1861), 10 C. B. N. S. 400; R. v. Wycombe Ry. (1867), L. R. 2 Q. B. 310; Tidswell v. Whitworth (1867), L. R. 2 C. P. 326; Plumstead Board of Works v. British Land Co. (1874), L. R. 10 Q. B. 16; R. v. Platts (1880), 28 W. R. 915; Landrock v. Met. Dist. Ry. (1886), 3 T. L. R. 162; Micklothwait v. Newla. Bridge Co. (1886), 33 Ch. D. 133; Devonshire v. Pattinson (1887), 20 Q. B. D. 263; Pryoe v. Petro, [1894] 2 Ch. 11.

997. When remedy lost—Plaintiff taking law in own hands—Pulling down works erected by promoters.]—LIND v. ISLE OF WIGHT FERRY CO. (1862), 1 New Rep. 13; 7 L. T. 416.

Annotations:—*Consd.* Tiverton & North Devon Ry. v. Loosemore (1884), 9 App. Cas. 480. *Mentd.* Nosbitt v. Mablethorpe U. C., [1918] 2 K. B. 1.

(d) *Injunction.*

998. General principles—Laches of applicant.]—GOLDIE v. OSWALD, No. 972, *ante*.

999. ——— Unnecessary interference with works—Not allowed.]—JONES v. GREAT WESTERN RY. CO., No. 979, *ante*.

compensation, the right of recovery for the prior occupation was still open.—GAUTHIER v. CANADIAN NORTHERN RY. CO., DAGENAIS v. CANADIAN NORTHERN RY. CO. (1914), 28 W. L. R. 240; 17 D. L. R. 193.—CAN.

PART VIII. SECT. 1, SUB-SECT. 2.—
B. (c).

o. Whether remedy barred—By Railway Act.]—WELLAND (COUNTY OF) v. BUFFALO & LAKE HURON RY. CO. (1870), 30 U. C. R. 147; 31 U. C. R. 539.—CAN.

p. ——— Compensation bond *fide* paid to other than true owner—Remedy under statutes.]—MOLEAN v. GREAT WESTERN RY. CO. (1873), 33 U. C. R. 198.—CAN.

q. When remedy lost—Plaintiff having claimed compensation in arbitration proceedings.]—GRIMSHAW v. GRAND TRUNK RY. CO. (1859), 19 U. C. R. 493.—CAN.

r. ——— After award—No acceptance of title.]—RANKIN v. GREAT WESTERN RY. CO. (1854), 4 C. P. 463.—CAN.

s. ——— Payment not made.]—COTTON v. HAMILTON & TORONTO RY. CO. (1855), 14 U. C. R. 87.—CAN.

t. ——— Action on award.]—NORVALL v. CANADA SOUTHERN RY. CO. (1877), 28 C. P. 309.—CAN.

PART VIII. SECT. 1, SUB-SECT. 2.—
B. (d).

998 i. General principles—Acquiescence of applicant.]—Where a trespasser, by taking proper steps to that effect, would have the right to expropriate the lands in dispute, an injunction should be withheld in order to enable the necessary proceedings to be taken & compensation made; & where there has been acquiescence equivalent to a fraud upon deft. the injunction ought not to be granted, even where the legal right of plff. has been proved.—SANDON WATERWORKS & LIGHT CO. v. WHITE (BYRON N.) CO. (1904), 35 S. C. R. 309.—CAN.

Sect. 1. - Conditions necessary to entry: Sub-sect. 2, B. (d), C. & D.]

1000. ————.]—*LANGFORD v. BRIGHTON, LEWES, & HASTINGS RY. CO.* (1845), 4 Ry. & Can. Cas. 69.

1001. Possession obtained improperly from tenant—By fraud.]—There is no equity to restrain by injunction the owners of a railroad made over pltf.'s land from using the railroad after it has been completed or from interrupting pltf.'s workmen in removing it, & restoring the land to its original state, although the possession of the land for the purpose of constructing the railroad, may have been obtained from a tenant of pltf., by means of circumvention & fraud.—*DEERE v. GUEST* (1836), 1 My. & Cr. 516; 6 L. J. Ch. 69; 40 E. R. 473, L. C. *Annotations:—Appld.* *Carnochan v. Norwich & Spalding Ry.* (1858), 26 Beav. 169. *Consd. M. S. & L. Ry. v. L. & N. W. Ry.* (1858), 22 J. P. 176; *Perks v. Wycombe Ry.* (1862), 3 Giff. 662. *Consd. & Distd. Goodson v. Richardson* (1874), 9 Ch. App. 221. *Refd. Calcraft v. Thompson* (1866), 35 Beav. 559. *Mentd. A.-G. v. Norwich Corpn.* (1837), 2 My. & Cr. 406; *Moreland v. Richardson* (1856), 22 Beav. 596; *Bowser v. Maclean* (1860), 2 De G. F. & J. 415; *A.-G. v. United Kingdom Electric Telegraph Co.* (1861), 30 Beav. 287; *Durell v. Pritchard* (1865), 1 Ch. App. 244.

——— **Under mistake—As to true owner.]**—*See* No. 147, *ante*.

——— **As to land required.]**—*See* No. 984, *ante*.

After works completed.]—*See* No. 1001, *ante*, No. 1005, *post*.

1002. After judgment in ejectment—Promoters attempting to act under old notice to treat.]—In 1856 the G. Co. took possession of a piece of land, a portion of which, undefined by boundaries, belonged to F. Such possession was taken without F.'s consent & without compliance with the provisions of Lands Act, 1845, ss. 84, 85, & F. being unable to define the boundaries of her land, the co. continued in possession & constructed a railway on the land without F.'s consent, & refused to pay her anything in respect of her land. In 1868 pltf. claiming title under F., brought an action of ejectment against the co. & recovered judgment, & possession was delivered to him by the sheriff under a writ of possession. The co., however, continued to run their trains over the land,

u. — When substantial damage.]—An owner whose property has been injuriously affected retains his ordinary right of action for trespass, & where the damages are of a substantial character is entitled to an injunction. In such case there is no discretion in the ct. to award damages only in lieu of injunction.—*CHAMPION & WHITE v. VANCOUVER CITY*, [1918] 1 W. W. R. 216.—**CAN.**

w. — Public injury if granted—Compliance with Act—Costs paid by promoters.]—A ry. co., instead of obtaining the finding of a jury respecting compensation for land taken, but acting on oral consent by the owner's solr., took possession, & commenced work.—*Held: pltf. was entitled to an injunction, but, since great public injury would, without corresponding benefit to him, result from stopping the work, & to prevent injury to the co., there should be no rule on the motion, the co. proceeding at once to obtain the finding of a jury, & paying all costs properly incurred because they had gone into possession without complying with the Act.*—*HARRIS v. CORK & Bandon RY. CO.* (1851), 3 Ir. Jur. 1.—**IR.**

y. After works completed—Injunction refused.]—The ct. ought never to interfere to restrain a co. by injunction from doing a thing which has been already done; & if a co. enter upon

lands without giving the requisite notice, when notice is required, the proper course is to proceed at law for the trespass, as this ct. cannot in such case properly estimate the amount of damages.—*NEWCOMBE v. DUBLIN & WICKLOW RY. CO.* (1854), 7 Ir. Jur.—**IR.**

z. Entry under agreement to purchase—Before payment of price.]—*CALDER v. MIDDLETON & VICTORIA BREACH RY. CO.*, 23 C. L. T. 18.—**CAN.**

a. — —.]—A ry. co., having agreed to purchase lands, entered, & carried on their works without vendor's leave, & without having paid him, or lodged the money in bank. The ct. granted an injunction till the money should be paid.—*ANDERSON v. NEWRY & WARRENPOINT RY. CO.* (1849), 1 Ir. Jur. 11.—**IR.**

b. Entry before expropriation—Injunction granted.]—*MONAGHAN v. PROVINCIAL EXHIBITION COMMISSION* (1906), 1 E. L. R. 177.—**CAN.**

c. Entry under mistake—As to sitting tribunal—Injunction refused.]—A ry. co., under Lands Act, ss. 59, 85, obtained assessment of compensation for pltf.'s interest on lands, by a surveyor appointed by 2 JJ. of another county, took possession, & proceeded with their works:—

Held: not sufficient ground to restrain defts.' proceedings.—*WILSON v.*

& pltf. filed a bill against them for an injunction to restrain the trespass. Thereupon, the co. served pltf. with notice of their intention to summon a jury for the purpose of ascertaining the value of the land, under a notice to treat served upon F. in 1856, but which notice had until then been treated by both parties as non-existent, & pltf. filed a second bill for an injunction to restrain the co. from summoning a jury:—*Held: (1) pltf. was entitled to both injunctions; (2) the case did not come within Lands Act, 1845, s. 124, relating to interests omitted by mistake or inadvertence to be purchased.*—*STRETTON v. GREAT WESTERN & BRENTFORD RY. CO.* (1870), 5 Ch. App. 751; 40 L. J. Ch. 50; 23 L. T. 379; 35 J. P. 183; 18 W. R. 1078, L. C. & L. J.

Annotations:—As to (1) Consd. London Corpn. v. Horner (1914), 111 L. T. 512. *Refd. Stoneham v. L. B. & S. C. Ry.* (1871), 20 W. R. 77. *Generally, Mentd. Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714.

Notice to treat generally.]—*See* Part VI., Sect. 2, *ante*.

1003. Entry under agreement to purchase—Before acceptance of title or payment of price—Specific performance proper remedy—Election of remedy by vendor.]—*HYDE v. GREAT WESTERN RY. CO.*, No. 976, *ante*.

1004. Plaintiff entitled to injunction when suit begun—Necessity for injunction ceasing pending proceedings—Right to damages.]—*M'RAE v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1868), 37 L. J. Ch. 267; 18 L. T. 226.

1005. Plaintiff's title not disputed—Water-pipes laid in soil of highway.]—(1) Where water-pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law & not being required to establish his right at law.

(2) The facts that the soil under the highway was of no value to the owner & that his motive for applying to the ct. was not connected with the enjoyment of his land were held not to be reasons against the grant of the injunction.

(3) Where pltf.'s title is not disputed the ct. will grant an injunction to restrain acts of trespass without requiring him first to bring an action at law.

NEWRY, WARRENPOINT & ROSTREVOR RY. CO. (1847), 10 L. T. O. S. 211.—**IR.**

d. Entry under award pending hearing of appeal—Injunction not granted.]—An arbitrator assessed the value of portions of land required by a ry. co. under their special act at a certain sum, & awarded a further sum as compensation for severance or other injury. Pltf. traversed the award. Pending its hearing the ry. co., having complied with the requirements of the Lands Act, 1845, s. 85, entered, & proceeded to make the ry.:—*Held: the entry was lawful, & the co. could not be restrained by injunction.*—*LAMBERT v. DUBLIN, WICKLOW & WEXFORD RY. CO.* (1890), 25 L. R. Ir. 163.—**IR.**

e. Entry on land not included in notice to treat—Injunction granted.]—A ry. co. served upon a proprietor statutory notice to treat for the purchase of a part of his lands, & then entered into possession of all his lands. A great part of the ry. was completed without objection, but without any express written consent or other authority under co.'s Act:—*Held: (1) an interim interdict would be refused with regard to land within the notice; (2) it would be granted as to land entered on & not included in the notice.*—*RENTON v. NORTH BRITISH RY. CO.* (1845), 8 Dunl. (Ct. of Sess.) 247; 18 Sc. Jur. 118.—**SCOT.**

(4) If pltf. is guilty of no acquiescence or delay he will be entitled to a mandatory injunction though the works complained of may have been completed before the filing of the bill.—*GOODSON v. RICHARDSON* (1874), 9 Ch. App. 221; 43 L. J. Ch. 790; 30 L. T. 142; 38 J. P. 436; 22 W. R. 337, L. C. & L. JJ.

Annotations:—As to (1) *Consd.* *St. Mary, Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31. *Refd.* *L. & N. W. Ry. v. Westminster Corpn.*, [1904] 1 Ch. 759; *Riley v. Halifax Corpn.* (1907), 5 L. G. R. 909. As to (2) *Consd.* *Marriott v. East Grinstead Gas & Water Co.*, [1909] 1 Ch. 70. As to (3) *Refd.* *Eardley v. Granville* (1876), 3 Ch. D. 826; *Cooper v. Crabtree* (1882), 20 Ch. D. 589. As to (4) *Refd.* *Elias v. Griffith* (1878), 8 Ch. D. 521. *Generally, Mentd.* *Allen v. Martin* (1875), L. R. 20 Eq. 462; *Butterley Co. v. New Hucknall Colliery Co.*, [1909] 1 Ch. 37.

1006. Plaintiff's motive for applying not connected with enjoyment of land.—*GOODSON v. RICHARDSON*, No. 1005, *ante*.

1007. Costs—Injunction refused—After reference to Board of Trade—Costs not given.—*PEARCE v. WYCOMBE RY. CO.* (1853), 7 Ry. & Can. Cas. 902; 1 Eq. Rep. 332; 21 L. T. O. S. 224; 17 Jur. 660.

1008. — Injunction dissolved—Upon compliance with Lands Act, 1845, s. 85—Paid by promoters.—*WOODWARD v. EASTERN COUNTIES RY. CO.* (1855), 25 L. T. O. S. 22; 1 Jur. N. S. 899; 3 W. R. 330.

1009. — Proceedings for injunction compromised—Promoters to pay costs to date of offer of compromise.—*KENSINGTON (LORD) v. METROPOLITAN RY. CO.*, *WILLIAMS v. METROPOLITAN RY. CO.* (1866), 14 L. T. 580; 14 W. R. 754.

1010. — No right to sign judgment for costs—On confession of defence—R. S. C., Ord. 24, r. 3.—*HOUGHTON v. TOTTENHAM & FOREST GATE RY. CO.*, [1892] W. N. 88.

See, also, Part III., Sect. 3, sub-sect. 1, A.; Sub-sect. 2, A., *ante*.

C. Penalties for.

See Lands Act, 1845, s. 89.

1011. Entering "wilfully."—Promoters protected after bonâ fide payment into bank.—*HUTCHINSON v. MANCHESTER, BURY, & ROSSINDALE RY. CO.* (1846), 15 M. & W. 314; 15 L. J. Ex. 293; 10 Jur. 361; 153 E. R. 869; *sub nom.* *HUTCHINSON v. EAST LANCASHIRE RY. CO.*, 3 Ry. & Can. Cas. 748.

1012. — Entry under mistaken belief of right protected.—*SPEELE v. MIDLAND RY. CO.* (1869),

Annotations:—*Consd.* *Kerford v. Seacombe, etc. Ry.* (1888), 57 L. J. Ch. 270. *Refd.* *Re Willis, Spencer v. Willis*, [1911] 2 Ch. 563.

D. Consent to Entry.

1013. Consent—Of occupying tenants Owners not compensated—Nor security deposited—Injunction granted.—*ARMSTRONGS v. WATERFORD & LIMERICK RY. CO.* (1846), 8 L. T. O. S. 199.

1014. — Of owner—At law—Representatives

of owner entitled to possession.—*DOE d. PATRICK v. BEAUFORT (DUKE)* (1851), 6 Exch. 498; 20 L. J. Ex. 251; 155 E. R. 610.

1015. — In equity—Representatives of owner & purchaser with notice entitled to compensation only.—*BEAUFORT (DUKE) v. PATRICK* (1853), 17 Beav. 60; 7 Ry. & Can. Cas. 906; 1 Eq. Rep. 41; 22 L. J. Ch. 489; 21 L. T. O. S. 296; 17 Jur. 682; 1 W. R. 280; 51 E. R. 954.

Annotations:—*Refd.* *Somersetshire Coal Canal Co. v. Harcourt* (1858), 2 De G. & J. 596; *Mold v. Wheatcroft* (1859), 27 Beav. 510; *Plimmer v. Wellington Corpn.* (1884), 9 App. Cas. 699. *Mentd.* *Martin v. L. C. & D. Ry.* (1866), 1 Ch. App. 501; *Eardley v. Granville* (1876), 24 W. R. 528.

1016. — Not revocable—Consent to arbitration—Subsequent disagreement as to conveyance.

—*DOE d. HUDSON v. LEEDS & BRADFORD RY. CO.* (1851), 16 Q. B. 796; 20 L. J. Q. B. 486; 17 L. T. O. S. 50; 15 J. 946; 117 E. R. 1086.

Annotations:—*Appld.* *Knapp v. L. C. & D. Ry.* (1863), 2 H. & C. 212. *Consd.* *Wing v. Tottenham & Hampstead Junction Ry.* (1868), 3 Ch. App. 740.

1017. — Consent of owners & occupiers.

(1) To a declaration framed on Lands Act, 1845, s. 68, alleging that pltf. being possessed of a house, defts., a railway co., having taken same & injuriously affected it by the execution of their works, & not having made any satisfaction, & pltf.'s claim exceeding £50 he had given notice to defts. to have same determined by a jury, & of the nature of his interest in the house; that defts. not having entered into any written agreement with pltf. & not having summoned a jury within the twenty-one days required by Lands Act, had become liable to pltf. for the whole amount of his claim, defts. pleaded that at the time the notice was given & the house taken pltf. had no greater interest therein than as a tenant from year to year; to which pltf. replied that pltf. had not, before the giving the notice, been required to give up possession of the house, & that defts. without pltf.'s consent, had entered upon & taken the house without notice to him:—*Held*: the plea was good & pltf. should have proceeded under s. 121 & not under s. 68.

(2) To a count for trespass to the house, defts. pleaded that the house was delineated in the plans & described in the books of reference deposited as required by their Act, & that it was necessary to take & use the house for the purposes of their Act, & that they entered & took possession of the house with the consent of the owners & occupiers thereof, & after such entry & possession taken pltf. took possession of the house & occupied same, & defts., because it was necessary to the construction of their works authorised by that Act, entered the house, pltf. then being therein, & pulled down same, etc.:—*Held*: the plea was good & the consent could not be revoked.

(3) To a count alleging that pltf. was entitled to support for the house from an adjoining house, & complaining that defts. wrongfully deprived pltf. of such support, to wit, by negligently &

complied with the provisions of the Ry. Act, entered & completed the work. The purchase money not having been agreed upon, pltf. brought an action against the corpn. & co. for damages to the land & interference with his business:—*Held*: the corpn. were not liable, & pltf.'s remedy against the co. was by arbitration under Ry. Act, & not by action.—*TODD v. MEAFORD CORPN.* (1903), 23 C. L. T. 323; 6 O. L. R. 469; 2 O. W. R. 12, 779.—*CAN.*

j. Entry under special Act—Compensation where owner's title doubtful—Reference to master.—*SCANLON v. LONDON & PORT STANLEY RY. CO.* (1876), 23 Gr. 559.—*CAN.*

PART VIII. SECT. 1, SUB-SECT. 2.—C.

1. Entry without paying compensation—Who may prosecute—Tenants for a year or for shorter term.—Tenants for a year or a shorter term may prosecute for penalties where a co. enters on lands without paying compensation to them. *GLASGOW DISTRICT SUBWAY CO. v. JOHNSTONE* (1892), 20 R. (Ct. of Sess.) 28; 30 Sc. L. R. 321. —*SCOT.*

PART VIII. SECT. 1, SUB-SECT. 2.—D.

g. Entry with consent of owner—Purchase price not paid—No title in owner.—Defts. fenced in land with consent of M. the proprietor; but remuneration was not agreed upon &

defts. occupied it & afterwards leased a small portion to pltf. M. not having been paid put up a fence, which interfered with pltf.'s enjoyment. Pltf. sued defts. on the covenant in the lease for quiet enjoyment:—*Held*: pltf. could not recover, for M. could not have dispossessed defts., his right to the land having been by the Acts converted into a claim for compensation. —*CLARKE v. GRAND TRUNK RY. CO.* (1874), 35 U. C. R. 57.—*CAN.*

h. Entry before compensation fixed—Owner's remedy arbitration not action.—A corpn. agreed with pltf. for the purchase & possession by a ry. co. of a portion of pltf.'s land, but without fixing the price. The co., having

Sect. 1.—Conditions necessary to entry: Sub-sect. 2, D. Sect. 2: Sub-sects. 1 & 2, A. & B.]

improperly pulling down same without taking due care to secure pltf.'s house against the consequences of such pulling down, defts. pleaded, except as to so much of the count as charged them with having negligently & improperly pulled down the adjoining house, that same was delineated in the plans & described in the books of reference deposited as required by their Act, & that it was necessary for the purposes of that Act to enter upon & pull down same:—*Held*: the plea was good, & the portion of the count to which it was pleaded stated a good cause of action.—*KNAPP v. LONDON, CHATHAM & DOVER RY. CO.* (1863), 2 H. & C. 212; 2 New Rep. 329; 32 L. J. Ex. 236; 8 L. T. 541; 9 Jur. N. S. 671; 11 W. R. 890; 159 E. R. 88.

Annotation:—As to (1) *Refd.* *Cameron v. Charing Cross Ry.* (1864), 16 C. B. N. S. 430.

1018. Acquiescence—Silence & conduct.—The owner of land upon which a railway co. empowered by Parliament are about to enter, is not entitled to an interlocutory injunction to restrain them from so entering, if, by his silence & conduct, he has permitted the co. to carry on their works upon the supposition that they were entitled to enter on & take the land in question.—*GREENHALGH v. MANCHESTER & BIRMINGHAM RY. CO.* (1838), 3 My. & Cr. 784; 1 Ry. & Can. Cas. 68; 8 L. J. Ch. 75; 2 Jur. 1035; 40 E. R. 1128, L. C.

Annotation:—*Consd.* *Lindsey v. G. N. Ry.* (1853), 10 Hare, 664.

1019. — Subsequent treating with promoters—Amounts to waiver of objection.—*TOWER v. EASTERN COUNTIES RY. CO.* (1843), 3 Ry. & Can. Cas. 374.

1020. — Delay—In applying for injunction—Amounts to acquiescence.—*HOPKINS v. GREAT NORTHERN RY. CO.* (1848), 11 L. T. O. S. 306.

1021. — — — — — For nine days—Not acquiescence.—*MURRAY v. LONDON & BLACKWALL RY. CO.* (1851), 18 L. T. O. S. 235.

1022. — — — — — In making objection—Complainant unaware that land in question belonged to him—Not precluded from re-entry.—*SALISBURY (MARQUIS) v. GREAT NORTHERN RY. CO.* (1858), 5 C. B. N. S. 174; 28 L. J. C. P. 40; 32 L. T. O. S. 175; 23 J. P. 22; 5 Jur. N. S. 70; 7 W. R. 75; 141 E. R. 69.

Annotations:—*Consd.* *Berridge v. Ward* (1861), 10 C. B. N. S. 400. *Distd.* *Jolly v. Wimbledon & Dorking Ry.* (1861), 31 L. J. Q. B. 95. *Consd.* *Plumstead Board of Works v. British Land Co.* (1874), L. R. 10 Q. B. 16. *Refd.* *R. v. Wycombe Ry.* (1867), L. R. 2 Q. B. 310; *Landrock v. Met. Ry.* (1886), 3 T. L. R. 162; *Pryor v. Petre*, [1894] 2 Ch. 11. *Mentd.* *Tidswell v. Whitworth* (1867), L. R. 2 C. P. 326; *R. v. Platts* (1880), 28 W. R. 915; *Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133; *Devonshire v. Pattinson* (1887), 20 Q. B. D. 263.

1023. — Effect of—Landowner restrained from bringing action of ejectment & from using land.—*SOMERSETSHIRE COAL CANAL CO., LTD. v. HARCOURT*, No. 436, *ante*.

Effect of entry before purchase or payment.—*See Sect. 2, sub-sect. 2, B., post.*

SECT. 2.—ENTRY BEFORE PURCHASE OR PAYMENT.

See Lands Act, 1845, ss. 84, 85.

SUB-SECT. 1.—IN GENERAL.

1024. Whether Lands Act, 1845, s. 85, applicable—After notice given by promoters to summon jury

—Promoters may proceed to obtain possession.]—*LANGHAM v. GREAT NORTHERN RY. CO.* (1848), 1 De G. & Sm. 486; 5 Ry. & Can. Cas. 263; 16 L. J. Ch. 437; 9 L. T. O. S. 452; 11 Jur. 839; 63 E. R. 1160.

Annotations:—*Mentd.* *Ex p. G. N. Ry.* (1848), 5 Ry. & Can. Cas. 269; *Wallis v. Wallis* (1859), 4 Drew. 458; *Cotter v. Mot. Ry.* (1864), 10 L. T. 777.

1025. — Land in possession of receiver—Leave of court necessary.]—*TINK v. RUNDLE* (1847), 10 Beav. 318; 50 E. R. 604.

1026. — Land taken irregularly—Bond given for insufficient amount.]—(1) Where a public co. deals with A. in respect of his individual interest in certain land, & is desirous of entering upon the land under Lands Act, 1845, s. 85, a bond to secure the payment of the compensation-money to, or the deposit of it in the Bank of England for, A., his exors., administrators or assigns, & not saying for the benefit of the parties interested in such land is a compliance with s. 85.

(2) The bond to be given under Lands Act, 1845, s. 85, need not identify with exactness the portion of land to be taken.

(3) A public co. does not lose its power of taking possession of land under Lands Act, 1845, s. 85, by the circumstance that there had been sufficient time, two years in this instance, between the notice to treat & the taking possession, to have enabled the co. to have ascertained the amount of compensation-money by the modes pointed out by the Act.

(4) Although the entry on land by a co. under Lands Act, 1845, s. 85, may have been originally wrongful in consequence of some informality, yet where the error is corrected, the possession will be considered a rightful continuance.—*WILLEY v. SOUTH EASTERN RY. CO.* (1840), 1 Mac. & G. 58; 1 H. & Tw. 56; 6 Ry. & Can. Cas. 100; 18 L. J. Ch. 201; 13 L. T. O. S. 229; 13 Jur. 241; 41 E. R. 1184, L. C.

Validity of bond generally, *see* Sub-sect. 4, A., *post*.

1027. — Laches in negotiating with landowner—Promoters not precluded from taking possession.]—*WILLEY v. SOUTH EASTERN RY. CO.*, No. 1026, *ante*.

1028. — On expiration of compulsory powers under special Act—Promoters cannot proceed under s. 85.]—*KINNERSLY v. NORTH STAFFORD-LE RY. CO.* (1849), 6 Ry. & Can. Cas. 662; 13 L. T. O. S. 340.

Annotations:—*Refd.* *Salisbury v. G. N. Ry.* (1852), 17 Q. B. 840; *Nixon v. Brownlow* (1857), 2 H. & N. 455.

1029. — Entry after conveyance from parties claiming to be owners—Subsequent claim by other persons & denial of promoters' title—Possession of promoters not interfered with.]—*ALSTON v. EASTERN COUNTIES RY. CO.* (1855), 26 L. T. O. S. 51; 1 Jur. N. S. 1009; 3 W. R. 559.

1030. — Diversion of stream.]—(1) Waterworks Act, 1847, is applicable to lands & streams, in the same manner as Lands Act, 1845, is applicable to lands; & in the mode of compensation, the same distinction is taken between lands & streams taken & used & lands & streams injuriously affected.

(2) The diversion of a stream is a taking & using it within Lands Act, 1845, s. 85, which is incorporated in the Waterworks Act, 1847, & before such diversion can be made the value of the stream must be ascertained & secured to the owners of the land through which it passes.

(3) *Qu.*: whether, by diverting a stream, the river into which it used to flow is injuriously affected, or taken & used.—*FERRAND v. BRADFORD*

CORPN. (1856), 21 Beav. 412; 27 L. T. O. S. 11; 20 J. P. 116; 2 Jur. N. S. 175; 52 E. R. 918.

Annotations:—*As to* (1) *Folld.* Stone v. Yeovil Corpn. (1876), 2 C. P. D. 99. *Consd.* Re Gough, Aspatria, Silloth & District Joint Water Board (1903), 88 L. T. 421.

See, generally, WATER SUPPLY; WATERS & WATERCOURSES.

1031. — If no urgent necessity for immediate entry—Promoters cannot enter under s. 85.]—

FIELD v. CARNARVON & LLANBERIS RY. CO. (1867), L. R. 5 Eq. 190; 37 L. J. Ch. 176; 17 L. T. 534; 16 W. R. 273.

Annotation:—*Consd.* Loosemore v. Tiverton & North Devon Ry. (1882), 22 Ch. D. 25.

1032. — Acquisition of easement—Construction of tunnel—Without purchase of surface—Possession granted on payment of value.]—

HILL v. MIDLAND RY. CO. (1882), 21 Ch. D. 143; 51 L. J. Ch. 774; 47 L. T. 225; 30 W. R. 774.

Annotation:—*Consd.* G. W. Ry. v. Swindon & Cheltenham Ry. (1884), 9 App. Cas. 787.

1033. — Land not “taken”—Notice to treat given—No actual entry made.]—R. v. MANLEY SMITH, *Re* CHURCH & LONDON SCHOOL BOARD (1892), 67 L. T. 197; 56 J. P. 729; 40 W. R. 333; *sub nom.* CHURCH v. LONDON SCHOOL BOARD, 8 T. L. R. 310, D. C.

1034. Notice to owner not necessary—If proceedings approved by justices.]—Where a railway co. proceeds under Lands Act, 1845, s. 85, it is sufficient that the proceedings are approved of by two justices, & the co. is not required to give notice to the owner of the land which is sought to be affected by those proceedings.—BRIDGES v. WILTS, SOMERSET & WEYMOUTH RY. CO. (1847), 4 Ry. & Can. Cas. 622; 16 L. J. Ch. 335; 9 L. T. O. S. 242; 11 Jur. 315.

Annotations:—*Refd.* Langham v. G. N. Ry. (1848), 1 De G. & Sm. 486. *Mentd.* Poynder v. G. N. Ry. (1847), 16 Sim. 3.

SUB-SECT. 2.—ENTRY.

A. Time and Mode of.

1035. Immediately before expiration of time limited for completion.]—The special Act of a railway co. enacted that the powers of the co. for the compulsory purchase of lands for the purposes of the Act should not be exercised after the expiration of three years from the passing of the Act; & that if the railways were not completed within five years from the passing of the Act, then on the expiration of that period the powers by the Act granted to the co. for making & completing the railways or otherwise in relation thereto should cease to be exercised except as to so much thereof as was then completed. A few days before the expiration of the three years the co. served on a landowner a notice to treat for part of his land. A correspondence ensued, no agreement was come to & the compensation was not assessed. Thirteen days before the expiration of the five years the co., having complied with the requirements of Lands Act, 1845, s. 85, entered & proceeded to make the railway, the landowner objecting & resisting. The land was *bonâ fide* required for the railway:—*Held*: (1) whether the railway could or could not have been completed within the thirteen days, the entry under s. 85 was lawful, & the co. could not be restrained by injunction, but were entitled to remain & complete the railway after the expiration of the five years; (2) (FRY, J.) clay was a mineral within Railways Act, 1845, s. 77, & a railway co. was liable to the owner of land taken by it in respect of clay from such land used for puddling bridges where it was not necessary to

remove the clay in the construction of its line; (3) (FRY, J.) the Board of Trade might, under Railways Act, 1867, s. 36, approve the sureties to a bond upon an *ex p.* application by the co., unless the parties differ.—TIVERTON & NORTH DEVON RY. CO. v. LOOSEMORE (1884), 9 App. Cas. 480; 53 L. J. Ch. 812; 50 L. T. 637; 48 J. P. 372; 32 W. R. 929, H. L.; *reversg.* S. C. *sub nom.* LOOSEMORE v. TIVERTON & NORTH DEVON RY. CO. (1882), 22 Ch. D. 25, C. A.

Annotations:—*As to* (1) *Consd.* Charlton v. Rolleston (1884), 28 Ch. D. 237; Shephard v. Norwich Corpn. (1885), 30 Ch. D. 553. *Distd.* Batson v. London School Board (1903), 67 J. P. 457. *Folld.* G. W. Ry. v. Mid. Ry., [1908] 2 Ch. 644. *Refd.* G. W. Ry. v. Swindon & Cheltenham Ry. (1884), 9 App. Cas. 787; Mercer v. Liverpool, St. Helens & South Lancashire Ry., [1903] 1 K. B. 652; Wild v. Woolwich B. C., [1910] 1 Ch. 35. *As to* (2) *Refd.* G. W. Ry. v. Blades, [1901] 2 Ch. 624.

B. Effect of.

1036. Before expiration of prescribed period—For exercising compulsory powers—Promoters entitled to hold after expiration.]—DOE d.

ARMITSTEAD v. NORTH STAFFORDSHIRE RY. CO. (1851), 16 Q. B. 526; 20 L. J. Q. B. 249; 17 L. T. O. S. 59; 15 Jur. 944; 117 E. R. 980; *subsequent proceedings* (1852), 19 L. T. O. S. 374.

Annotations:—*Expld.* R. v. York, Newcastle & Berwick Ry. (1851), 6 Ry. & Can. Cas. 648. *Consd.* Worsley v. South Devon Ry. (1851), 16 Q. B. 539. *Consd. & Folld.* Salisbury v. G. N. Ry. (1852), 17 Q. B. 840. *Consd.* Tiverton & North Devon Ry. v. Loosemore (1884), 9 App. Cas. 480. *Refd.* Doe d. Hudson v. Leeds & Bradford Ry. (1851), 16 Q. B. 796; Sparrow v. Oxford, Worcester & Wolverhampton Ry. (1852), 7 Ry. & Can. Cas. 92; May v. G. W. Ry. (1872), L. R. 7 Q. B. 364; Dowling v. Pontypool Caerleon & Newport Ry. (1874), L. R. 18 Eq. 714. *Mentd.* Finch v. L. & S. W. Ry. (1889), 60 L. T. 350; Donaldson v. South Shields Corpn. (1899), 79 L. T. 685; Cannon Brewery Co. v. Central Control Board (Liquor Traffic), [1918] 2 Ch. 101.

1037. — — — — —.]—WORSLEY v. SOUTH DEVON RY. CO. (1851), 16 Q. B. 539; 20 L. J. Q. B. 254; 17 L. T. O. S. 60; 15 Jur. 970; 117 E. R. 986.

Annotations:—*Consd.* Tiverton & North Devon Ry. v. Loosemore (1884), 9 App. Cas. 480. *Refd.* Salisbury v. G. N. Ry. (1852), 17 Q. B. 480; Mercer v. Liverpool, St. Helens & South Lancashire Ry., [1903] 1 K. B. 652. *Mentd.* R. v. York Newcastle & Berwick Ry. (1851), 17 L. T. O. S. 153.

1038. — — — — —.]—For completion—Right to complete works after expiration.]—TIVERTON & NORTH DEVON RY. CO. v. LOOSEMORE, No. 1035, *ante*.

1039. Not exercise of compulsory powers of purchase.]—(1) A notice given by a railway company to a landowner requiring his land for the purpose of the undertaking, is an exercise of the powers for the compulsory purchase of land within Lands Act, 1845, s. 123, & if such notice be given within the prescribed period, the steps necessary to acquire the possession of the land may be taken afterwards.

(2) The entry on land, under s. 85, is not the exercise of a power for compulsory purchase, but is the exercise of a power for carrying that purchase into effect.—SALISBURY (MARQUIS) v. GREAT NORTHERN RY. CO. (1852), 17 Q. B. 840; 7 Ry. & Can. Cas. 175; 21 L. J. Q. B. 185; 18 L. T. O. S. 240; 16 Jur. 740; 117 E. R. 1503.

Annotations:—*As to* (1) *Consd.* Pinchin v. London & Blackwall Ry. (1854), 1 K. & J. 34; Haynes v. Haynes (1861), 1 Drew. & Sm. 426. *Distd.* Re Battersea Park Acts (1863), 32 Beav. 591; R. v. Manley Smith, *Re* Church & London School Board (1892), 67 L. T. 197. *Consd.* Sewell v. Harrow & Uxbridge Ry. (1902), 19 T. L. R. 130. *Refd.* G. W. Ry. v. Swindon & Cheltenham Extension Ry. (1884), 9 App. Cas. 787. *As to* (2) *Consd.* Tiverton & North Devon Ry. v. Loosemore (1884), 9 App. Cas. 480. *Refd.* G. W. Ry. v. Swindon & Cheltenham Extension Ry. (1884), 9 App. Cas. 787; Mercer v. Liverpool, St. Helens & South Lancashire Ry., [1903] 1 K. B. 652. *Generally*, *Expld.* Re Arnold, *Re p.* Battersea Park Comrs. (1863), 2 New Rep. 257.

Sect. 2.—Entry before purchase or payment: Sub-sect. 2, B.; sub-sect. 3, A. (a), (b) & (c), B. & C.

1040. —.—.]—*FORD v. PLYMOUTH, DEVONPORT & SOUTH WESTERN JUNCTION RY. CO.*, [1887] W. N. 201.

1041. Does not vest ownership of land in promoters.]—(1) The public character & objects of a railway co. do not in the case of a purchase of land by the co. affect the right of lien & the consequential remedies which vendors of land ordinarily possess over the land in respect of unpaid purchase-money; & where a co. took land, partly under its compulsory powers & partly under an agreement, & constructed its railway over the land, & the line was opened for traffic, a sale of the land taken was decreed at the suit of the vendor for the purpose of paying him his purchase-money which the co. had not paid in due time.

(2) The object & effect of the Lands Act, 1845, s. 85, are to give a co. the right to immediate entry upon land required for the purposes of their undertaking, but not to vest in them the ownership of the land.—*WING v. TOTTENHAM & HAMPSTEAD JUNCTION RY. CO.* (1868), 3 Ch. App. 740; 37 L. J. Ch. 654; 33 J. P. 99; 16 W. R. 1098, L. J. J. *Annotations*:—As to (1) *Consd.* *Jersey v. South Wales Mineral Ry.* (1868), 19 L. T. 446. *Refd.* *Sutton v. Hoylake Ry.* (1869), 20 L. T. 214; *Munns v. Isle of Wight Ry.* (1870), 5 Ch. App. 414; *Allgood v. Merrybent & Darlington Ry.* (1886), 33 Ch. D. 571.

1042. Does not cure ultra vires proceedings.]—*BATSON v. LONDON SCHOOL BOARD* (1903), 67 J. P. 157; 20 T. L. R. 22; 2 L. G. R. 116; *subsequent proceedings* (1904), 69 J. P. 9.

SUB-SECT. 3.—ON MAKING DEPOSIT BY WAY OF SECURITY.

A. Ascertainment of Amount to be deposited.

(a) In General.

1043. Notice to treat for whole property—Entry on part only—Deposit on account of part only insufficient.]—A railway co. gave notice of their intention to take ten pieces of land, authorised to be taken by their special Act, according to Lands Act, 1845, s. 18. They afterwards entered upon eight of such pieces only, & had them valued, & deposited the amount of valuation in the bank, & gave security by bond under their corporate seal, but without sureties, to the landowners, under s. 85:—*Held*: (1) the co. could not enter on less than all the lands comprised in their original notice, & deposit the value of & give security for such less quantity; (2) two sureties were required as well when the bond is given by a corpn. as by an individual.

(3) *Seemle*: the several bond of the co. & joint bond of the sureties is insufficient.

(4) It is generally incumbent on a co. seeking to avail themselves of Lands Act, 1845, s. 85, to show satisfactorily & clearly that they have fulfilled its conditions & complied with its requisitions; & if there is room for doubt, the landed proprietor should have the benefit of the doubt.

(5) Certain landowners, by their original bill,

sought to restrain a railway co. from entering on & taking eight out of the ten pieces of land which they had originally given notice of their intention to take. Having obtained an injunction on this bill, they filed a supplemental bill, alleging that the ten pieces formed part of a "manufactory" within Lands Act, 1845, s. 92, & praying for an injunction restraining the co. from taking possession or assessing the value of the ten pieces before a jury, without taking the whole "manufactory":—*Held*: the landowner not entitled under the circumstances to the injunction.

Seemle: the term "manufactory" in s. 92 means the actual manufactory & not also the conveniences adjoining it.—*BARKER v. NORTH STAFFORDSHIRE RY. CO.* (1848), 2 De G. & Sm. 55; 5 Ry. & Can. Cas. 401; 10 L. T. O. S. 390; 11 L. T. O. S. 43, 345, 451; 12 Jur. 324, 575, 589; 64 E. R. 25, L. C.

Annotations:—As to (1) *Consd.* *L. & Y. Ry. v. Evans* (1851), 15 Beav. 322. *Expld.* *Webster v. S. E. Ry.* (1851), 1 Sim. N. S. 272. *Consd.* *Lavers v. L. C. C.* (1905), 93 L. T. 233. *Refd.* *Dakin v. L. & N. W. Ry.* (1849), 3 De G. & Sm. 414.

1044. Notice to treat for part of premises—Owner giving notice requiring promoters to take whole—Deposit necessary on value of whole premises.]—A railway co. gave notice to pltf. that they should require to take a part of his workshop for the purposes of their railway. Pltf. gave a counter-notice, under Lands Act, 1845, s. 92, that the co. must take the whole of the premises. The co., however, took possession of only a part, & paid into ct. the ascertained value of that portion only:—*Held*: the co. were bound to pay into ct. the value of the whole premises, & could not be allowed to take possession of part, paying only for that part.—*GILES v. LONDON, CHATHAM & DOVER RY. CO.* (1861), 1 Drew. & Sm. 406; 30 L. J. Ch. 603; 5 L. T. 479; 7 Jur. N. S. 509; 9 W. R. 587; 62 E. R. 435.

Annotations:—*Appld.* *Gardner v. Charing Cross Ry.* (1861), 2 John. & H. 248. *Refd.* *Gibson v. Hammersmith Ry.* (1863), 32 L. J. Ch. 337.

1045. —.—.]—*UNDERWOOD v. BEDFORD & CAMBRIDGE RY. CO.* (1861), 7 Jur. N. S. 941.

1046. S. P. DADSON v. EAST KENT RY. CO. (1859), 7 Jur. N. S. 941.

Liability of promoters to take whole property generally.]—See Part VI., Sects. 4 & 5, *ante*.

1047. Compensation claimed—Agreement between surveyors of owners & promoters—Confers no right of entry on promoters.]—*FORD v. PLYMOUTH, DEVONPORT & SOUTH WESTERN JUNCTION RY. CO.*, [1887] W. N. 201.

(b) By Surveyor.

1048. Appointment—Who may be appointed—Valuer of promoters—Not disqualified.]—*LANGHAM v. GREAT NORTHERN RY. CO.* (1848), 1 De G. & Sm. 486; 5 Ry. & Can. Cas. 263; 16 L. J. Ch. 437; 9 L. T. O. S. 452; 11 Jur. 839; 63 E. R. 1160.

Annotations:—*Mentd.* *Ex p. G. N. Ry.* (1848), 5 Ry. & Can. Cas. 269; *Wallis v. Wallis* (1859), 4 Drew. 458; *Cotter v. Met. Ry.* (1864), 10 L. T. 777.

1049. —.—.] **Form of instrument.]**—(1) The instrument by which a surveyor is appointed under Lands Act, 1845, s. 85, need not specify either the lands which the surveyor is to value, or the course of the railway.

—*Railway Act*, s. 8.]—An order made, under above sect., in chambers for payment out of money deposited by a ry. co. as security for land taken, is not appealable as a proceeding instituted in a superior ct.—*CANADIAN PACIFIC RY. CO. v. LITTLE SEMINARY OF STE. THERÈSE* (1889), 16 S. C. R. 606.—*CAN.*

PART VIII. SECT. 2, SUB-SECT. 3.—A. (a).

k. Deposit does not cover costs.]—*Held*: under Lands (Scot.) Act, 1845, s. 84, where consignation is made by way of security, to enable a ry. co. to enter upon possession of land before purchase, such deposit is only intended

to cover the purchase-money or compensation claimed, or the party's interest therein, & does not cover expenses.—*EDINBURGH, PERTH & DUNDEE RY. CO. v. HOPE* (1854), 16 Dunl. (Ct. of Sess.) 1041; 26 Sc. Jur. 558.—*SCOT.*

l. Order for payment out—Whether

(2) The sureties in a bond to be given to the landowner, under that sect., may be appointed without notice to the landowner; but the money secured by it ought not to be made payable "on demand, to pay the owner, or on demand to deposit in the bank the amount when determined."

The condition of the bond ought to adopt the words of the sect., & make the money payable either to the obligee or into the Bank of England, "as the case may require."

(3) Money paid into the bank under s. 86, to the credit of *ex p.* the promoters of the undertaking, the account of the landowner, is rightly paid in.

(4) A notice given by a railway co., under Railways Act, 1845, s. 32, of their intention to take temporary possession of land, ought to state for which of the purposes mentioned in that sect. the land is meant to be used. A notice that the co. intend to enter upon the land for those purposes, or some or one of them, is not sufficient.—*POYNDER v. GREAT NORTHERN RY. CO.* (1847), 10 Sim. 3; 5 Ry. & Can. Cas. 196; 16 L. J. Ch. 444; 9 L. T. O. S. 510, 531; 11 Jur. 646; 60 E. R. 773; *affd.* 2 Ph. 330, L. C.

Annotations:—*As to* (2) *Distd.* Willey v. S. E. Ry. (1849), 1 H. & Tw. 56. *Expld.* Cotter v. Met. Ry. (1864), 10 L. T. 777.

(c) The Valuation.

1050. Proper valuation—What is—Not valuation where surveyor never entered premises valued.]—(1) A valuation made by a surveyor appointed under Lands Act, 1845, s. 85, who never entered the buildings valued, is not a proper valuation within the sect.

(2) The valuation must include fixtures.

(3) A bond made under same sect., the condition of which was, that if the railway co. should at any time thereafter pay to pltf. or deposit in the Bank of England the purchase-money or compensation required by the Act, is not a proper bond within the sect.—*COTTER v. METROPOLITAN RY. CO.* (1864), 4 New Rep. 454; 10 L. T. 777; 28 J. P. 759; 10 Jur. N. S. 1014; 12 W. R. 1021.

Annotation:—*As to* (1) *Distd.* River Roden Co. v. Barking Town U. D. C. (1902), 18 T. L. R. 608.

1051. ——— Valuation where surveyor has considered whole matter—Although alleged to be inadequate.] Where a surveyor who had been appointed by the Board of Trade under Railways Act, 1867, s. 36, to value claimant's interest in land to be taken by a railway co., & the compensation to be paid to him for all damage caused by the execution of the works, so as to entitle the co. to take possession of the land under Lands Act, 1845, s. 85, before the compensation was ascertained, had made a valuation which purported to include all damage & injury:—*Held*: an injunction to restrain the co. from taking possession of the land, upon the ground that the surveyor's valuation was grossly inadequate, must be refused. *RIVER RODEN CO., LTD. v. BARKING TOWN URBAN DISTRICT COUNCIL* (1902), 18 T. L. R. 608; 46 Sol. Jo. 513, C. A.

1052. What must be included in—Trade fixtures.]—*GIBSON v. HAMMERSMITH & CITY RY. CO.* (1863),

2 Drew. & Sm. 603; 1 New Rep. 305; 32 L. J. Ch. 337; 8 L. T. 43; 27 J. P. 132; 9 Jur. N. S. 221; 11 W. R. 299; 62 E. R. 748.

Annotations:—*Consd.* Hunter v. Dowling, [1895] 2 Ch. 223. *Refd.* Cotter v. Met. Ry. (1864), 10 L. T. 777.

1053. ———.]—COTTER v. METROPOLITAN RY. CO., No. 1050, ante.

1054. ——— Compensation for severance.]—FIELD v. CARNARVON & LLANBERIS RY. CO. (1867), L. R. 5 Eq. 190; 37 L. J. Ch. 176; 17 L. T. 531; 16 W. R. 273.

Annotation:—*Consd.* Loosemore v. Tiverton & North Devon Ry. (1882), 22 Ch. D. 25.

1055. ——— Not compensation for minerals.]—EX p. NEATH & BRECON RY. CO. (1876), 2 Ch. D. 201; 45 L. J. Ch. 196; 24 W. R. 357.

1056. Undervaluation—Court will not interfere—By injunction—Valuation purporting to include all damage & injury.]—RIVER RODEN CO., LTD. v. BARKING TOWN U. D. C. (1902), 18 T. L. R. 608, ante.

B. Payment of Deposit into Bank.

See Lands Act, 1845, s. 85.

1057. To whose credit Credit of ex parte promoters.]—POYNDER v. GREAT NORTHERN RY. CO., No. 1049, ante.

C. Dealing with Deposit.

See Lands Act, 1845, s. 87.

(a) In General.

1058. Difference between sum deposited & ultimate price agreed—Must be paid into court.]—EX p. LONDON, TILBURY & SOUTHEAST RY. CO. (1853), 1 W. R. 533.

1059. ———.]—Where a railway co. took possession of pltf.'s land, under Lands Act, 1845, s. 85, paid into ct. £868, as the value of the land, & the land was afterwards duly valued at £1,227, pltf. moved for an order directing the co. to pay the difference in the value into ct.:—*Held*: the difference must be paid in forthwith.—*ASHFORD v. LONDON, CHATHAM & DOVER RY. CO.* (1866), 14 L. T. 787.

1060. Equitable mortgagees—Whether entitled to have mortgage debt discharged out of deposit.]—MARTIN v. LONDON, CHATHAM & DOVER RY. CO., No. 2019, post.

(b) On Application of Promoters.

1061. Service of petition for return of deposit—On landowner—Unnecessary—Vendor's costs paid.]—EX p. EASTERN COUNTIES RY. CO. (1848), 5 Ry. & Can. Cas. 210.

1062. ———.]—Re POLLOCK, EX p. WINDSOR, STAINES & SOUTH WESTERN RY. CO. (1849), 13 Jur. 760; *subsequent proceedings, sub nom. Re WINDSOR, STAINES & SOUTH WESTERN RAILWAY ACT* (1850), 12 Beav. 522.

1063. ——— Landowner's consent proved or obtained.]—Re DYSON, EX p. HUDDERSFIELD CORPN. (1882), 46 L. T. 730.

1064. ——— After considerable lapse of time.]—EX p. LANCASHIRE & YORKSHIRE RY. CO. (1886), 55 L. T. 58.

Annotation:—*Folld.* *EX p. Mid. Ry.* (1891), 38 Sol. Jo. 289.

PART VIII. SECT. 2, SUB-SECT. 3.—C. (b).

m. Service of petition for return of deposit—On all parties interested—Necessary.]—A ry. co. requiring lands in possession of R. lodged in ct. the amount of the valuation made by a surveyor appointed by two JJ. under Lands Act, 1845, s. 85, to the credit of R. & all other persons interested in the lands, & gave a bond to R. con-

ditioned to pay compensation to which he might be entitled. They subsequently paid the compensation, & obtained a conveyance & a redelivery of the bond to be cancelled. The ct., notwithstanding, refused to allow the co., without notice, to draw the money out of ct., but granted conditional order for repayment to be made absolute in Chambers.—*Re IRISH SOUTH EASTERN RY. CO. v. KEARNEY* (1847), 9 L. T. O. S. 436.—*IR.*

n. When return of deposit ordered—Not when award traversed.]—A draft award stated, under Rys. Act (Ir.), 1851, a sum as the sum to be deposited in respect to land required by a corpn. The corpn. lodged that sum, & went into possession. The final award awarded a smaller sum. Pending a traverse, the ct. refused to refund the difference to the corpn.—*Re DUBLIN CORPN. WATERWORKS* (1866), 17 L. Ch. R. 16.—*IR.*

“On demand”—Bond irregular.]—*LANGHAM v. GREAT NORTHERN RY. CO.* (1848), 1 De G. & Sm. 486; 5 Ry. & Can. Cas. 263; 16 L. J. Ch. 437; 9 L. T. O. S. 452; 11 Jur. 839; 63 E. R. 1160.

Annotations:—Expld. *Cotter v. Met. Ry.* (1864), 10 L. T. 777. *Mentd.* *Ex p. G. N. Ry.* (1848), 5 Ry. & Can. Cas. 269; *Wallis v. Wallis* (1859), 4 Drew. 458.

1079. ——— “Or on demand to deposit in bank.”]—*POYNDER v. GREAT NORTHERN RY. CO.*, No. 1049, *ante*.

1080. ——— To plaintiffs “jointly” — Plaintiffs tenants in common—Bond irregular.]—*LANGHAM v. GREAT NORTHERN RY. CO.* (1848), 1 De G. & Sm. 486; 5 Ry. & Can. Cas. 263; 16 L. J. Ch. 437; 9 L. T. O. S. 452; 11 Jur. 839; 63 E. R. 1160.

Annotations:—Refd. *Cotter v. Met. Ry.* (1864), 10 L. T. 777. *Mentd.* *Ex p. G. N. Ry.* (1848), 5 Ry. & Can. Cas. 269; *Wallis v. Wallis* (1859), 4 Drew. 458.

1081. ——— To obligee or into Bank of England “as case may require.”]—*POYNDER v. GREAT NORTHERN RY. CO.*, No. 1049, *ante*.

1082. ——— On deposit in Bank of England “or otherwise” — Bond irregular.]—*HOSKING v. PHILLIPS* (1848), 3 Exch. 168; 5 Ry. & Can. Cas. 560; 18 L. J. Ex. 1; 12 L. T. O. S. 198; 12 Jur. 1030; 154 E. R. 801.

Annotations:—Refd. *Cotter v. Met. Ry.* (1864), 10 Jur. N. S. 1014. *Mentd.* *Davis v. Underwood* (1857), 22 J. P. 8; *Morgan v. Hardy* (1886), 17 Q. B. D. 770; *Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co.* (1887), 36 Ch. D. 113; *Joyner v. Weeks*, [1891] 2 Q. B. 31.

1083. ——— To landowner “his heirs, executors, administrators or assigns” — Bond irregular.]—*HOSKING v. PHILLIPS* (1848), 3 Exch. 168; 5 Ry. & Can. Cas. 560; 18 L. J. Ex. 1; 12 L. T. O. S. 198; 12 Jur. 1030; 154 E. R. 801.

Annotations:—Refd. *Cotter v. Met. Ry.* (1864), 10 Jur. N. S. 1014. *Mentd.* *Davis v. Underwood* (1857), 22 J. P. 8; *Morgan v. Hardy* (1886), 17 Q. B. D. 770; *Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co.* (1887), 36 Ch. D. 113; *Joyner v. Weeks*, [1891] 2 Q. B. 31.

1084. ——— To A. B. his executors, administrators or assigns—No reference to “the parties interested in premises.”]—*WILLEY v. SOUTH EASTERN RY. CO.*, No. 1026, *ante*.

1085. ——— Of purchase-money “at any time hereafter.”]—*COTTER v. METROPOLITAN RY. CO.*, No. 1050, *ante*.

1086. ——— Several bond of company—Joint bond of sureties—Insufficiency of bond.]—*BARKER v. NORTH STAFFORDSHIRE RY. CO.*, No. 1043, *ante*.

1087. ——— Recital of quantity of land required.]—*WILLEY v. SOUTH EASTERN RY. CO.*, No. 1026, *ante*.

1088. Effect of bond—Based on ineffective claim for compensation—Confers no right of entry.]—*FORD v. PLYMOUTH, DEVONPORT & SOUTH WESTERN JUNCTION RY. CO.*, [1887] W. N. 201.

B. Sureties.

See Lands Act, 1845, s. 85.

1089. Necessity for—Bond given by corporation.]—*BARKER v. NORTH STAFFORDSHIRE RY. CO.*, No. 1043, *ante*.

1090. Appointment of—Who may be appointed—Solicitors to promoters can be appointed.]—*LANG-*

HAM v. GREAT NORTHERN RY. CO. (1848), 1 De G. & Sm. 486; 5 Ry. & Can. Cas. 263; 16 L. J. Ch. 437; 9 L. T. O. S. 452; 11 Jur. 839; 63 E. R. 1160.

Annotations:—Mentd. *Ex p. G. N. Ry.* (1848), 5 Ry. & Can. Cas. 269; *Wallis v. Wallis* (1859), 4 Drew. 458; *Cotter v. Met. Ry.* (1864), 10 L. T. 777.

1091. ——— Without notice to landowner—Validity of.]—*POYNDER v. GREAT NORTHERN RY. CO.*, No. 1049, *ante*.

1092. ——— Valid.]—*LANGHAM v. GREAT NORTHERN RY. CO.* (1848), 1 De G. & Sm. 486; 5 Ry. & Can. Cas. 263; 16 L. J. Ch. 437; 9 L. T. O. S. 452; 11 Jur. 839; 63 E. R. 1160.

Annotations:—Mentd. *Ex p. G. N. Ry.* (1848), 5 Ry. & Can. Cas. 269; *Wallis v. Wallis* (1859), 4 Drew. 458; *Cotter v. Met. Ry.* (1864), 10 L. T. 777.

1093. ——— Without objection by landowner—Approval by Board of Trade.]—*TIVERTON & NORTH DEVON RY. CO. v. LOOSEMORE*, No. 1035, *ante*.

SUB-SECT. 5.—REMEDIES ON DEFAULT.

1094. Onus of proof that Lands Act, 1845, s. 85 complied with—On promoters.]—*BARKER v. NORTH STAFFORDSHIRE RY. CO.*, No. 1043, *ante*.

1095. Defective bond—Injunction to restrain promoters from continuing in possession—Granted.]—*DAUBNEY v. MANCHESTER, SHEFFIELD & LINCOLN RY. CO.* (1847), 10 L. T. O. S. 283.

1096. Default in payment of bond—Injunction to restrain promoters from continuing in possession—Until purchase-money paid—Not granted.]—A railway co., by agreement with a landowner, were let into possession of land which they required for part of their land, & made their railway over it, giving a bond for payment of the purchase-money on a future day. Default was made in payment of the bond:—*Held*: the landowner was not entitled to an injunction to restrain the co. from continuing in possession until the purchase-money was paid.

Qu.: whether the landowner might not be entitled to a receiver, or to have the purchase-money paid into ct.—*PELL v. NORTHAMPTON & BANBURY JUNCTION RY. CO.* (1866), 2 Ch. App. 100; 36 L. J. Ch. 319; 15 L. T. 169; 30 J. P. 787; 12 Jur. N. S. 897; 15 W. R. 27, L. J.J.; *subsequent proceedings* (1868), 16 W. R. 1077; *sub nom.* *PELL v. MIDLAND COUNTIES & SOUTH WALES RY. CO.* (1869), 20 L. T. 288, L. O.

Annotations:—Expld. & Distd. *Winchester v. Mid-Hants Ry.* (1867), L. R. 5 Eq. 17. *Consd.* *Munns v. Isle of Wight Ry.* (1870), 5 Ch. App. 414. *Foll.* *Latimer v. Aylesbury & Buckingham Ry.* (1878), 9 Ch. D. 385. *Mentd.* *Re Cambrian Rys.* (1868), 16 W. R. 346.

— **Right to payment out of deposit.]**—*See* Sub-sect. 3, C. (c), *ante*.

SECT. 3.—COSTS OF ENTRY.

Sheriff's costs of warrant to give possession—Money deposited in court.]—*See* Part XII., Sect. 3, *post*.

PART VIII. SECT. 2, SUB-SECT. 4.—B.

1089 i. Necessity for—Bond given by corporation.]—Under Lands (Scot.) Act,

1845, s. 84, a co. is bound to find two sureties for a sum equal to the sum deposited & a bond by its secretary without sureties is not sufficient.—

RADCLIFFE v. GLASGOW, DUMFRIES, ETC. RY. CO. (1847), 9 Dunl. (Ct. of Sess.) 1462; 19 Sc. Jur. 640.—*SCOT.*

Part IX: Assessment of Compensation after Entry or Injurious Affection.

SECT. 1.—UNDER LANDS CLAUSES ACTS.

See Lands Act, 1845, ss. 22-68.

SUB-SECT. 1.—IN GENERAL.

When right to compensation arises—For lands purchased or taken.]—See Part III., Sect. 1, ante.

—For injurious affection.]—See Part III., Sect. 3, ante.

1097. Application of Lands Act, 1845, s. 68—To land taken under s. 85.]—(1) Although the compulsory taking of land under the Railway Acts may, to a certain extent & for certain purposes, place the co. & the landowner in the relative position of purchaser & vendor, yet it does not follow that a ct. of equity will decree the specific performance of such sales.

(2) *Qu.*: whether in a case depending exclusively on a notice to take land given by a co. under Lands Act, 1845, the ct. will interfere to compel the co. to adopt the subsequent proceedings directed by the Act for giving compensation to the landowner.

In a case where such a notice had been followed by a claim to compensation on the part of the landowner, & a subsequent agreement between the parties, which claim & agreement were however ultimately abandoned & repudiated on both sides:—*Held*: (3) the co., who were in possession of the land, could not be compelled to summon a jury; (4) the notice *per se* did not give the ct. jurisdiction; (5) the rights of the parties were to be regulated by Lands Act, 1845, ss. 68, 85; (6) s. 68 applied to the case of land taken under s. 85.—*ADAMS v. LONDON & BLACKWALL RY. CO.* (1850), 2 Mac. & G. 118; 6 Ry. & Can. Cas. 271; 2 H. & Tw. 285; 19 L. J. Ch. 557; 16 L. T. O. S. 277; 14 Jur. 679; 42 E. R. 46, L. C.

Annotations:—As to (1) *Consd.* *Hill v. G. N. Ry.* (1854), 3 Eq. Rep. 321, *Pinchin v. London & Blackwall Ry.* (1854), 1 K. & J. 34; *Leominster Canal Navigation Co. v. Shrewsbury & Hereford Ry.* (1857), 3 K. & J. 654; *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575. *Apld.* *Lind v. Isle of Wight Ferry* (1862), 1 New Rep. 13. *Consd.* *Re Cary-Elwes' Contract*, [1906] 2 Ch. 143. *Refd.* *Salisbury v. G. N. Ry.* (1852), 17 Q. B. 840; *Re Pigott & G. W. Ry.* (1881), 18 Ch. D. 146. As to (2) *Consd.* *Mercer v. Liverpool, St. Helen's & South Lancashire Ry.*, [1903] 1 K. B. 652. *Refd.* *Wild v. Woolwich B. C.*, [1909] 2 Ch. 287. As to (3) *Consd.* *Harding v. Met. Ry.* (1872), 7 Ch. App. 154. *Refd.* *Hedley v. Bates* (1880), 49 L. J. Ch. 170. As to (4) *Consd.* *Inge v. Birmingham, Wolverhampton & Stour Valley Ry.* (1853), 1 Sm. & G. 347. *Distd.* *Mason v. Stokes Bay Ry. & Pier Co.* (1862), 1 New Rep. 81. As to (5) *Refd.* *Stretton v. G. W. & Brentford Ry.* (1870), 40 L. J. Ch. 51, n. As to (6) *Foll.* *Doe d. Armitstead v. North Staffordshire Ry.* (1851), 16 Q. B. 526. *Generally*, *Consd.* *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

1098. — Duty of landowner to initiate proceedings.]—*DOE d. ARMITSTEAD v. NORTH STAFFORDSHIRE RY. CO.* (1851), 16 Q. B. 526; 20 L. J. Q. B. 249; 17 L. T. O. S. 59; 15 Jur. 944; 117 E. R. 980; *subsequent proceedings* (1852), 19 L. T. O. S. 374.

Annotations:—*Refd.* *R. v. York, Newcastle & Berwick Ry.*, *R. v. L. & Y. Ry.* (1851), 6 Ry. & Can. Cas. 648; *Salisbury v. G. N. Ry.* (1852), 17 Q. B. 840; *Tiverton & North Devon Ry. v. Loosmore* (1884), 9 App. Cas. 480. *Mentd.* *Doe d.*

Hudson v. Leeds & Bradford Ry. (1851), 16 Q. B. 796; *Worsley v. South Devon Ry.* (1851), 16 Q. B. 539; *Sparrow v. Oxford, Worcester & Wolverhampton Ry.* (1852), 7 Ry. & Can. Cas. 92; *May v. G. W. Ry.* (1872), L. R. 7 Q. B. 364; *Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714; *Finch v. L. & S. W. Ry.* (1889), 60 L. T. 350; *Donaldson v. South Shields Corpn.* (1899), 79 L. T. 685; *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101.

1099. Construction of Lands Act, 1845, s. 68—“Taken”—Means “actually taken.”]—(1) The words “lands which shall have been taken for or injuriously affected by the execution of the works” in Lands Act, 1845, s. 68, include such lands only as are actually taken or actually affected by the works.

(2) The owner of houses, which were liable to be taken for making a railway under an Act of Parliament, received notice under Lands Act, 1845, s. 18, from the promoters that they would be required for the railway, & the co. demanded the particulars of his interest & stated their willingness to purchase. The particulars were furnished by the landowner, & £4,500 was claimed as compensation for taking the property, & he required either payment, or that a warrant should be issued by the co. to summon a jury to assess the amount. The co. took no further step in the matter:—*Held*: the landowner could not maintain an action to recover the £4,500.

(3) Where a co. give notice to a party that they require his lands for their works, it amounts to an agreement by them for the purchase of those lands, assented to by the opposite party, on the terms of making the compensation in the way appointed by the Act under which such notice is given, & binds both parties finally.—*BURKINSHAW v. BIRMINGHAM & OXFORD JUNCTION RY. CO.* (1850), 5 Exch. 475; 6 Ry. & Can. Cas. 600; 20 L. J. Ex. 246; 155 E. R. 208.

Annotations:—As to (1) *Consd.* *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142. *Foll.* *R. v. Manley Smith, Re Church & London School Board* (1892), 67 L. T. 197. As to (3) *Refd.* *Salisbury v. G. N. Ry.* (1852), 17 Q. B. 840. *Generally*, *Consd.* *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

1100. — — — — —.]—*STANDISH v. LIVERPOOL CORPN.* (1852), 1 Drew. 1; 61 E. R. 351.

1101. — — — — —.]—*R. v. MANLEY SMITH, Re Church & London School Board* (1892), 67 L. T. 197; 56 J. P. 729; 40 W. R. *sub nom.* *Church v. London School Board*, 8 T. L. R. 310, D. C.

— — — — —.]—*See, also*, No. 1112, *post*.

1102. Notice of claim by landowner—Misdescription—Of promoters—Blackburn & Clitheroe Railway Company—Sufficient.]—*EASTHAM v. BLACKBURN RY. CO.* (1854), 9 Exch. 758; 23 L. J. Ex. 199; 2 W. R. 377; 2 C. L. R. 1016; 156 E. R. 325.

1103. — Insufficient description—Of nature of interest—“Occupier” of house where business affected carried on—Sufficient.]—*CAMERON v. CHARING CROSS RY. CO.* (1864), 16 C. B. N. S. 430; 4 New Rep. 150; 33 L. J. C. P. 313; 10

PART IX. SECT. 1, SUB-SECT. 1.

10971. Application of Lands Act, s. 68—To land taken under Lands Act, s. 85.]—A service of notice to treat was served by a co. & the party served replied by a notice stating his title to

the lands & the compensation claimed; the co. neither referred the matter to arbitration, nor summoned a jury to decide it:—*Held*: (1) the co. thereby acquiesced in the offer made; (2) sect. 68 of Lands Act, 1845, gave a right

of action to the owner of the land for the amount claimed; (3) sects. 68 & 85 of above Act were not repugnant to each other.—*EATON v. MIDLAND GREAT WESTERN RY. CO.* (1847), 10 L. L. R. 310.—*IR.*

L. T. 381 ; 10 Jur. N. S. 635 ; 12 W. R. 803 ; 143 E. R. 1195 ; *revsd.* on other grounds (1865), 19 C. B. N. S. 764, Ex. Ch.

Annotations :—*Distd.* Healey v. Thames Valley Ry. (1864), B. & S. 769. *Mentd.* Ricket v. Met. Ry. (1867), L. R. 2 H. L. 175.

1104. ———— “**Leasehold**” ———— **Insufficient.**]—A notice by a claimant for compensation for lands taken by a co. under Lands Act, 1845, s. 68, stating his desire to have the question of compensation settled by a jury, must give such reasonable information as to the nature of his claim as will enable the co. to make an offer. A notice merely describing the nature of his interest as “leasehold” is insufficient.—*HEALEY v. THAMES VALLEY RY. CO.* (1864), 5 B. & S. 769 ; 5 New Rep. 10 ; 34 L. J. Q. B. 52 ; 11 L. T. 268 ; 29 J. P. 325 ; 10 Jur. N. S. 1182 ; 13 W. R. 44 ; 122 E. R. 1016 ; *subsequent proceedings* (1866), 7 B. & S. 836, Ex. Ch. *Annotation* :—*Distd.* Lovering v. City of London & Southwark Subway Co. (1891), 7 T. L. R. 600.

1105. ———— “**Mortgagee in possession**” ———— **Whether sufficient—Premises sub-let by him.**]—In an arbn. pltf. claimed as mtgee. in possession whereas in fact he had sub-let the premises. In an action on the award :—*Held* : (1) (LAWRENCE, J.) the misdescription of pltf.’s interest was fatal to the right to recover ; (2) (C. A.) defts. by proceeding to arbn. had waived any objection they might have taken.—*LOVERING v. CITY OF LONDON & SOUTHWARK SUBWAY CO.* (1891), 7 T. L. R. 600, C. A.

SUB-SECT. 2.—PROCEDURE BEFORE JUSTICES.

See Lands Act, 1845, ss. 22, 24.

Jurisdiction of justices—To assess purchase-money & compensation generally.]—*See* Part VII., Sect. 2, *ante*.

——— **Applicant having interest only as tenant from year to year.**]—*See* Part XIII., Sect. 6, *post*.

SUB-SECT. 3.—PROCEDURE BY ARBITRATION.

See Lands Act, 1845, ss. 23, 68.

Notice of claim—Form of.]—*See* Nos. 1102–1105, *ante*.

Offer of compensation.]—*Compare* Nos. 1108, 1109, *post*.

Assessment of purchase-money & compensation generally.]—*See* Part VII., Sect. 5, *ante*.

SUB-SECT. 4.—PROCEDURE BY JURY.

See Lands Act, 1845, ss. 23, 68.

Notice of claim—Form of.]—*See* Nos. 1102–1105, *ante*.

1106. Notice of summoning of jury—Lands Act, 1845, s. 38, not applicable.]—*RAILSTONE v. YORK, NEWCASTLE & BERWICK RY. CO.*, No. 823, *ante*.

1107. ————.]—*Re* HAYWARD & METROPOLITAN RY. CO., No. 824, *ante*.

1108. Offer of compensation—Time for making—May be made at any time before notice of time & place of inquiry given—Fresh offers may be made before such notice given.]—*Re* HAYWARD & METROPOLITAN RY. CO., No. 824, *ante*.

1109. ———— **Form of order—Claims for com-**

ensation for premises & loss of business—Separate sums may be offered.]—*Re* HAYWARD & METROPOLITAN RY. CO., No. 824, *ante*.

1110. Costs—Lands Act, 1845, s. 51, applicable—As to land injuriously affected.]—*Re* HAYWARD & METROPOLITAN RY. CO., No. 824, *ante*.

1111. ———— **Separate sums offered by promoters—Same sums in aggregate awarded but position of sums reversed—Claimant not entitled to costs.**]—*Re* HAYWARD & METROPOLITAN RY. CO., No. 824, *ante*.

Assessment of purchase-money & compensation before entry.]—*See* Part VII., Sect. 6, *ante*.

SUB-SECT. 5.—DEFAULT OF PROMOTERS.

See Lands Act, 1845, s. 68.

1112. In issuing warrant to sheriff to summon jury within twenty-one days—Compensation recoverable by action in High Court—Provided land actually “taken” or injuriously affected.]—*BARKER v. METROPOLITAN RY. CO.* (1864), 17 C. B. N. S. 785 ; 5 New Rep. 13 ; 11 L. T. 312 ; 10 Jur. N. S. 1127 ; 13 W. R. 82 ; 144 E. R. 314.

1113. ————.]—*BURKINSHAW v. BIRMINGHAM & OXFORD JUNCTION RY. CO.*, No. 1099, *ante*.

Meaning of “taken” in Lands Act, 1845, s. 68, *see, also*, Nos. 1099–1101, *ante*.

1114. ———— **Defence of fraud not allowed.**]—*HOOPER v. BRISTOL PORT RY. & PIER CO.* (1866), 35 L. J. C. P. 299.

1115. ———— **Five per cent. interest payable on sum recovered.**]—*Re* ABERDARE RY. CO. (1860), 8 W. R. 603.

1116. ———— **Service of notice under Lands Act, 1845, s. 54—Not waiver of notice under s. 68—So as to give promoters extension of twenty-one days.**]—*GLYN v. ABERDARE VALLEY RY. CO.* (1859), 6 C. B. N. S. 359 ; 28 L. J. C. P. 271 ; 33 L. T. O. S. 185 ; 23 J. P. 375 ; 5 Jur. N. S. 1011 ; 7 W. R. 443 ; 141 E. R. 496.

1117. In applying for trial in High Court within twenty-one days—Under Railways Act, 1845—Expiry of time after summons taken out but before returnable—Prior award quashed—Original warrant in force.]—*TANNER v. SWINDON, ETC. RY. CO.* (1881), 45 L. T. 209, D. C.

SECT. 2.—UNDER OTHER ACTS.

1118. Promoters proceeding contrary to terms of Act—Remedy not limited to appearance before tribunal provided by Act—Compensation ascertainable by ordinary tribunals.]—(1) When road trustees under an Act of Parliament do not follow the terms of the Act in entering upon the grounds of individuals, they have no right to say that the compensation & damages shall be estimated by the jurisdiction created by the Act, & the party injured has a right to insist upon having them ascertained by the ordinary tribunals.

(2) *Seem* : under such circumstances the trustees cannot insist upon the ground being estimated according to its value at the time of their wrongful entry, but the estimate may be taken

PART IX. SECT. 2.

a. Compensation assessable by arbitration—National Transcontinental Railway—3 Edw. 7, c. 71—Railway Act, 1906, c. 37.]—*R. v. JONES* (1910), 13 Exch. C. R. 171.—*CAN.*

t. Special mode of compensation for injury provided—No action lies—Public Works Act, 1894, s. 110.]—If a local authority, in the execution of authorised works, causes injury, without negligence on its part in carrying

out such works, & the Act provides a special mode in which compensation may be recovered, no action will lie for it.—*LE BON'S BAY ROAD DISTRICT (INHABITANTS) v. OLDRIDGE* (1898), 17 N. Z. L. R. 321.—*N.Z.*

Sect. 2.—Under other Acts. Part X. Sect. 1: Sub-s. 1 & 2, A. & B. (a), (b) & (c), i.]

according to the improved value of the ground at the time when the valuation comes to be made, by the authority & under the direction of the ordinary tribunals, acting with the consent & at the suit of the injured individual; apparently on the principle that, as the trustees have not adopted the proper measures to acquire a right to the ground by force of the Act, the right remains with the individual till the recompense or price is thus

ascertained.—*BURNET v. KNOWLES* (1815), 3 Dow 280; 3 E. R. 1066, H. L.

1119. Tribunal appointed by special Act becoming non-existent—Compensation assessable in High Court.]—*BENTLEY v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, [1891] 3 Ch. 222; 60 L. J. Ch. 641; 65 L. T. 22.

*Annotations:—*Consd. *Swansea Corpn. v. Harpur*, [1912] 3 K. B. 493. *Refd.* Central Control Board (Liquor Traffic) *v. Cannon Brewery*, [1919] A. C. 744.

Under Acts for acquisition of land for particular purposes.]—*See* Part XV., *post*.

Part X.—Conveyance of Land and Payment of Purchase-Money.

SECT. 1.—COMPLETION OF PURCHASE.

SUB-SECT. 1.—WHEN CONTRACT COMPLETE.

1120. Where notice to treat served—Abstract of title delivered to promoters—Death of owner before conveyance executed.]—*Ex p. HAWKINS* (1843), 13 Sim. 569; 2 L. T. O. S. 94; 60 E. R. 221.

*Annotations:—*Consd. *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426; *Watts v. Watts* (1873), L. R. 17 Eq. 217.

1121. ——— Inaccuracy in description of title—Price agreed by promoters—Specific performance decreed.]—A railway co. gave notice to a landholder to treat for the purchase of his land required for the railway. The landholder described his title to the land as being one of fee simple, subject to a certain unexpired term in a lease, & the co. agreed to pay £1,500 for his interest in same. The treaty not being completed certain proceedings were taken under the special Act & Lands Act, 1845, to summon a jury to assess the value of the land, & proceedings at law were taken against the co. Afterwards pltf. filed his bill against the co. for specific performance:—*Held*: (1) upon notice to treat, together with all that followed thereon, a binding contract had been entered into, of which specific performance could be decreed; (2) although the description of the landholder's title was not completely accurate, there was no misdescription; (3) pltf.'s proceedings at law having failed, relief could be had in this ct.—*INGE v. BIRMINGHAM, WOLVERHAMPTON & STOUR VALLEY RY. CO.* (1853), 3 De G. M. & G. 658; 2 Eq. Rep. 80; 22 L. T. O. S. 109; 2 W. R. 22; 43 E. R. 259, L. C.

*Annotation:—*As to (1) *Consd.* *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

1122. ——— & price fixed pursuant to Act—Specific performance decreed.]—*REGENT'S CANAL CO. v. WARE* (1857), 23 Beav. 575; 26 L. J. Ch. 566; 29 L. T. O. S. 274; 3 Jur. N. S. 924; 5 W. R. 617; 53 E. R. 226.

*Annotations:—**Refd.* *Mason v. Stokes Bay Ry. & Pier Co.* (1862), 1 New Rep. 84; *Harding v. Met. Ry.* (1872), 7 Ch. App. 154; *Re Pigott & G. W. Ry.* (1881), 18 Ch. D. 146; *Re Cary-Elwes' Contract*, [1906] 2 Ch. 143. *Mentd.* *Clarke v. Ramuz* (1891), 60 L. J. Q. B. 679.

1123. ———.]—*MASON v. STOKES BAY RY. & PIER CO.* (1862), 1 New Rep. 84; 32 L. J. Ch. 110; 11 W. R. 80.

*Annotations:—**Expld.* *Harding v. Met. Ry.* (1872), 7 Ch. App. 154. *Refd.* *Re Cary-Elwes' Contract*, [1906] 2 Ch. 143.

1124. ——— Promoters in same position as ordinary purchaser.]—*HARDING v. METROPOLITAN RY. CO.*, No. 762, *ante*.

1125. ——— A complete contract being established between a railway co. & a landowner by the notice to treat, & an award under Lands Act, 1845, fixing the amount of the purchase-money, the ordinary rules as between vendor & purchaser apply to such a contract, including the liability of the purchasing co., in a proper case, to pay interest on their unpaid purchase-money. Thus, where the title has not been accepted before the award, & the co. not being in possession, delay paying or depositing the purchase-money, they are liable to pay interest at 4 per cent. *per annum*, not from the date of the award, but from the time they might prudently have taken possession; that is, when a good title was shown.

(2) Where a railway co. has given notices to treat to a legal tenant for life under a settlement & to the trustees of the settlement who have a bare power of sale with his consent, & the purchase-money for the life estate is fixed as between the co. & the tenant for life by award under a reference to arbn. under Lands Act, 1845, in the usual way, the trustees taking no part in the reference, the co. cannot require the sale to be completed as a sale by the trustees, but it must be completed as a sale by the tenant for life under the Act.—*Re PIGOTT & GREAT WESTERN RY. CO.* (1881), 18 Ch. D. 146; 50 L. J. Ch. 679; 44 L. T. 792; 29 W. R. 727.

*Annotations:—*As to (1) *Consd.* *Re Cary-Elwes' Contract*, [1906] 2 Ch. 143. *Refd.* *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142; *Re Shaw & Birmingham Corpn.* (1884), 27 Ch. D. 614; *Spencer-Bell to L. & S. W. Ry. & Met. Dist. Ry.* (1885), 33 W. R. 771; *Re Keeble & Stillwell's Fletton Brick Co.* (1898), 78 L. T. 383.

1126. ——— Promoters compelled to take conveyance.]—*Re CARY-ELWES' CONTRACT*, [1906] 2 Ch. 143; 75 L. J. Ch. 571; 94 L. T. 845; 70 J. P. 345; 54 W. R. 480; 22 T. L. R. 511; 50 Sol. Jo. 464; 4 L. G. R. 838.

See, further, Sect. 1, sub-sect. 2, A., *post*.

1127. ——— Death of owner before price fixed—Contract incomplete.]—*Re BATTERSEA PARK ACTS, Re ARNOLD* (1863), 32 Beav. 591; 2 New Rep. 257; 8 L. T. 623; 9 Jur. N. S. 883; 11 W. R. 793; 55 E. R. 232.

*Annotation:—**Distd.* *Re Dykes' Estate* (1869), L. R. 7 Eq. 337.

1128. ———.]—*RIGHTON v. RIGHTON* (1866), 36 L. J. Ch. 61.

Effect of mere notice to treat.]—*See* Part VI., Sect. 2, sub-sect. 5, *ante*.

PART X. SECT. 1, SUB-SECT. 1.

u. Where notice to treat served—& price fixed pursuant to Act—Powers expired—*No* *RY. CO.*, *Ex p. HARNETT* (1865), 16 L. Ch. R. 268.—*IR.*

—Re CORK & YOUGHAL

SUB-SECT. 2.—SPECIFIC PERFORMANCE.

A. Compulsory Acquisition of Land.

See, generally, SPECIFIC PERFORMANCE.

1129. Parties to suit—By assignees of vendor—Assignor not necessary party.]—*BURR v. WIMBLEDON LOCAL BOARD* (1887), 56 L. T. 329; 35 W. R. 404; 3 T. L. R. 436.

1130. When court will decree—Not necessarily when relation of vendor & purchaser established.]—*ADAMS v. LONDON & BLACKWAIL RY. CO.*, No. 1097, *ante*.

1131. ——— Contract arising out of notice to treat—Within Statute of Frauds.]—*INGE v. BIRMINGHAM, WOLVERHAMPTON & STOUR VALLEY RY. CO.*, No. 1121, *ante*.

——— When contract complete—Value fixed after notice to treat.]—See Sect. 1, sub-sect. 1, *ante*.

——— Of purchase of whole or part.]—See Part VI., Sect. 4, *ante*.

1132. Payment of purchase-money into court—Ordered on interlocutory motion—Purchasers in possession—Contract admitted & vendor's title accepted.]—*CHAPPLE v. LONDON, CHATHAM & DOVER RY. CO.* (1865), 34 L. J. Ch. 597.

See, also, Sect. 1, sub-sect. 2, B. (d), *post*.

1133. When proceedings in suit stayed—Not on ground of vendor's partial interest subsequently discovered—Lands taken compulsorily & value assessed.]—*GEDYE v. PUBLIC BUILDINGS COMRS.* (1868), 19 L. T. 82; 16 W. R. 1106.

B. Acquisition of Land by Agreement.

(a) Parties to Suit.

Procedure to acquire land by agreement.]—See Part V., *ante*.

1134. Who may be made defendants in suit by vendor—Land leased by purchasers to another company—Both companies.]—*WINCHESTER (BP.) v. MID-HANTS RY. CO.* (1867), L. R. 5 Eq. 17; 37 L. J. Ch. 64; 17 L. T. 161; 32 J. P. 116; 16 W. R. 72.

Annotations:—*Folld. Drax v. Somerset & Dorset Ry.* (1868), 38 L. J. Ch. 232; *Goodford v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 307; *Marling v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 306.

1135. ——— Line worked by purchasers with another company under traffic agreement—Both companies.]—*MARLING v. STONEHOUSE & NAILSWORTH RY. CO.* (1869), 38 L. J. Ch. 306; 17 W. R. 484.

Annotation:—*Folld. Goodford v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 307.

1136. ——— ———.]—*GOODFORD v. STONEHOUSE & NAILSWORTH RY. CO.* (1869), 38 L. J. Ch. 307; 20 L. T. 137; 17 W. R. 515.

1137. Who may sue—One trustee on behalf of inhabitants—Lands vested in trustees by Act of Parliament.]—*GRANSTONE v. HEMEL Hempstead & LONDON & NORTH WESTERN RY. CO.* (1868), 17 L. T. 596.

1138. Death of co-plaintiff—Bill by tenant for life & owner in fee—Death of tenant for life after cause set down for hearing—Surviving plaintiff & tenant in tail enabled to continue.]—*WILLIAMS v. LLANELLY RY. & DOCK. CO.* (1870), L. R. 10 Eq. 401; 39 L. J. Ch. 820.

PART X. SECT. 1, SUB-SECT. 2.

W. When Court will decree—awarded not excessive.]—*NORVALL v. CANADA SOUTHERN RY. CO.* (1880), 5 A. R. 13.—CAN.

PART X. SECT. 1, SUB-SECT. 2.—B. (c) i.

y. Written agreement to convey.]—By an agreement in writing made with the owner who agreed to convey land upon condition that a station should be placed upon it. The owner afterwards refused to convey unless the

(b) Possession pending Suit.

1139. Purchasers not proceeding under Lands Act, 1845, ss. 76, 85—In same position as ordinary purchasers—Not entitled to possession.]—Pltf., a lessee of premises required for a street improvement, contracted to sell a lease of the premises for twenty-one years to the Metropolitan Board of Works. The purchasers required an abatement on the ground that the lease was found to be determinable at the end of seven or fourteen years by the lessor. Pltf. claimed specific performance. Pending the action the board applied to be let into possession on payment into ct. of the whole purchase-money claimed, & an order was made for letting them into possession on their paying into ct. that sum with interest:—*Held*: though the board could, by taking the steps prescribed by Lands Act, 1845, have obtained immediate possession of the property, yet as they had not done so, they were in same position as any other purchaser who was deft. to an action for specific performance, & were not entitled to have possession given to them pending the action.—*BYGRAVE v. METROPOLITAN BOARD OF WORKS* (1886), 32 Ch. D. 147; 55 L. J. Ch. 602; 54 L. T. 889; 50 J. P. 788; 2 T. L. R. 422, C. A.; *subsequent proceedings*, 3 T. L. R. 98.

(c) When Specific Performance decreed.

i. In General.

1140. Decreed by court of equity though action maintainable at law.]—*EASTERN COUNTIES RY. CO. v. HAWKES*, No. 442, *ante*.

1141. Not before time for payment of principal—No time fixed for payment—No entry into possession or commencement of works by promoters.]—*BODINGTON v. GREAT WESTERN RY. CO.* (1849), 13 Jur. 144.

1142. Not before entry on land by promoters—Though agreement for payment of purchase-money & compensation before entry.]—*GAGE v. NEWMARKET RY. CO.* (1852), 18 Q. B. 457; 7 Ry. & Can. Cas. 168; 21 L. J. Q. B. 398; 19 L. T. O. S. 155; 16 Jur. 1136; 118 E. R. 173.

Annotations:—*Consd. Hawkes v. Eastern Counties Ry.* (1852), 1 Do G. M. & G. 737. *Refd. Norwich Corpn. v. Norfolk Ry.* (1855), 4 E. & B. 397; *Scottish North Eastern Ry. v. Stewart* (1859), 33 L. T. O. S. 307; *Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356. *Mentd. Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331; *Preston v. Liverpool, Manchester, etc. Ry.* (1856), 5 H. L. Cas. 605; *Hammersmith, etc. Ry. v. Brand* (1869), L. R. 4 H. L. 171; *Taylor v. Chichester Ry.* (1870), 35 J. P. 228.

1143. Contract with party himself purchaser—But not entitled to specific performance against his vendor—Bill by promoters against both vendor & purchaser—Not decreed.]—*SOUTH EASTERN RY. CO. v. KNOTT* (1852), 10 Hare, 122; 68 E. R. 865. *Annotation*:—*Refd. Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

1144. Variation as to parties & subject-matter—Railway sold by purchasers pending suit—Compulsory powers acquired by new owners of railway—Not decreed.]—*MEYNELL v. SURTRES* (1855), 3 Sm. & G. 101; 25 L. J. Ch. 257; 25 L. T. O. S. 227; 1 Jur. N. S. 737; 3 W. R. 535; 65 E. R. 581, L. C.

Annotation:—*Mentd. Benecke v. Chadwicke* (1856), 4 W. R. 687.

contractors secured to him crossings over the ry. track. The ct. decreed specific performance of the agreement notwithstanding deft. swore that the condition upon which he agreed to convey was that the crossing should be secured to him.—*JACKSON v. JESSUP* (1856), 5 Gr. 524.—CAN.

Sect. 1.—Completion of purchase: Sub-sect. 2, B. (c) i., ii.,

1145. Contract for sale of lands not strictly required for purpose of undertaking—Decreed at instance of owner with no knowledge of mis-application.]—EASTERN COUNTIES RY. CO. v. HAWKES, No. 442, ante.

1146. When title of vendor defective—Failure of promoters to perfect according to agreement—Decreed.]—EASTERN COUNTIES RY. CO. v. HAWKES, No. 442, ante.

1147. When no investigation of title—Reference made to chambers—Not decreed.]—GUNSTON v. EAST GLOUCESTERSHIRE RY. CO. (1868), 18 L. T. 8.

1148. Agreement to take over land required at fixed rate on obtaining Act—Company not in existence at time of contract—Decreed.]—BEDFORD & CAMBRIDGE RY. CO. v. STANLEY (1862), 2 John & H. 746; 1 New Rep. 162; 32 L. J. Ch. 60; 7 L. T. 477; 9 Jur. N. S. 152; 11 W. R. 139; 70 E. R. 1260.

Annotation:—Mentd. Kemp v. S. E. Ry. (1872), 7 Ch. App.

1149. — Company proceeding under compulsory clauses in Lands Act, 1845—Not decreed.]—BEDFORD & CAMBRIDGE RY. CO. v. STANLEY (1862), 2 John & H. 746; 1 New Rep. 162; 32 L. J. Ch. 60; 7 L. T. 477; 9 Jur. N. S. 152; 11 W. R. 139; 70 E. R. 1260.

Annotation:—Refd. Kemp v. S. E. Ry. (1872), 7 Ch. App. 364.

1150. Agreement to pay sum certain on certain date—Default of payment—Undertaking completed—Decreed.]—SUTTON v. HOYLAKES RY. CO. (1869), 20 L. T. 214.

Undertaking abandoned.]—See Sub-sect. 2, B. (c), v., post.

1151. Contract varied by subsequent agreement—Performance of subsequent agreement becoming impossible—Original contract enforced.]—FIRTH v. MIDLAND RY. CO. (1875), L. R. 20 Eq. 100; 44 L. J. Ch. 313; 32 L. T. 219; 23 W. R. 509.

Annotation:—Mentd. County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

1152. Leave to prosecute decree—Granted notwithstanding provisions in Act restraining proceedings.]—GRIFFITH v. CAMBRIAN RY. CO. (1869), 21 L. T. 290; 17 W. R. 979.

ii. Agreement vague or uncertain.

1153. Difference to be settled by arbitration—Not decreed.]—TILLET v. CHARING CROSS BRIDGE CO. (1859), 26 Beav. 419; 28 L. J. Ch. 863; 34 L. T. O. S. 42; 5 Jur. N. S. 994; 7 W. R. 391; 53 E. R. 959.

Annotations:—Distd. Hart v. Hart (1881), 18 Ch. D. 670. Mentd. Baker v. Met. Ry. (1862), 31 Beav. 504; Re Whistler (1887), 35 Ch. D. 561.

1154. Vendor disputing construction of agreement under which corporation paid—Subsequent claim for further compensation—Relief obtainable at law—Not decreed.]—INGRAM v. MIDLAND RY. CO. (1860), 3 L. T. 533.

1155. Defendant acting on mistaken construction of contract—Parties not ad idem—Not decreed.]—WYCOMBE RY. CO. v. DONNINGTON HOSPITAL, No. 429, ante.

1156. Agreement to purchase such lands as required—Option of promoters—Not decreed.]—WENTWORTH v. HULL & NORTH WESTERN JUNCTION RY. CO. (1891), 61 L. T. 190.

iii. Adoption of Contract by Promoters.

1157. Adoption by other purchasers—Agreement between all parties—Decreed.]—The B. Co. agreed with pltf. to give him, for fourteen acres of land, £20,000, to be paid by instalments; other parties, called the C. Co., at same time started a rival line, & both cos. went to Parliament. In committee it was agreed that the merits of both lines should be referred to two members of the committee, & the solrs. for the rival cos. at same time signed an agreement, by which it was stipulated that the adopted co. should take the engagements with landholders, into which the rejected co. might have entered; & to this agreement the sanction of two members of each co., & also of pltf., was subsequently obtained, & was signified by a written memorandum of approval. The C. Co. was adopted, & was incorporated by Act of Parliament. Their line required sixteen acres of pltf.'s land in a different place. Pltf. filed a bill against the C. Co., stating these facts, & seeking to compel them to keep the agreement entered into by him with the B. Co., & to restrain the C. Co. from entering upon any lands belonging to him, till after payment of the first instalment, which was already due; & from proceeding, after subsequent instalments became due, till such instalments should have been paid:—*Held*: the general demurrer of defts. must be overruled.—STANLEY v. CHESTER & BIRKENHEAD RY. CO. (1838), 3 My. & Cr. 773; 1 Ry. & Can. Cas. 58; 40 E. R. 1124, L. C.

Annotations:—Consd. Lindsey v. G. N. Ry. (1853), 10 Hare. 664. Distd. Eastern Counties Ry. v. Hawkes (1855), 5 H. L. Cas. 331. Consd. Caledonian & Dumbartonshire Junction Ry. v. Helensburgh Harbour Trustees (1856), 27 L. T. O. S. 241. Distd. Williams v. St. George's Harbour Co. (1857), 24 Beav. 339. Consd. Shrewsbury v. North Staffordshire Ry. (1865), L. R. 1 Eq. 593. Refd. Preston v. Liverpool, Manchester & Newcastle-on-Tyne Junction Ry. (1851), 1 Sh. N. S. 586.

1158. Agreement with unauthorised agent of promoters—Not under seal—Adopted by promoters before bill filed—Decreed.]—LONDON & BIRMINGHAM RY. CO. v. WINTER (1810), Cr. & Ph 57; 41 E. R. 410, L. C.

Annotations:—Distd. Lindsey v. G. N. Ry. (1853), 10 Hare. 664. Apld. Wilson v. West Hartlepool Harbour & Ry. (1861), 34 Beav. 187. Refd. Hoare v. Lewisham Corpn. (1901), 85 L. T. 281. Mentd. Smith v. Wheatercroft (1878), 9 Ch. D. 223.

1159. — — — No proof of adoption by promoters—Not decreed.]—GOODAY v. COLCHESTER ETC. RY. CO. (1852), 17 Beav. 132; 7 Ry. & Can. Cas. 375; 19 L. T. O. S. 331; 51 E. R. 983

Annotations:—Consd. Eastern Counties Ry. v. Hawkes (1855), 5 H. L. Cas. 331. Folld. Williams v. St. George's Harbour Co. (1857), 24 Beav. 339 (see 2 De G. & J. 547). Refd. Preston v. Liverpool, Manchester & Newcastle-on-Tyne Junction Ry. (1853), 17 Beav. 114; Haynes v. Haynes (1861), 7 Jur. N. S. 595.

1160. Company consenting to judge's order against themselves—Precluded from objecting that a promoter had no authority to bind company—Or that consideration partly illegal—Bill to enforce payment of balance.]—A bill was applied for to Parliament to enable an intended co. to do certain works interfering with lands. A landowner, W., opposed the bill, but on a promoter of the bill agreeing to pay him a certain sum before commencing the works, he withdrew his opposition, & the bill passed. W. commenced legal proceedings against the promoter who signed the agreement, & the co. consented to a judge's order, against themselves, for the amount claimed in the action,

PART X. SECT. 1, SUB-SECT. 2.—B. (c) iii.

11581. Agreement with agent of promoters—Not under seal—Decreed.]—A

ry. co. served notice to treat. Persons in their employ, who were authorised to fix the price, obtained the owner's signature to a printed form of agreement fixing the price:—*Held*: the co.

were bound to specifically perform the agreement, though not under their corporate seal.—SMITH v. DUBLIN & BRAY RY. CO. (1853), 3 L. Ch. R. 225.—IR.

& then proceeded with the works before the whole money due on the agreement was paid. W. filed a bill to enforce payment of the remainder:—*Held*: the co. had adopted the agreement by submitting to the order, & were precluded from objecting that the promoter had no authority to bind the co., or that the consideration for the agreement was partly illegal.—**WILLIAMS v. ST. GEORGE'S HARBOUR CO.** (1858), 2 De G. & J. 547; 27 L. J. Ch. 691; 31 L. T. O. S. 227; 4 Jur. N. S. 1066; 6 W. R. 609; 44 E. R. 1102, L. J.J.

Annotation:—**Mentd.** *Re South Essex Estuary Co., Ex p. Chorley* (1870), L. R. 11 Eq. 157.

iv. Statutory Valuation not obtained.

1161. Under Lands Act, 1845, s. 9—When decreed.—**BAKER v. METROPOLITAN RY. CO.**, No. 421, *ante*.

1162. ———— **Wycombe Ry. Co. v. Donnington Hospital**, No. 429, *ante*.

1163. ———— **Not when surveyors' certificate not annexed to valuation.**—**BRIDGEND GAS & WATER CO. v. DUNRAVEN** (1885), 31 Ch. D. 219; 55 L. J. Ch. 91; 53 L. T. 714; 34 W. R. 119.

1164. ———— **Decreed—Objection not maintainable by purchasers—Parties agreed as to amount of purchase-money.**—**ELY (DEAN & CHAPTER) v. PETERBOROUGH, WISBEACH & SUTTON RY. CO.**, [1869] W. N. 201.

Annotation:—**Consd.** *Bridgend Gas & Water Co. v. Dunraven* (1885), 31 Ch. D. 219.

Mode of ascertaining consideration.—*See Part V., Sect. 3, sub-sect. 1, ante.*

v. Abandonment of Undertaking.

1165. Relief obtainable at law—No mutuality—Vagueness in terms—Not decreed.—An incorporated railway co. applied to Parliament for an Act to enable them to make a branch line. A landowner, A., through whose property the proposed railway would, according to the deposited plans & sections pass, opposed the bill in Parliament; whereupon the railway co. entered into negotiations with him, which resulted in certain heads of agreement being drawn up & signed by agents on behalf of both parties, & A.'s withdrawal of his opposition. The bill passed into an Act in 1847, & soon afterwards A. tendered a formal agreement to the co. for their execution. A. died in Mar., 1848, leaving plffs. his devisees in trust. The railway co., in same year, declared their intention of abandoning their scheme for making the branch line; & after repeated applications, returned the draft agreement, altered so as to make the taking of A.'s land conditional on the formation of the railway. Nothing further was done; & on June 18, 1850, plffs. filed their claim for specific performance of the heads of agreement. On July 9, the powers of the co. to take land compulsorily ceased:—*Held*: it was not a case for specific performance, on the grounds, that complete relief could be obtained at law, & there existed no mutuality in the contract; & independently of these grounds, the laches of plffs. in filing their claim, public policy & the vagueness of the terms of the contract, prevented the ct. from decreeing specific performance.—**STUART (LORD JAMES) v. LONDON & NORTH WESTERN RY. CO.** (1852), 1 De G. M. & G. 721; 7 Ry. & Can. Cas. 25; 15 Beav. 513, 524, n.; 21 L. J. Ch. 450; 19 L. T. O. S. 99; 16 Jur. 531; 42 E. R. 733, L. J.J.

Annotations:—**Consd.** *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331. **Refd.** *Gage v. Newmarket Ry.* (1852), 18 Q. B. 457; *Gooday v. Colchester etc. Ry.* (1852), 17 Beav. 132; *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.* (1853), 4 De G. M. & G. 115; *Norwich Corp'n. v. Norfolk Ry.* (1855), 4 E. & B. 397.

1166. Not decreed.—An agreement was entered into on behalf of, & was confirmed by, a railway co., in consideration of a landowner's opposition to the bill being withdrawn, to pay him £4,500 as the purchase-money of land not exceeding eight acres to be taken by the co. for the formation of their railway, & for consequential damages to the landowner's property. The railway was abandoned, & the landowner filed a claim for specific performance:—*Held*: plff. had means of complete redress at law, & the claim must be dismissed.—**WEBB v. DIRECT LONDON & PORTSMOUTH RY. CO.** (1852), 1 De G. M. & G. 521; 7 Ry. & Can. Cas. 9; 21 L. J. Ch. 337; 19 L. T. O. S. 2; 16 Jur. 323; 42 E. R. 654, L. J.J.

Annotations:—**Distd.** *Gooday v. Colchester etc. Ry.* (1852), 17 Beav. 132. **Consd. & Apld.** *Stuart v. L. & N. W. Ry.* (1852), 1 De G. M. & G. 721. **Distd.** *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331. **Refd.** *Gage v. Newmarket Ry.* (1852), 18 Q. B. 457; *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.* (1853), 4 De G. M. & G. 115; *Norwich Corp'n. v. Norfolk Ry.* (1855), 4 E. & B. 397. **Mentd.** *Parkin v. Thorold* (1852), 16 Beav. 59; *Tiverton & North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480.

1167. Contract conditional on breaking of ground—Not decreed.—**SCOTTISH NORTH-EASTERN RY. CO. v. STEWART**, No. 1, *ante*.

1168. Contract alleged by promoters to be illegal—Decreed.—On a bill filed against a railway co. before the expiration of their compulsory powers, for specific performance of a contract for the purchase of land in the event of a proposed bill in Parliament for a branch line passing into a law, which it did, & although the co. ultimately abandoned their intention of making the branch line, & did not require the land:—*Held*: specific performance must be decreed.—**EASTERN COUNTIES RY. CO. v. HAWKES** (1855), 5 H. L. Cas. 331; 24 L. J. Ch. 601; 25 L. T. O. S. 318; 3 W. R. 609; 10 E. R. 928, H. L.; *affg.* *S. C. sub nom. HAWKES v. EASTERN COUNTIES RY. CO.* (1852), 1 De G. M. & G. 737, L. C.

Annotations:—**Distd.** *Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees* (1856), 27 L. T. O. S. 241. **Consd.** *Haynes v. Haynes* (1861), 1 Drow. & Sm. 426. **Refd.** *Stuart v. L. & N. W. Ry.* (1852), 15 Beav. 513; *Ffooks v. S. W. Ry.* (1853), 1 Sm. & G. 142; *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.* (1853), 4 De G. M. & G. 115; *Norwich Corp'n. v. Norfolk Ry.* (1855), 4 E. & B. 397; *Preston v. Liverpool, Manchester etc. Ry.* (1856), 5 H. L. Cas. 605; *Bedford & Cambridge Ry. v. Stanley* (1862), 2 John. & H. 746; *Steele v. North Met. Ry.* (1867), 2 Ch. App. 239, n.; *Taylor v. Chester & Midhurst Ry.* (1870), L. R. 4 H. L. 628. **Mentd.** *Lindsey v. G. N. Ry.* (1853), 10 Hare, 664; *South Yorkshire Ry. & River Don Co. v. G. N. Ry.* (1853), 9 Exch. 55; *Bateman v. Ashton-under-Lyne Corp'n.* (1858), 3 H. & N. 323; *Maunsell v. Mid. G. W. Ry. of Ireland & G. N. & W. Ry. of Ireland* (1863), 8 L. T. 347; *Ashbury Railway Carriage & Iron Co. v. Riche* (1875), L. R. 7 H. L. 653; *A.-G. v. G. E. Ry.* (1879), 11 Ch. D. 449; *San Permanent Benefit Bldg. Soc. v. Western Suburban & Harrow Road Permanent Bldg. Soc.*, [1921] 2 Ch. 438.

1169. Contract in furtherance of general objects of company—Company not empowered at time to execute works—Not ultra vires—Decreed.—**EASTERN COUNTIES RY. CO. v. HAWKES**, No. 142, *ante*.

Compare No. 117, *ante*.

(d) When Payment into Court ordered.

1170. Purchasers in possession—Entry by agent of purchasers by mistake—Possession surrendered subsequently—Not ordered.—**TOMLINSON v. MANCHESTER & BIRMINGHAM RY. CO.** (1840), 2 Ry. & Can. Cas. 104.

1171. ———— **On part payment of purchase-money—Balance retained on vendor being unable to make good title—Not ordered.**—**CAPPS v. NORWICH & SPALDING RY. CO.** (1863), 2 New Rep. 51; 9 Jur. N. S. 635; 11 W. R. 657.

1172. ———— **Or delivery up of land—Ordered.**—

Sect. 1.—Completion of purchase: Sub-sect. 2, B. (d); sub-sect. 3, A., B. & C.; sub-sect. 4.]

COOPER v. LONDON, CHATHAM & DOVER RY. CO. (1866), 14 W. R. 985.

*Annotation:—*Refd. Cook v. Andrews (1896), 66 L. J. Ch. 137.

1173. — Without option of surrendering possession—Waste by purchasers—Ordered.]—POPE v. GREAT EASTERN RY. CO. (1866), L. R. 3 Eq. 171; 36 L. J. Ch. 60; 15 L. T. 239; 15 W. R. 192.

*Annotations:—*Refd. Lewis v. James (1886), 32 Ch. D. 326; Greenwood v. Turner, [1891] 2 Ch. 144.

1174. — After award & acceptance of title—Though promoters disputing amount of award—Ordered.]—SOUTH EASTERN RY. CO. v. LONDON, BRIGHTON & SOUTH COAST RY. CO. (1866), 14 W. R. 666.

1175. — Delay in completion after award by sheriff—Ordered.]—GRIFFITHS v. CRYSTAL PALACE & SOUTH LONDON JUNCTION RY. CO. (1866), 14 L. T. 753; 12 Jur. N. S. 560.

1176. — On refusal to complete on ground of want of funds—Not ordered.]—In 1862 lands were taken by a railway co. under agreements stipulating for a price to be fixed by arbn., for a deposit, & for interest in the meantime, to be at an increased rate in case of delay by the co. in completing the purchase. The deposit was paid & possession taken by the co. which constructed its railway on the land. The co. also accepted the vendors' titles, & approved draft conveyances, but refused to complete the purchase on the ground of want of money. Suits having been commenced by the vendors for specific performance of the agreement in 1867, a motion was made for payment of the balance into ct.:—*Held*: the motion must be refused.—PRYSE v. CAMBRIAN RY. CO. (1867), 2 Ch. App. 444; *sub nom.* LEWES v. CAMBRIAN RY. CO., PRYSE v. CAMBRIAN RY. CO., 36 L. J. Ch. 565; 15 W. R. 604, L. J.J.

SUB-SECT. 3.—ENFORCEMENT OF LIEN OF UNPAID VENDOR.

A. Nature and Extent of right.

See, generally, LIEN.

1177. Nature of right—Same as that of ordinary vendor.]—(1) The owners of land taken by public cos. under their compulsory powers have the ordinary vendor's lien for unpaid purchase-money, & they are entitled to enforce that right by a sale of the land. (2) The lien extends not only to the value of the land, but also to the amount of compensation for damages. (3) The right of lien is unaffected by the deposit under Lands Act, 1845, s. 85, & by a deposit, by agreement, before the amount payable has been ascertained. (4) The rights of the public, & of debenture creditors & others claiming under the co., are subordinate to the vendor's lien for unpaid purchase-money.—WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO. (1865), L. R. 1 Eq. 195; 35 Beav. 52; 35 L. J. Ch. 94; 13 L. T. 517; 12 Jur. N. S. 18; 14 W. R. 158; 55 E. R. 813.

*Annotations:—*As to (1) Foll. Sedgwick v. Walford & Rickmansworth Ry. (1867), 36 L. J. Ch. 379; Pell v. Northampton & Banbury Ry. (1868), 16 W. R. 1077; Raper v. Crystal Palace & South London Ry. (1868), 16 W. R. 413. *Consd.* Wing v. Tottenham & Junction Ry. (1868), 3 Ch. App. 740. *Refd.* Sutton v. Hoylake Ry. (1869), 20

L. T. 214. *Generally, Mentd.* Re Cambrian Ry. (1868), 16 W. R. 346; Goodford v. Stonehouse & Nailsworth Ry. (1869), 38 L. J. Ch. 307.

1178. — — —.]—WING v. TOTTENHAM & HAMPSTEAD JUNCTION RY. CO., No. 1041, *ante*.

1179. — Takes priority over rights of public & of debenture creditors & others claiming under company.]—WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO., No. 1177, *ante*.

1180. — — — Rights of public no larger than rights of promoters.]—MUNNS v. ISLE OF WIGHT RY. CO., No. 1189, *post*.

1181. — Unaffected by deposit under Lands Act, 1845, s. 85—& by deposit by agreement—Before amount payable ascertained.]—WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO., No. 1177, *ante*.

1182. Extent of right—For value of land—& amount of compensation for damages.]—WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO., No. 1177, *ante*.

B. Declaration of Lien.

1183. Vendor entitled to—On obtaining decree against purchasers for specific performance—Purchasers becoming insolvent.]—HERIOT v. LONDON, CHATHAM & DOVER RY. CO. (1867), 16 L. T. 473.

1184. — Form of order.]—MARSHALL v. SCARBOROUGH & WHITBY RY. CO., [1889] W. N. 73.

C. How enforced.

1185. Injunction to restrain user & continuance of possession—Parties not ad idem—Granted.]—TEMPEST v. LONDON & NORTH WESTERN RY. CO. (1849), 13 L. T. O. S. 88.

1186. — Land leased to another company—Both companies restrained.]—A railway co. took land & made a railway thereon, & afterwards leased the railway to another co. Part of the purchase-money remained unpaid, & the landowner filed his bill against both cos., praying for payment of the money or an injunction to restrain them from using the land:—*Held*: the first co. should pay the money & in default both cos. should be restrained from using the land.—COSENS v. BOGNOR RY. CO. (1866), 1 Ch. App. 594; 36 L. J. Ch. 104; 15 L. T. 168; 14 W. R. 1002, L. J.J.

*Annotations:—*N.F. Pell v. Northampton & Banbury Junction Ry. (1866), 15 L. T. 169. *Mentd.* Re Cambrian Ry. (1868), 16 W. R. 346; Munns v. Isle of Wight Ry. (1870), 5 Ch. App. 414.

1187. — After specific performance decreed—Completion after specified time—Granted.]—NELSON (LORD) v. SALISBURY & DORSET JUNCTION RY. CO. (1868), 16 W. R. 1074.

1188. — Promoters electing to give securities instead of cash as under agreement—Claimant recovering part of money by action at law on bond—Granted—Sale in default of payment.]—A landowner sold land to a railway co. by an agreement under which they were to pay him £2,000 to be paid in cash or, at the option of the co., in such securities as should be agreed upon between the parties. The co. took possession of the land, & opened their line upon it. Under the agreement they elected to give security in lieu of a cash payment, & a bond was accordingly settled & given. The co. made default on the day for payment mentioned in the bond, & pltf. sued them on the bond at law, & recovered a part of his money by a sheriff's sale:—*Held*: this was not a contract

PART X. SECT. 1, SUB-SECT. 3. -C.

z. Injunction to restrain continuance of possession—Refused—Vendor entitled to order for sale.]—Where a ry. co. failed to pay the compensation in accordance with a judgt.

though they had entered into possession & were operating over the lands:—*Held*: (1) the owners had a vendor's lien for the amount, with such provisions as were necessary to realise by means of a sale; (2) they were not

entitled to an injunction to restrain the defts. from operating the ry., nor to an order for possession.—LINCOLN PAPER MILLS CO. v. ST. CATHERINES & NIAGARA CENTRAL RY. CO. (1890), 19 O. R. 106.—CAN.

to take securities instead of cash, & pltf. had a lien for the balance of his purchase-money, & was entitled to an injunction restraining the co. from continuing in possession of the land, & to a sale in default of payment.—*PELL v. MIDLAND COUNTIES & SOUTH WALES RY. CO.* (1869), 20 L. T. 288; 17 W. R. 506, L. C.

1189. — When purchasers insolvent—Refused—Order made for receiver with immediate possession.]—(1) An unpaid vendor of land, who has obtained a decree for specific performance against a railway co. & a declaration of lien for the balance of his purchase-money, is entitled, notwithstanding the filing & enrolment of a scheme of arrangement, to an order for sale of the land, free from the claims of all persons claiming under the railway co., & to the appointment of a receiver with immediate possession, but is not entitled to an injunction restraining the co. from using the land until payment.

(2) The rights of the public in such a case, where the railway has been opened for traffic, are the same as, & no larger than, the rights of the railway co., & are subject to, & can in no way interfere with, the rights of the vendor.—*MUNNS v. ISLE OF WIGHT RY. CO.* (1870), 5 Ch. App. 414; 39 L. J. Ch. 522; 23 L. T. 96; 18 W. R. 781, L. J. *Annotations:—As to (1) Foll. Lyeett v. Stafford & Uttoxeter Ry.* (1872), L. R. 13 Eq. 261. *Consd. Allgood v. Merrybent & Darlington Ry.* (1886), 33 Ch. D. 571. *Generally, Mentd. Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67.

1190. — Until sale directed by order—Refused.]—*LYCETT v. STAFFORD & UTOXETER RY. CO.* (1872), L. R. 13 Eq. 261; 41 L. J. Ch. 474; 25 L. T. 870.

Annotation:—Foll. Bee v. Stafford & Uttoxeter Ry. (1875), 23 W. R. 868.

1191. — Before decree—In action commenced by vendor to enforce lien—Refused.]—Where the unpaid vendor of land taken by a railway co. has commenced an action against the company to enforce his lien, the ct. will not grant an injunction or a receiver against the co. before judgment has been obtained in the action, even though the co. admit their liability.—*LATIMER v. AYLESBURY & BUCKINGHAM RY. CO.* (1878), 9 Ch. D. 385; 39 L. T. 460; 27 W. R. 141, C. A.

1192. — Land unsaleable—No order for sale in decree declaring lien—Granted.]—*ALLGOOD v. MERRYBENT & DARLINGTON RY. CO.* (1886), 33 Ch. D. 571; 55 L. J. Ch. 743; 55 L. T. 835; 35 W. R. 180; 2 T. L. R. 800.

1193. Sale of land—Vendor entitled to order for.]

PART X. SECT. 1, SUB-SECT. 4.

a. Whether payable—Not when non-completion due to appeal by vendor.]—*ATLANTIC & NORTH WEST RY. CO. v. JUDAH* (1894), 23 S. C. R. 231.—**CAN.**

b. — Not where vendor traverses award.]—*Re DUNDALK & KENNISKILLLEN RY. CO., Ex p. SPEAR* (1861), 11 L. Ch. R. 467; 13 Ir. Jur. 148.—**IR.**

1205 i. — Not when purchase-money paid into bank—Failure of vendor to show good title.]—A corpn. took land under compulsory powers, & owners failed to deduce satisfactory title; the corpn. lodged the money in the Bank of Ireland, & took possession on the same day:—*Held: corpn. were not liable to pay interest.—Re LINDSEY, Ex p. DUBLIN CORPN.* (1883), 11 L. R. Ir. 392.—**IR.**

c. From what date payable—From date of taking possession—Under statutory powers—Not merely from time when amount ascertained.]—Lands of pltf. were taken by defts. under Lands Compensation Act, 1890. The award of compensation was not given till a

considerable time after the defts. took possession:—*Held: pltf. entitled to interest from the date of taking of possession.—GLENN v. BOARD OF LAND & WORKS*, [1905] V. L. R. 518.—**AUS.**

d. — — — — —.]—Where a ry. co. made a deposit as required by Lands (Scot.) Act, 1845, s. 84, but without giving any bond, that not being required by the landowner, & afterwards paid the compensation found due with interest from the date of the decree-arbitral, presented a petition for repayment of their deposit:—*Held: the landowner was entitled to interest from the date of entry on the lands.—WEST HIGHLAND RY. CO. v. PLACE* (1894), 21 R. (Ct. of Sess.) 576; 31 Sc. L. R. 455.—**SCOT.**

e. — — — — —.]—*Re COLLINS OTTAWA WATER COMRS.* (1877), 42 U. C. R. 378.—**CAN.**

f. — — — — —.]—Interest on compensation awarded is properly allowable from the date of the taking of the land.—*Re CAVANAGH & CANADIAN ATLANTIC RY. CO.* (1907), 14 O. L. R. 523; 9 O. W. R. 842.—**CAN.**

—*WALKER v. WARE, HADHAM & BUNTINGFORD RY. CO.*, No. 1177, *ante*.

—*SEDGWICK v. WATFORD & RICKMANSWORTH RY. CO.* (1867), 36 L. J. Ch. 379.

1195. — — — — —.]—*RAPER v. CRYSTAL PALACE RY. CO.* (1868), 18 L. T. 8; 16 W. R. 413.

1196. — — — — — Decree obtained for specific performance & declaration of lien—Although railway made & ready for traffic.]—*WING v. TOTTENHAM & HAMPSTEAD JUNCTION RY. CO.*, No. 1041, *ante*.

1197. — — — — —.]—*JERSEY (EARL) v. SOUTH WALES MINERAL RY. CO.* (1868), 19 L. T. 446.

1198. — — — — —.]—*VYNER v. HOY LAKE RY. CO.* (1868), 17 W. R. 92.

1199. — — — — —.]—*MUNNS v. ISLE OF WIGHT RY. CO.*, No. 1189, *ante*.

1200. — — — — — Purchasers insolvent.]—*WILLIAMS v. GREAT EASTERN RY. CO.* (1868), 18 L. T. 458; 16 W. R. 821.

1201. — — — — — In default of payment of balance of purchase-money.]—*PELL v. MIDLAND COUNTIES & SOUTH WALES RY. CO.*, No. 1188, *ante*.

1202. — — — — — Order for made on petition—Appointment of fresh receiver where receiver already appointed.]—*WARE v. AYLESBURY & BUCKINGHAM RY. CO.* (1873), 28 L. T. 893; 21 W. R. 819.

Annotation:—Refd. Ex p. Hartington (1875), 23 W. R. 484.

SUB-SECT. 4.—INTEREST ON PURCHASE-MONEY.

1203. Jurisdiction of court to order payment—Not when money paid into court—& deed poll executed under Lands Act, 1845, s. 76.]—*Re CRYSTAL PALACE RY. CO. & Re DIVERS* (1855), 1 Jur. N. S. 995.

1204. Whether payable—Not when purchase-money paid into bank—On ground that payment ought to have been made to vendors.]—*Re GREAT WESTERN RY. CO., Ex p. WHITE* (1839), 9 L. J. Ex. Eq. 9.

1205. — — — — — Not when non-completion due to default of vendor—Purchase-money lying idle after notice.]—*REGENT'S CANAL CO. v. WARE* (1857), 23 Beav. 575; 26 L. J. Ch. 566; 29 L. T. O. S. 274; 3 Jur. N. S. 924; 5 W. R. 617; 53 E. R. 226.

Annotations:—Consd. Re Pigott & G. W. Ry. (1881), 18 Ch. D. 146. *Refd. Mason v. Stokes Bay Ry. & Pier Co.*

—*ODLUM v. VAN COUVER & CANADIAN NORTHERN RY. CO.* (1915), 1 W. L. R. 42; 31 W. L. R. 678.—**CAN.**

Good title not then acquired.]—R. v. MURRAY (1896), 5 Exch. C. R. 69.—**CAN.**

*Even if no plan & description filed.]—*Interest allowed from date of taking of possession, although the plan & description be not filed on that date.—*DRURY v. R.* (1898), 6 Exch. C. R. 204.—**CAN.**

k. — — — — — Even if before compensation ascertained.]—*GREEN v. CANADIAN NORTHERN RY. CO.*, [1917] 2 W. W. R. 273; 10 Sask. L. R. 108; 33 D. L. R. 608.—**CAN.**

l. — — — — — Where compensation increased on traverse.]—A co. took possession of land under their powers, & lodged in ct. the sum awarded as compensation, which was afterwards increased on a traverse of the award:—*Held: interest payable on the difference from the time when the co. went into possession.—Re NAVAN & KINGSCOURT RY. CO.* (1876), 1 R. 10 Eq. 113.—**IR.**

Sect. 1.—Completion of purchase: Sub-sect. 4. Sect. 2: Sub-sects. 1 & 2.]

(1862), 1 New Rep. 84; *Harding v. Met. Ry.* (1872), 7 Ch. App. 154; *Re Cary-Elwes' Contract*, [1906] 2 Ch. 143. *Mentd. Clarke v. Ramuz* (1891), 60 L. J. Q. B. 679.

— *After counter-notice by purchasers.]—See No. 367, ante.*

1206. From what date payable—From date of contract—Money paid into bank previous to payment into court—Pending master's approval of contract.]—*HAMBERS v. WHITE* (1850), 14 Jur. 1129.

1207. — Not previous to award fixing price—Delay in completion not attributable to purchaser—Agreement silent as to interest.]—*CATLING v. GREAT NORTHERN RY. CO.*, No. 458, *ante*.

1208. — From date of taking possession—Under statutory powers—Not merely from time when amount ascertained.]—*RHYS v. DARE VALLEY RY. CO.* (1874), 1 L. R. 19 Eq. 93; 23 W. R. 23.

Annotations:—Consd. Re Northumberland & Tynemouth Corpn., [1909] 2 K. B. 374. *Refd. Ballard v. Shutt* (1880), 15 Ch. D. 122; *Re Shaw & Birmingham Corpn.* (1884), 27 Ch. D. 614; *Fletcher v. L. & Y. Ry.*, [1902] 1 Ch. 901. *Mentd. Re Pigott & G. W. Ry.* (1881), 18 Ch. D. 146.

1209. — Agreement varying contract becoming impossible to perform—Original contract enforced.]—*FIRTH v. MIDLAND RY. CO.* (1875), 1 L. R. 20 Eq. 100; 44 L. J. Ch. 313; 32 L. T. 219; 23 W. R. 509.

Annotation:—Mentd. County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

1210. — From date of verdict—Though de facto possession obtained subsequently.]—*Re ECCLESHILL LOCAL BOARD* (1879), 13 Ch. D. 365; 49 L. J. Ch. 214; 28 W. R. 536.

Annotations:—Consd. Re Pigott & G. W. Ry. (1881), 18 Ch. D. 146. *Refd. Re Shaw & Birmingham Corpn.* (1884), 27 Ch. D. 614.

1211. — From time when good title shown—Purchase under statutory powers.]—*Re PIGOTT & GREAT WESTERN RY. CO.*, No. 1125, *ante*.

1212. Up to what date payable—"Completion" of purchase—Agreement to pay from delivery of abstract until purchase completed—Interest ceases to run on payment into court.]—*LEWIS v. SOUTH WALES RY. CO.* (1852), 10 Hare, 113; 7 Ry. & Can. Cas. 923; 22 L. J. Ch. 209; 21 L. T. O. S. 3; 16 Jur. 1149; 1 W. R. 45; 68 E. R. 861.

*m. — Where money lodged in court but not invested.]—*A ry. co., having taken lands, lodged the amount found by the arbitrator in ct., under Railways (Ir.) Act, 1860, s. 2, & went into possession. The co. neither applied to have the money invested nor transferred to the credit of the sum awarded by the final award:—*Held*: co. were liable for interest on the purchase-money from the date at which they went into possession of the lands.—*Re DUBLIN, WICKLOW & WEXFORD RY. CO.*, *Ex p. JORDAN* (1891), 27 L. R. Ir. 79.—*IR.*

*n. — From time award acquires effect of judgment.]—*Interest will not be allowed on the sum awarded under Public Works Act, until award has acquired the effect of a judgment of Supreme Ct.—*WALKER v. WELLINGTON & MANAWATU RY. CO., LTD.* (1886), 5 N. Z. L. R. 193.—*N.Z.*

*o. —]—**HALLENSTEIN v. MAYOR, ETC. OF THE CITY OF WELLINGTON* (1901), 21 N. Z. L. R. 61.—*N.Z.*

*p. — From date of bye-law of expropriation.]—**Re MAC & CITY OF TORONTO* (1895), 26 O. R. 558.—*CAN.*

*q. Up to what date payable—Whether to date of award.]—*No interest can be awarded on the amount of compensation as between the date of

taking possession of the land acquired & the date of the award.—*JAYCOCK v. VICTORIAN RAILWAYS COMRS.*, [1917] V. L. R. 556.—*AUS.*

allowed to owner on compensation from time of taking to time of award.—*JAMES v. ONTARIO & QUEBEC RY. CO.* (1886), 12 O. R. 624.—*CAN.*

*s. — Till date of payment of purchase-money.]—*An owner executed a conveyance to a co. of his interest in land in consideration of payment of the compensation awarded on the hearing of a traverse. No claim for interest was made at the execution of the conveyance:—*Held*: the owner could claim interest from time of entering on the land to date of payment. *Re BALTIMORE EXTENSION RY. CO., LTD.*, *Ex p. DALY*, [1895] 1 L. R. 169; 29 L. T. 54.—*IR.*

*t. — Whether till payment into bank.]—*Purchasers went into possession, refused to pay interest, & lodged the purchase-money in the bank:—*Held*: the owners were entitled to interest to the time of the lodgment in the bank.—*BLOUNT v. GREAT SOUTHERN & WESTERN RY. CO.* (1852), 2 L. Ch. R. 40.—*IR.*

*u. — Whether till payment into court.]—*Where the W. Corpn. entered upon lands under their powers, &

1213. — Decree of court ordering payment from date of award until completion of purchase—Interest computed until purchase-money paid & conveyance executed.]—*NEATH NEW GAS CO. v. GWYN*, [1873] W. N. 200.

1214. — Investment of purchase-money—Acquiescence of promoters to vendor's demand.]—A railway co. gave the usual notice to a tenant for life of settled estates that they required a portion of the estates for their line, & afterwards made an offer for the fee simple. The solr. of the tenant for life accepted the offer, stipulating that interest at £5 per cent. should be paid from the time of the co. taking possession, & proposing that, as the title was well known, the co. should be satisfied without the production of the deeds. To this the co. objected, & proposed to pay the money into a banker's in the names of the respective solrs. pending the investigation of the title. The tenant for life's solr. thereupon suggested that, as the money must be paid into ct., it had better be so at once. The co. thereupon paid the money into ct. to the account of the Railway Act only, & communicated to the tenant for life's solr. that they had paid the money into ct. under Lands Act, 1845, s. 69. The solr. for the tenant for life thereupon reminded them that interest at £5 per cent. would continue to be payable till the purchase was completed. To this the co.'s solr. returned no answer, & although several other communications passed between the solrs. respecting the purchase, the co.'s solr. did not, till a year afterwards, express any objection to the payment of interest. The money remained uninvested during the whole of that period:—*Held*: the co. had acquiesced in the vendor's view of the case, & were bound to pay interest up to the investment.—*Re ROYSTON & HITCHIN RAILWAY CO.'S ACT*, 1846, *Ex p. HARDWICKE (EARL)* (1852), 1 De G. M. & G. 297; 7 Ry. & Can. Cas. 919; 18 L. T. O. S. 281; 42 E. R. 567, L. J.J.

Annotations:—Consd. Lewis v. South Wales Ry. (1852), 10 Hare, 113. *Refd. Lewis v. South Wales Ry.* (1853), 21 L. T. O. S. 3; *Re L. B. & S. C. Ry.* (1854), 18 Beav. 608. *Mentd. Re Marylebone Improvement Act*, 1868, *Ex p. Topple* (1867), 19 W. R. 1058.

1215. At what rate payable—Promoters agreeing to pay on ascending scale in certain events—Must

lodge in ct. the sum awarded; & upon a traverse, a verdict for an increased amount was afterwards had, & the corpn. then lodged the balance of the verdict:—*Held*: interest on the sum originally lodged, & on the sum awarded by the verdict, was payable from the date of entering on the lands to the dates of the respective lodgments.—*Re WATERFORD WATER ACT*, *Ex p. SULLIVAN* (1871), 12 L. L. T. 1.—*IR.*

*w. —]—*Where a co. enter upon lands under Railways (Ir.) Act, 1860, s. 2, interest becomes payable upon the purchase-money, from the date of entry, but the interest ceases running on the date of the lodgment of the principal.—*Re BELFAST WATER COMRS.*, *Ex p. DALWAY* (1884), 15 L. R. Ir. 13, 21.—*IR.*

*y. At what rate payable—Money paid into bank—At bank rate.]—*Where money was paid into a bank under Dominion Railway Act, 1879, & an order for immediate possession of lands made by a judge, & an award of compensation made subsequently:—*Held*: owner entitled to interest on the amount awarded him only at rate allowed by the bank & not at legal rate.—*Re FAYLOR & ONTARIO & QUEBEC RY. CO.* (1886), 11 P. R. 371.—*CAN.*

*z. —]—**Re GRAND TRUNK PACIFIC BRANCH LINES CO. & LAW*, [1917] 2 W. W. R. 1011.—*CAN.*

pay at higher rate on happening of event—Cannot object to contract in absence of fraud.]—HERBERT v. SALISBURY & YEOVIL RY. CO. (1866), L. R. 2 Eq. 221; 14 L. T. 507; 14 W. R. 706.
Of copyholds.]—See No. 2014, *post*.

SECT. 2.—PAYMENT INTO COURT.

See Lands Act, 1845, ss. 69–83.

SUB-SECT. 1.—REFUSAL OF OWNER TO CONVEY OR FAILURE TO MAKE GOOD TITLE.

See Lands Act, 1845, ss. 69, 71–74, 76, 77, 79.

Payment out of court.]—See Part XI., Sect. 7, sub-sect. 3, A., *post*.

1216. Under Lands Act, 1845, ss. 76, 77—Who is an “owner”—Person having some title—Land may be subject to dower or jointure or other interest in third party.]—(1) A railway co. took possession of land under a contract for a sixty years’ title. The vendor failed to show more than a possessory title for thirty-six years:—*Held*: he could not compel the co. to deposit the purchase-money in the bank under Lands Act, 1845, s. 76.

(2) By the term “owner” in the sect. the Legislature meant a person having some title; & in providing for the event of an owner failing to make out a title to the satisfaction of the promoters of the undertaking, they had in contemplation the possibility of the land being subject to dower or jointure, or some other independent estate or interest outstanding in a third party, who is under no legal or equitable obligation to concur in the sale, but which does not displace the owner’s title.

(3) A surviving partner, selling partnership lands in discharge of his duty, as survivor, to wind up the partnership, is an owner within s. 76, & by virtue of that sect. & s. 77 the promoters of the undertaking, depositing the purchase-money in the bank to the credit of the vendor & of the representative of his deceased partner, would acquire all the estate & interest of both.

(4) A person in possession, but showing a bad title, is not the “owner” within s. 76, & where the lands are in such possession, & the true owner cannot be found, the promoters must have recourse to the jury clauses of the Act.—DOUGLASS v. LONDON & NORTH WESTERN RY. CO. (1857), 3 K. & J. 173; 3 Jur. N. S. 181; 69 E. R. 1069.

Annotations:—As to (1) *Consd.* *Ex p.* Winder (1877), 6 Ch. D. 696. As to (4) *Consd.* Wells v. Chelmsford L. B. of Health (1880), 15 Ch. D. 108. *Generally.* *Mentd.* *Re* Metropolitan Street Improvement Act, 1877, *Ex p.* Chamberlain (1880), 14 Ch. D. 323.

1217. ——— Not persons with no title at all.]—Pltfs. contracted to sell land to defts., but failed to make any title to a small portion thereof. Thereupon defts. paid the purchase-money of the whole land, after making certain deductions therefrom in accordance with the contract, into ct. under Lands Act, 1845, s. 76, & executed a deed poll under s. 77 purporting to vest the whole of the land in themselves:—*Held*: pltfs. were not owners of the strip of land within ss. 76 & 77, & defts. could not acquire the land under those sects.—WELLS v. CHELMSFORD LOCAL BOARD OF HEALTH (1880), 15 Ch. D. 108; 49 L. J. Ch. 827; 43 L. T. 378; 45 J. P. 6; 29 W. R. 381.

1218. ——— Not person in possession showing bad title.]—DOUGLASS v. LONDON & NORTH WESTERN RY. CO., No. 1216, *ante*.

1219. ——— Surviving partner selling partnership lands—In discharge of duty as survivor.]—DOUGLASS v. LONDON & NORTH WESTERN RY. CO., No. 1216, *ante*.

1220. ——— Effect of payment in—To credit of vendor & representative of deceased partner—All estate & interest of both acquired.]—DOUGLASS v. LONDON & NORTH WESTERN RY. CO., No. 1216, *ante*.

1221. ——— When promoters compelled to deposit—Not when contract for sixty years’ title—Vendor failing to show more than possessory title for thirty-six years.]—DOUGLASS v. LONDON & NORTH WESTERN RY. CO., No. 1216, *ante*.

1222. Under private Act—Promoters need not deposit—On application of party claiming to be owner—On ground of defective title—Unless clear evidence of defect in affidavits.]—R. v. DEPTFORD PIER CO. (1838), 8 Ad. & El. 910; 1 Per. & Dav. 128; 8 L. J. Q. B. 62; 112 E. R. 1084; *sub nom.* COLLIER v. DEPTFORD PIER & IMPROVEMENT CO., 2 Jur. 1039.

Annotation:—*Mentd.* R. v. Bodmin JJ., [1892] 2 Q. B. 21.

1223. ——— Procedure not applicable till after purchase-money agreed on or compensation settled—Duty of promoters to call upon owner to make out title after assessment—Though owner failing to disclose title before assessment.]—DOE d. HUTCHINSON v. MANCHESTER, BURY, & ROSSENDALE RY. CO. (1845), 14 M. & W. 687; 2 Car. & Kir. 162; 15 L. J. Ex. 208; 6 L. T. O. S. 103; 9 Jur. 949; 153 E. R. 651.

SUB-SECT. 2.—VENDORS UNDER DISABILITY.

See Lands Act, 1845, ss. 69, 71–74.

1224. Principles upon which court acts in ordering payment.]—The principle upon which the ct. acts in ordering the payment of money into ct., is that where there is a case of account between parties, there must be something like a trust; but the ct. also acts on this principle, that, where there is a question to be litigated & determined, it will protect the property pending the litigation.—LONDON & NORTH WESTERN RY. CO. v. LANCASTER CORPN. (1851), 15 Beav. 22; 18 L. T. O. S. 132; 16 Jur. 677; 51 E. R. 444.

1225. When payment in proper procedure—Not when promoters enter into special contract to purchase.]—NEWTON v. METROPOLITAN RY. CO. (1861), 1 Drew & Sm. 583; 5 L. T. 542; 8 Jur. N. S. 738; 10 W. R. 102; 62 E. R. 501.

1226. ——— When lands of corporation purchased—Lands not superfluous—Corporation with no power to treat.]—*Re* CHELSEA WATERWORKS CO. (1887), 56 L. J. Ch. 640; 56 L. T. 421; 3 T. L. R. 464.

1227. ——— When trustees of charity sell—Powers of sale in deed of foundation—Not “scheme legally established.”]—*Re* MASON’S ORPHANAGE & LONDON & NORTH WESTERN RY. CO., [1896] 1 Ch. 596; 65 L. J. Ch. 439; 74 L. T. 161; 44 W. R. 339; 12 T. L. R. 236; 40 Sol. Jo. 352, (C. A.).

Annotations:—*Apld.* A.-G. v. National Hospital for Relief & Cure of Paralyzed & Epileptic, [1901] 2 Ch. 252. *Reid.* Ogilvie v. Littleboy (1897), 13 T. L. R. 399; *Re* Howard Street Congregational Chapel, Sheffield, [1913] 2 Ch. 690; A.-G. v. Foundling Hospital, [1914] 2 Ch. 154. *Mentd.* Power v. Banks (1901), 70 L. J. Ch. 700.

PART X. SECT. 2, SUB-SECT. 2.

a. When payment in proper procedure—Not where lands subject to a

suit in equity.]—WILLIAMSON v. COURTNEY & ST. KILDA & BRIGHTON RAILWAY ACTS, 1857 & 1861 (1862), 1 W. & W. 21, 161.—AUS.

under Consolidated Act, 1883, s. 488.]—*Re* BECKETT & CITY OF TORONTO CORPN. (1885), 10 O. R. 106.—CAN.

Sect. 2.—Payment into court: Sub-sect. 2. Sect. 3: Sub-sects. 1 & 2, A., B. (a), (b) & (c), C.]

1228. When payment in dispensed with—Proceeds of sale of lands of lunatic—Order made for payment to credit of lunacy—& for investment to joint account of lunatic & promoters.]—Land belonging to a lunatic having been purchased by a railway co. under the powers of its Act, an order was made for payment of the purchase-money to the credit of the lunacy, & for its investment to the joint account of the lunatic & the co., without its being first paid into ct. under Lands Act, 1845, s. 69.—*Re MILNES (A PERSON OF UNSOUND MIND)* (1875), 1 Ch. D. 28; 34 L. T. 46; 24 W. R. 98, C. A.

1229. Time when money paid in—Before notice of motion served.]—*WILLIAMS v. LLANELLY RY. CO.* (1868), 19 L. T. 310.

1230. Where payment made to vendor instead of into court—Under pressure—Vendors ordered to pay money into court—For interim protection. *LONDON & NORTH WESTERN RY. CO. v. LANCASTER CORPN.* (1851), 15 Beav. 22; 18 L. T. O. S. 132; 16 Jur. 677; 51 E. R. 444.

1231. — Money ordered to be invested—On petition of vendor.]—*Re LONDON, BRIGHTON & SOUTH COAST RY. CO., Ex p. ABERGAVENNY (EARL)* (1856), 4 W. R. 315.

1232. — In consideration of not opposing bill—Held in trust by vendor for himself and persons entitled in remainder. *POLE v. POLE* (1865), 2 Drew. & Sm. 420; 13 W. R. 648; 62 E. R. 680; *sub nom. POLE v. DE LA POLE*, 6 New Rep. 19; 34 L. J. Ch. 586; 12 L. T. 337; 11 Jur. N. S. 477. Annotations:—*Consd. Shrewsbury v. North Staffordshire Ry.* (1865), L. R. 1 Eq. 593; *Re Berkeley's Will, Re Gloucester & Berkeley Canal Act, 1870* (1874), 10 Ch. App. 56; *Re Lacon's Settlement, Lacon v. Lacon*, [1911] 1 Ch. 351. *Refd. Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356.

1233. Effect of payment in—Infant owner not constituted a ward of court.]—*Re WILTS, SOMERSET & WEYMOUTH RY. CO., Ex p. BREWER* (1865), 2 Drew. & Sm. 552; 13 L. T. 207; 13 W. R. 959; 62 E. R. 729.

1234. — Fulfilment of contract to pay tenant for life.]—*TAYLOR v. CHICHESTER & MIDHURST RY. CO. (DIRECTORS, ETC.)*, No. 444, *ante*.

1235. Mandamus to compel promoters to pay in—Award made under Lands Act, 1845, s. 68—Granted.]—*BARNETT v. GREAT EASTERN RY. CO.* (1868), 18 L. T. 408; 16 W. R. 793.

Payment out of court.]—*See* Part XI., Sect. 7, sub-sect. 3, A., *post*.

SECT. 3.—THE CONVEYANCE.

SUB-SECT. 1.—IN GENERAL.

1236. Parties to—Notice to treat served upon tenant for life & trustees with power of sale—Amount ascertained as between tenant for life & promoters—Promoters not entitled to conveyance

PART X. SECT. 3, SUB-SECT. 2.—B. (a).

1242 i. General rule.]—Where a sale of lands is compulsory under the powers of an Act, the purchaser must pay the expense of the conveyance, unless the statute expressly throws it on the vendor.—*HIGGINBOTHAM v. CLYDE RIVER TRUSTEES* (1845), 4 Bell, Sc. App. 268; 17 Sc. Jur. 461; *affg. 5 Dunl. (Ct. of Sess.)* 1267; 15 Sc. Jur. 518.—*SCOT*.

c. Making title—Answers to re-allowed—Not costs after title accepted.]—Promoters are not liable under Act No. 1109, s. 47, for costs

incurred by vendor for work done after title accepted, & costs of perusing conveyance, & taking copies thereof should be disallowed.

Costs necessarily incurred in attempts to answer requisitions made by promoters are expenses incident to verification of title, & though not successful should be allowed.—*Re NICHOLLS* (1900), 25 V. L. R. 599.—*AUS*.

d. — Registration of vendor's title.]—Where a vendor had not registered his title, pursuant to Local Registration of Title Act, 1891, & promoters required this to be done, &

by trustees.]—*Re PIGOTT & GREAT WESTERN RY. CO.*, No. 1125, *ante*.

1237. Form of—Notice to treat for lands “with the appurtenances”—Purchasers not entitled to benefit of general words—Implied in Conveyancing Act, 1881 (c. 41), s. 6.]—*Re PECK & LONDON SCHOOL BOARD*, [1893] 2 Ch. 315; 62 L. J. Ch. 598; 68 L. T. 847; 41 W. R. 388; 37 Sol. Jo. 372; 3 R. 511.

Annotations:—*Refd. Re Lyne-Stephens & Scott-Miller's Contract*, [1920] 1 Ch. 472. *Mentd. Nicholls v. Nicholls* (1899), 81 L. T. 811; *Schwann v. Cotton*, [1916] 2 Ch. 120; *Re Walmsley & Shaw's Contract*, [1917] 1 Ch. 93.

1238. — Settled by court in case of disagreement.]—*Re CARY-ELWES' CONTRACT*, [1906] 2 Ch. 143; 75 L. J. Ch. 571; 94 L. T. 845; 70 J. P. 345; 54 W. R. 480; 22 T. L. R. 511; 50 Sol. Jo. 464; 4 L. G. R. 838.

See, also, Lands Act, 1845, s. 81.

1239. Promoters bound to take—Value fixed after notice to treat—No question as to vendor's title.]—*CARY-ELWES' CONTRACT*, [1906] 2 Ch. 143; 75 L. J. Ch. 571; 94 L. T. 845; 70 J. P. 345; 54 W. R. 480; 22 T. L. R. 511; 50 Sol. Jo. 464; 4 L. G. R. 838.

SUB-SECT. 2.—COSTS OF CONVEYANCE.

A. Jurisdiction of Court to order.

See Lands Act, 1845, s. 82.

1240. Court has no jurisdiction to order—Costs of deducing title & conveyance.]—*Re WILTS, SOMERSET, & WEYMOUTH RY. CO., Ex p. BATH (MARQUIS) (AN INFANT)* (1847), 4 Ry. & Can. Cas. 567.

1241. — Costs of petition under Trustee Act 1850 (c. 60)—For vesting of legal estate in executor.]—*Re REES' DEVISEES* (1852), 21 L. J. Ch. 687.

B. What Costs Payable by Promoters.

See Lands Act, 1845, s. 82.

(a) In General.

1242. Making title—Liability for costs of “contracts, sales & conveyances.”]—*Re LONDON & GREENWICH RY. CO., Ex p. ADDIES' CHARITY FELLOWS* (1843), 3 Hare, 22; 3 Ry. & Can. Cas. 119; 12 L. J. Ch. 513; 67 E. R. 281.

1243. Conveyancing counsel.]—A railway co. took land belonging to a devisee for life, with reversion to testator's heirs, & paid the purchase-money into ct.:—*Held*: they must pay the costs of two petitions by two co-heirs who claimed the fund on the death of the tenant for life, & also the costs of investigating the title of other persons who claimed to be heirs, in answer to the advertisements issued by order of the ct., except such costs as were occasioned by affidavits of petitioners, in opposition to such claims, which were occasioned by adverse litigation, within Lands Act, 1845, s. 80.

Costs incurred before the conveyancing counsel are provided for by ss. 82 & 83, & being liable to

the title was registered accordingly.

Held: the promoters were bound to bear cost of registration as “costs of conveyance,” under Lands Act, 1845, s. 82.—*Re BELFAST & NORTHERN COUNTIES RY. CO., Ex p. GILMORE*, [1895] 1 I. R. 297.—*IR*.

e. —.]—The expenses of conveyances of lands, which under Lands (Scot.) Act are to be borne by promoters of a ry. or other public undertaking do not include the expense of making up a title in the person of the proprietor conveying.—*GRAHAM v. CALEDONIAN RY. CO.* (1848), 10 Dunl. (Ct. of Sess.) 495.—*SCOT*.

taxation, a proper bill of them should be delivered to the co.—*Re SPOONER'S ESTATE* (1854), 1 K. & J. 220; 69 E. R. 438.

1244. Collateral agreement—Forming no part of conveyance—Not included.]—*Re LIETCH & KEWNEY* (1867), 16 L. T. 729; 15 W. R. 1055.

1245. Apportioning ground rents—Between houses taken & houses left—Not included.]—*Re HAMPSTEAD JUNCTION RY. CO., Ex p. BUCK* (1863), 1 Hem. & M. 519; 3 New Rep. 110; 33 L. J. Ch. 79; 9 L. T. 374; 9 Jur. N. S. 1172; 12 W. R. 100; 71 E. R. 227.

Annotation:—Refd. Ex p. Morris (1871), L. R. 12 Eq. 418.

(b) *Administration and Probate.*

1246. Obtaining order in administration suit—Sanctioning concurrence of trustees to conveyances—Part of lands mortgaged & vested in trustees—Agreement silent as to existence of mortgage—Promoters not liable.]—*Re LONDON & SOUTH WESTERN RAILWAY ACT, 1855, Ex p. PHILLIPS* (1862), 3 De G. J. & Sm. 341; 32 L. J. Ch. 102; 7 L. T. 452; 11 W. R. 54; 46 E. R. 667, L. J.

1247. Taking out administration de bonis non—To perfect title—Promoters liable.]—*Re LIVERPOOL IMPROVEMENT ACT* (1868), L. R. 5 Eq. 282; 37 L. J. Ch. 376; 16 W. R. 667.

Annotations:—Consd. Re London United Tramways Act, 1900, [1906] 1 Ch. 534. Dists. Re Elementary Education Acts, 1870 & 1873 (1908), 78, L. J. Ch. 281; Re Thames Tunnel (Rotherhithe & Ratcliff) Act, 1900, [1908] 1 Ch. 493. Refd. Re Griggs, Ex p. London School Board, [1914] 2 Ch. 547.

1248. Taking out probate to vendor's will—Death of vendor before completion—Completion by executrix—Promoters not liable.]—*Re ELEMENTARY EDUCATION ACTS, 1870 & 1873, [1909] 1 Ch. 55; 78 L. J. Ch. 281; 99 L. T. 862; 73 J. P. 22; 25 T. L. R. 78, C. A.*

(c) *Proceedings to obtain Conveyance.*

1249. Death of vendors before completion—Suit to obtain conveyance from infant heir—Suit rendered necessary by vendor suffering legal estate to descend to infant—Promoters not liable.]—*MIDLAND COUNTIES RY. CO. v. WESTCOMB* (1840), 11 Sim. 57; 2 Ry. & Can. Cas. 211; 9 L. J. Ch. 324; 59 E. R. 795.

Annotations:—Folld. Midland Counties Ry. v. Caldecote (1841), 2 Ry. & Can. Cas. 394; *Eastern Counties Ry. v. Tufnell* (1843), 3 Ry. & Can. Cas. 133. *Consd. Hanson v. Lake* (1843), 2 Y. & C. Ch. Cas. 328. *Refd. Hinder v. Streeter* (1852), 16 Jur. 650. *Mentd. Creswell v. Haines* (1861), 8 Jur. N. S. 208.

1250. ——— Proceedings under 11 Geo. 4 & 1 Will. 4, c. 60—Promoters not liable for.]—*Re SOUTH WALES RY. CO.* (1851), 14 Beav. 418; 20 L. J. Ch. 534; 15 Jur. 1145; 51 E. R. 347.

Annotations:—Consd. Re Nash's Estate (1855), 4 W. R. 111. *Overd. Re Liverpool Improvement Act* (1868), L. R. 5 Eq. 282. *Consd. Re London United Tramways Act, 1900, [1906] 1 Ch. 534; Re Thames Tunnel (Rotherhithe & Ratcliff) Act, 1900, [1908] 1 Ch. 493.*

1251. ——— Agreement to pay "costs of & incidental to conveyance"—Promoters liable.]—*LAKE v. EASTERN COUNTIES RY. CO.* (1852), 19 L. T. O. S. 323.

PART X. SECT. 3, SUB-SECT. 2.—
B. (b).

1247 i. Taking out administration de bonis non—To perfect title—Promoters liable.]—A. had for more than 12 years been in possession of land held under a lease for a life & term of years. The land was taken by a co., under an Act which incorporated Lands Act, 1845. The co. required administration to be taken out to B., the assignee of the lease, through whom A. claimed. C. accordingly took out administration, & then conveyed her interest to A.:—*Held: the costs of conveyance should be borne by the co.—Re SOUTH CITY*

MARKET CO., Ex p. KEATLEY (1890), 25 L. R. Ir. 263.—IR.

PART X. SECT. 3, SUB-SECT. 2.—
B. (c).

1. Sale by tenant for life—Order of judge necessary—Promoters liable.]—In order that the tenant for life can get the right to sell to a ry. co. an order of a judge was required; & where such proceeding was entirely for benefit of co. & no factionous opposition was raised by any one, the co. should pay costs of the order.—*Re DOLSEN* (1889), 13 P. R. 84.—CAN.

1252. ——— Bill for specific performance against infant heir—Heir entitled to costs up to hearing of suit.]—*MIDLAND COUNTIES RY. CO. v. RICE* (1854), 2 Eq. Rep. 1109.

Annotation:—Refd. Re Fenton's Will (1855), 3 W. R. 331.

1253. ——— Costs borne by each party.]—*LONDON & SOUTH WESTERN RY. CO. v. BRIDGER* (1864), 4 New Rep. 261; 10 L. T. 689; 10 Jur. N. S. 650; 12 W. R. 948.

1254. ——— Devise of real estate in strict settlement—Costs out of purchase-money.]—*EASTERN COUNTIES RY. CO. v. TUFNELL* (1843), 3 Ry. & Can. Cas. 133.

1255. Heir-at-law of mortgagee not known—Promoters liable—Form of order.]—*Re NASH'S ESTATE* (1855), 4 W. R. 111.

Annotation:—Consd. Re Thames Tunnel (Rotherhithe & Ratcliff) Act, 1900, [1908] 1 Ch. 493.

1256. ——— ———.]—*Re EASTERN COUNTIES & TILBURY JUNCTION RY. CO., Ex p. CAVE* (1855), 26 L. T. O. S. 176.

Annotation:—Refd. Re Thames Tunnel (Rotherhithe & Ratcliff) Act, 1900, [1908] 1 Ch. 493.

1257. On purchase of copyholds—Promoters liable for—Steward's fees—& fines payable on admission.]—*Re LONDON UNITED TRAMWAYS ACT, 1900, [1906] 1 Ch. 534; 75 L. J. Ch. 223; 91 L. T. 608; 54 W. R. 328; 22 T. L. R. 286; 50 Sol. Jo. 256.*

Annotations:—Consd. Re Thames Tunnel (Rotherhithe & Ratcliff) Act, 1900, [1908] 1 Ch. 493. Refd. Re Griggs, Ex p. London School Board, [1914] 2 Ch. 547.

1258. ——— Not fines payable on admission.]—The subsoil of certain copyhold land was purchased under the compulsory powers of a special Act for the purposes of a tunnel, the price being fixed by agreement. The agreement provided that the purchasers should pay the vendors' costs of title & conveyance as provided by Lands Act, 1845, under which Act the agreement was to be carried out. The vendors, who were trustees, had full power to sell the equitable customary fee, but since the death of the former trustees there had been no tenant on the ct. roll, & the vendors, at the request of the purchasers, obtained the admittance of the customary co-heirs of the last surviving tenant, in order that a proper assurance might be made under Lands Act, s. 95. On the completion of the purchase the vendors claimed the steward's fees & the legal costs of procuring the admittance & also the fine payable to the lord of the manor as costs of conveyance, but they ultimately abandoned their claim as to the fine:—*Held: they were entitled to payment of these costs other than the fine.—Re THAMES TUNNEL (ROTHERHITHE & RATCLIFF) ACT, 1900, [1908] 1 Ch. 493; 77 L. J. Ch. 330; 98 L. T. 188; 72 J. P. 153; 24 T. L. R. 346, C. A.*

Annotations:—Consd. Re Griggs, Ex p. London School Board, [1914] 2 Ch. 547. Refd. Re Elementary Education Acts, 1870 & 1873, [1909] 1 Ch. 55.

C. *Taxation and Recovery of Costs.*

See Lands Act, 1845, c. 83.

1259. General rule—Taxation as between vendor

PART X. SECT. 3, SUB-SECT. 2.—C.

g. Solicitor appearing for several clients.]—The practice on taxation of costs of & incidental to conveyance of lands to promoters under the Lands Act, 1845, & Railways (Ir.) Acts, is regulated by Railways (Ir.) Act, 1864, s. 12; & where one solicitor is employed by several clients for the purposes of such conveyance, he is not entitled to furnish separate bills of costs, charging taxation items in respect of each bill.—*Re BELFAST WATER COMRS., Ex p. ORR, SAME Ex p. USHER, SAME Ex p. CONNOR* (1888), 21 L. R. Ir. 342.—IR.

Sect. 3.—The conveyance: Sub-sect. 2, C.; sub-sect. 3. Part XI. Sects. 1 & 2: Sub-sect. 1.]

& promoters—Not vendor's solicitor & promoters.]
—*Re MIDDLESEX COUNTY LIGHT RAILWAYS ORDER*, 1903, [1908] W. N. 167.

1260. What costs liable to taxation—Conveyancing counsel.]—*Re SPOONER'S ESTATE*, No. 1243, *ante*.

1261. Time for taxation—Not after costs paid.]
—*Re SOUTH EASTERN RY. CO., Ex p. SOMERVILLE* (1883), 23 Ch. D. 167; 52 L. J. Ch. 438; 48 L. T. 416; 31 W. R. 518.

1262. Under Solicitors' Remuneration Act, 1881 (c. 44)—General Order, Sched. 1, Part 1, r. 11, rendering scale inapplicable to sales under Lands Act, 1845—Applies only to vendor's costs—Not to costs of purchasers.]—*Re STEWART* (1889), 41 Ch. D. 494; 60 L. T. 737; 37 W. R. 484; 5 T. L. R. 368.

Annotations:—Consd. Re Earnshaw-Wall, [1894] 3 Ch. 156; *Re Burdekin*, [1895] 2 Ch. 136; *Re Sanders' Settlement*, [1896] 1 Ch. 480; *Re Evans*, [1905] 1 Ch. 290.

1263. Applies when sale to local board under Public Health Act, 1875 (c. 55)—Though sale by voluntary agreement.]—A local board entered into a voluntary agreement with an owner of land for the purchase of certain land for the purpose of establishing sewage works under the powers of Public Health Act, 1875, which incorporated the provisions of Lands Act, 1845, as to the purchase of land. The agreement provided that all costs & expenses of the vendor of & incidental to the sale should be borne by the purchasers. The solr. for the vendor delivered a bill of costs not made out according to the scale in part 1 of schedule 1 of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), but in items according to scheme 11:—*Held*: although the sale was by voluntary agreement, yet, inasmuch as the powers of the local board arose under the Public Health Act, 1875, which incorporated Lands Act, 1845, the case came under r. 11 in part 1 of schedule 1 of the General Order, which rendered the scale inapplicable to a purchase under Lands Act, 1845. —*Re BURDEKIN*, [1895] 2 Ch. 136; 64 L. J. Ch.

561; 72 L. T. 639; 43 W. R. 534; 39 Sol. Jo. 452; 12 R. 243, C. A.

1264. Special agreement as to costs—Common order to tax not applicable.]—*Re NORTH EASTERN RAILWAY CO. ACT*, 1901, *Re LANDS CLAUSES CONSOLIDATION ACTS*, 1845, 1860, 1869, *HOLDEN v. NORTH EASTERN RY. CO.* (1904), 48 Sol. Jo. 526.

1265. ———.]—*Re MIDDLESEX COUNTY LIGHT RAILWAYS ORDER*, 1903, [1908] W. N. 167.

SUB-SECT. 3.—STAMP DUTIES.

See, generally, REVENUE.

1266. Notice to treat—Need not be stamped as agreement—Decree made for specific performance.]—In a suit for the specific performance of a contract founded upon a notice to treat under Lands Act, 1845:—*Held*: the notice did not require to be stamped as an agreement.—*RAWLINGS v. METROPOLITAN RY. CO.* (1868), 37 L. J. Ch. 824; 18 L. T. 871.

———.]—*See, generally, Part VI., Sect. 2, ante.*

1267. Lands & chattels purchased under statutory powers—Conveyance liable to ad valorem duty—Calculated upon consideration for entire property purchased.]—Finance Act, 1895 (c. 16), s. 12, provided that, where by virtue of any Act any person was authorised to purchase property, he should within three months after the completion of the purchase produce to the Inland Revenue Comrs. an instrument of conveyance of the property duly stamped with the *ad valorem* duty payable on a conveyance on sale of the property:—*Held*: upon the true construction of the sect., where property comprising both realty & chattels was purchased under statutory authority, an instrument of conveyance must be produced stamped with *ad valorem* duty calculated upon the whole consideration for the entire property purchased, including the chattels.—*EASTBOURNE CORPN. v. A.-G.*, [1901] A. C. 155; 73 L. J. K. B. 259; 90 L. T. 99; 68 J. P. 393; 52 W. R. 577; 20 T. L. R. 252; 2 L. G. R. 789, H. L.; *affg. S. C. sub nom. A.-G. v. EASTBOURNE CORPN.*, [1902] 1 K. B. 403, C. A.

Part XI.—Application of Money Deposited in Bank.

See Lands Act, 1845, s. 78.

SECT. 1.—INTERIM INVESTMENT.

1268. What investments authorised—Mortgage—Investment not for benefit of parties—Not allowed.]—*Re FRANKLYN'S SETTLEMENT, Ex p. FRANKLYN* (1848), 1 De G. & Sm. 528; 63 E. R. 1179; *sub nom. Re GREAT NORTHERN RY. CO., Ex p. FRANKLYN*, 5 Ry. & Can. Cas. 206; 17 L. J. Ch. 166; 12 Jur. 642.

Annotation:—Dtd. & N.F. Re Wilkinson's Estate (1868), 37 L. J. Ch. 384.

1269. ——— If security good—Allowed.]—

PART X. SECT. 3, SUB-SECT. 3.

1267 i. Lands & chattels purchased under statutory powers—Conveyance liable to ad valorem duty.]—On a compulsory purchase by a ry. co. of lands & buildings occupied for business purposes, a jury assessed the compensation to be paid in three separate sums:—(1) for value of the land; (2) for value of the buildings, machinery, &

plant; (3) for loss of business:—*Held*: the sum assessed as compensation for loss of business was part of the "consideration for the sale" within Stamp Act, 1870, & that *ad valorem* duty was payable on the conveyance to the co. in respect of the whole amount awarded.—*INLAND REVENUE COMRS. v. GLASGOW & SOUTH WESTERN RY. CO.* (1887), 56 L. J. P. C. 82.—**SCOT.**

h. Vesting order—Not conveyance on sale—Duty not chargeable.]—An order vesting lands compulsorily taken in a railway co. under Railways Construction & Land Act, 1881, s. 31, is not a conveyance on sale within Stamp Act, 1882, s. 88.—*WALKER v. WELLINGTON & MANAWATU RY. CO., LTD.* (1887), 6 N. Z. L. R. 411.—**N.Z.**

Re SMITH'S ESTATE (1870), L. R. 9 Eq. 178; 18 W. R. 369.

Annotation:—Folld. Re Flemon's Trusts (1870), L. R. 10 Eq. 612.

1270. ——— Metropolitan Consolidated Stock.]—*Re REDHEAD'S TRUSTS* (1878), 39 L. T. 60.

1271. "Cash under control of court"—Within Law of Property Amendment Act, 1860 (c. 38), s. 10—May be invested in East India 4 per cent. Stock.]—*Re FRYER'S SETTLEMENT, FRYER v. SALISBURY & DORSET JUNCTION RY. CO.* (1875), L. R. 20 Eq. 468; 45 L. J. Ch. 96.

Annotations:—Consd. Re Kirsmeaton (1882), 30 W. R. 539. *Refd. Ex p. St. John's College, Oxford* (1882), 31 W. R. 55.

1272. ——— Money paid in under Lands Act,

1845—May be invested in East India 3½ per cent. Stock.]—Money paid into ct. under Lands Act, 1845, is "cash under the control of the ct." within Law of Property Amendment Act, 1860 (c. 38), s. 10, & the General Ord. of Feb. 1, 1861, & may be invested in East India 3½ per cent. Stock.—*Re METROPOLITAN & DISTRICT RAILWAYS ACT, Ex p. ST. JOHN BAPTIST COLLEGE, OXFORD* (1882), 22 Ch. D. 93; 52 L. J. Ch. 268; 48 L. T. 331, C. A. *Annotations:—Expld. Jackson v. Tynas* (1883), 52 L. J. Ch. 830. *Consd. Re Brown* (1890), 59 L. J. Ch. 530. *Refd. e Gaselee, [1901] 1 Ch. 923.*

1273. Money paid for redemption of Consols—Representing money paid in under Lands Act, 1845.]—(1) Money in ct. paid for the redemption of 3 per cent. Consols, representing money paid into ct. under Lands Act, 1845, is "cash under the control of the ct." within Law of Property Amendment Act, 1860 (c. 38), s. 10, & may be invested as such.

(2) Where a change of investment of a fund representing money paid into ct. by a railway co. under Lands Act, 1845, is rendered necessary, not by any caprice of the holder, but by the act of the Govt., the railway co. ought to pay the costs of the reinvestment.—*Re BROWN* (1890), 59 L. J. Ch. 530; 63 L. T. 131; 38 W. R. 529, C. A.

Annotation:—Consd. Re Gaselee, [1901] 1 Ch. 923.

1274. — Not within Law of Property Amendment Act, 1860 (c. 38), s. 10—Money paid under Lands Act, 1845 or other Act specifying securities—Must be invested in securities specified in Act.]—*Ex p. ST. MARY, WIGTON (VICAR)* (1881), 18 Ch. D. 616; 45 L. T. 134; 29 W. R. 883.

—*Re HULL RAILWAY & DOCK ACT, Ex p. KIRKSMEATON (RECTOR)* (1882), 20 Ch. D. 203; 51 L. J. Ch. 581; *sub nom. Re KIRKSMEATON (RECTOR)*, 30 W. R. 539.

Annotations:—Refd. Ex p. St. John's College, Oxford (1882), 31 W. R. 55. *Mentd. Ex p. Castle Bytham & Ex p. Mid. Ry., [1895] 1 Ch. 348.*

, also, No. 1415, post.

Investment of funds in court generally.]—See PRACTICE & PROCEDURE.

Costs of investment & reinvestment.]—See Part XII., Sects. 5, 6, 7, post.

Application for investment & payment of dividends.]—See Sect. 7, sub-sect. 3, B., post.

Who entitled to dividends.]—See Sect. 3, post.

1276. Change of investment—From funds—To real securities—Both authorised by special Act.]—*Ex p. CHRIST COLLEGE, MANCHESTER (DEAN & CANONS)* (1846), 10 Jur. 1091.

Permanent investment in funds.]—See No. 1375,

SECT. 2.—PERMANENT APPLICATION.

SUB-SECT. 1.—REDEMPTION OF LAND TAX OR INCUMBRANCES.

1277. Land tax—Reimbursement to tenant for

PART XI. SECT. 2, SUB-SECT. 1.

1288 i. Discharge of Charge of tenant for life—For money expended on estate—Under Pasture Protection Act, 1912.]—Compensation money for part of a settled estate, resumed under Public Works Act, were paid into ct. A contribution toward the cost of rabbit-proof fencing, upon other portions of the estate, was paid by the tenant for life. By s. 49 of above Act, the amount of the contribution was made a charge upon the land:—*Held: tenant for life was entitled to payment out of the sum amount of his contribution.*—*Re WENTWORTH* (1915), 15 S. R. N. S. W. 384; 32 N. S. W. W. N. 130.—**AUS.**

j. Quit-rent.]—Quit-rent is a debt or incumbrance affecting land in payment of which purchase money deposited may be applied, under Lands Act, 1845, s. 69.—*Re PUBLIC WORKS COMRS., Ex p. STUDDERT* (1856), 6 L. Ch. R. 53.—**IR.**

k. — Drainage charge—Drainage (Ir.) Act, 1842.]—Advances to life tenant, under above Act, should not be paid out of compensation money deposited; such fund representing the corpus of the estate; the tenant for life being bound to pay annual instalments which fall due during his life; it being possible that all instalments may become payable during his life.—*Re PUBLIC WORKS COMRS., Ex p.*

life—Although remainderman a minor.]—Re SHEPARD (1811), Wight. 131; 145 E. R. 1201.

1278. — — — — — Redemption before passing of Act.]—*Re LONDON & BIRMINGHAM RY. CO., Ex p. NORTHWICK* (1834), 1 Y. & C. Ex. 166; 160 E. R. 68.

Annotations:—Expld. Cousens v. Harris (1848), 17 L. J. Q. B. 273. *Mentd. Re Liverpool & Manchester Railway Act, Ex p. Trafford* (1837), 2 Y. & C. Ex. 522; *Re Oakham Canal* (1843), 1 L. T. O. S. 12; *Re Bethlehem Hospital* (1875), L. R. 19 Eq. 457.

1279. — — — Money proceeds of glebe—Drainage of remaining glebe.]—*Re QUEEN CAMEL (VICAR), Re GREAT WESTERN RAILWAY ACT, & WILTS, SOMERSET & WEYMOUTH AMENDMENT ACT, 1846* (1863), 8 L. T. 233; 11 W. R. 503.

1280. Discharge of incumbrance—On other land belonging to corporation.]—*Re EASTERN COUNTIES RY. CO., Ex p. CAMBRIDGE CORPN.* (1848), 6 Hare, 30; 5 Ry. & Can. Cas. 204; 12 Jur. 450; 67 E. R. 1069.

See, also, No. 1373, post.

1281. — — — Expenses of Inclosure Act—Charged on allotment.]—*Ex p. QUEEN'S COLLEGE, CAMBRIDGE* (1849), 14 Beav. 159, n; 51 E. R. 217.

1282. — — — Incurred by rector—With power of sale to pay expenses.]—*Re OXFORD, WORCESTER ETC. RY. CO., Ex p. LOCKWOOD* (1851), 14 Beav. 158; 51 E. R. 247.

Annotation:—Refd. Re Saunderton Glebe Lands, Ex p. Rector (1903), 72 L. J. Ch. 276.

1283. — — — Arrears of annuity—Though annuitant has no power of sale.]—*Re TINKLER'S TRUSTS, Re GREAT NORTHERN RY. CO.* (1852), 5 De G. & Sm. 722; 21 L. J. Ch. 672; 19 L. T. O. S. 338; 64 E. R. 1316.

1284. — — — Costs of other proceedings charged on charity funds—Not an incumbrance—Unless charged on charity lands.]—*Re AYLESBURY FREE SCHOOL* (1852), 19 L. T. O. S. 8.

See, also, No. 1480, post.

1285. — — — Obtaining surrender of lease.]—*Re MANCHESTER, SHEFFIELD ETC. RY. CO., Ex p. SHEFFIELD CORPN.* (1855), 21 Beav. 162; 25 L. J. Ch. 587; 26 L. T. O. S. 146; 2 Jur. N. S. 31; 4 W. R. 70; 52 E. R. 821.

Annotations:—Folld. Ex p. London Corpn. (1868), L. R. 5 Eq. 418. *N.F. Ex p. Manchester* (1873), 28 L. T. 184.

Mentd. Re Hadfield (1861), 30 L. J. Ch. 278.

1286. — — — Purchase of leasehold interests by reversioner.]—*Ex p. LONDON CORPN.* (1868), L. R. 5 Eq. 418; 37 L. J. Ch. 375; 17 L. T. 189; 16 W. R. 355.

Annotation:—Mentd. Re Clark, [1906] 1 Ch. 615.

1287. — — —.]—*Re TOWNSHEND'S (MARQUIS) ESTATES & LYNN & FAKENHAM RAILWAY ACT, 1876, [1882] W. N. 7.*

1288. — — — Charge of tenant for life—For money expended on estate Under Metropolitan Building Acts.]—Where expenses had been incurred by a tenant for life under a will in reinstating structures on a portion of the devised property, in conformity with Metropolitan Buildings Act, 1855 (c. 122),

STUDDERT (1856), 6 L. Ch. R. 53.—**IR.**

l. — — — Tithe rentcharge—Out of land in settlement—Though tenant in tail a minor.]—Money lodged under Irish Church Act, 1869, s. 57, was on petition of life tenant, ordered, under Lands Act, 1845, s. 69, to be invested in the purchase of tithe rentcharge issuing out of lands in strict settlement although infant tenant in tail not served with petition nor before ct.—*Ex p. LECONFIELD* (1874), 1 L. R. 8 Eq. 559.—**IR.**

m. — — — — — Not approved.]—*Re DUBLIN, WICKLOW & WEXFORD RY. CO., Ex p. TOTTENHAM* (1884), 13 L. R. Ir. 479.—**IR.**

Sect. 2.—Permanent application: Sub-sects. 1 & 2, A., B., C. & D.; sub-sect. 3, A.]

s. 74, which authorised the comrs. to sell the structures if the owner refused or neglected to pay the expenses of reinstatement:—*Held*: these expenses constituted a charge on the property, & their repayment was a proper application of the proceeds of other lands devised to the same uses, & taken under Lands Act, 1845.—*Re DAVIS'S ESTATE & CRYSTAL PALACE & WEST END RAILWAY ACT, Ex p. DAVIS* (1858), 3 De G. & J. 144; 27 L. J. Ch. 712; 31 L. T. O. S. 339; 4 Jur. N. S. 1029; 6 W. R. 844; 44 E. R. 1224, L. JJ.

Annotation:—*Consd. Re L. & N. W. Railway Act, 1861, Ex p. Liverpool Corpn.* (1866), 1 Ch. App. 596.

1289. — Mortgage—By husband & wife on wife's land—Although mortgage not acknowledged.]—*Re CLARK'S ESTATE* (1864), 5 New Rep. 32; *nom. POLLOCK v. BIRMINGHAM, WOLVERHAMPTON & STOUR VALLEY RY. CO., Re CLARKE'S ESTATE*, 11 L. T. 663; 13 W. R. 401.

1290. — Of tolls—By corporation.]—*Re DERBY MUNICIPAL ESTATES* (1876), 3 Ch. D. 289; 24 W. R. 729.

1291. — Terminable rentcharge on glebe—Created under Land Improvement Act, 1864 (c. 114).]—*Ex p. CASTLE BYTHAM (VICAR) & Ex p. MIDLAND RY. CO.*, [1895] 1 Ch. 348; 64 L. J. Ch. 116; 71 L. T. 606; 43 W. R. 156; 11 T. L. R. 2; 39 Sol. Jo. 10; 13 R. 24.

Annotation:—*Consd. Re Bach & Wells*, [1899] 2 Ch. 138.

1292. — To secure advance by Queen Anne's Bounty—For purchase of vicarage.]—*Ex p. LONDON COUNTY COUNCIL, Ex p. CHRIST CHURCH EAST GREENWICH (VICAR)*, [1896] 1 Ch. 520; 65 L. J. Ch. 331; 74 L. T. 18; 44 W. R. 520.

Enfranchisement of copyholds.]—*See* Sub-sect. 2, A., *post*.

SUB-SECT 2.—PURCHASE OF OTHER LAND TO SETTLED TO USES OF LAND TAKEN.

A. What Land may be purchased.

1293. Not equity of redemption — Though petitioner offers to pay balance.]—*Re CHILTENHAM & GREAT WESTERN RY. CO., Ex p. CRAVEN* (1848), 17 L. J. Ch. 215; 11 L. T. O. S. 1.

Annotation:—*Reid. Worman v. Worman* (1889), 43 Ch. D. 296.

See, also, Nos. 1304, 1331, 1722, 1723, *post*.

1294. Copyholds—Out of proceeds of freeholds—Allowed where for benefit of persons interested.]—*Re CANN'S ESTATE, Re NORFOLK RAILWAY CO.'S ACTS* (1850), 19 L. J. Ch. 376; 15 L. T. O. S. 520; 15 Jur. 3.

Annotations:—*Consd. Re Eastern Counties Ry., Ex p. Sawston* (1858), 27 L. J. Ch. 755. *Reid. Re L. & Y. Ry., Ex p. Macaulay* (1854), 23 L. J. Ch. 815; *Re Brasher's Trust* (1858), 6 W. R. 406.

1295. — Out of proceeds of leaseholds.]—*Re COYTE'S ESTATE, Re LIVERPOOL DOCK ACTS* (1851), 1 Sim. N. S. 202; 61 E. R. 78.

1296. — Out of proceeds of copyholds of same manor.]—(1) On a petition for the confirmation of the master's report approving of a proposed purchase wherein to reinvest a sum in ct., & proceeds of land sold by a tenant for life to a railway co., under Lands Act, 1845, it is not

necessary that the persons entitled in remainder should be before the ct.

(2) Reinvestment in the purchase of copyholds of inheritance is allowed, on affidavits showing that the greater part of the land sold to a railway co. is of copyhold tenure; & that the sum now sought to be invested in the purchase of land of a similar tenure, does not exceed in amount the purchase-money of the copyhold sold, & that the land now about to be purchased is copyhold of the same manor as that sold to the railway co., & adjacent thereto.—*Re BROWNE & OXFORD & BLETCHLEY JUNCTION & BUCKINGHAMSHIRE RAILWAY ACTS, Ex p. STAPLES* (1852), 1 De G. M. & G. 294; 6 Ry. & Can. Cas. 732; 21 L. J. Ch. 251; 18 L. T. O. S. 231; 16 Jur. 158; 42 E. R. 565, L. JJ.

Annotations:—*As to* (1) *Folld. Re Ground's Estate* (1852), 1 W. R. 32. *Reid. Re Gore Langton's Estates* (1874), 10 Ch. App. 330, n.

1297. Enfranchisement of copyholds.]—*Re GROUND'S ESTATE* (1852), 1 W. R. 32.

1298. — Settled on same trusts—Out of proceeds of freeholds.]—*Re CHESHUNT COLLEGE, Re NEW RIVER COMPANY'S ACT*, 1852 (1855), 1 Jur. N. S. 995; 3 W. R. 638.

Annotation:—*Consd. Dixon v. Jackson* (1856), 27 L. T. O. S. 53.

1299. —.]—*DIXON v. JACKSON*, No. 1776, *post*.

1300. Leaseholds—Cannot be purchased out of proceeds of freeholds & copyholds—Even if advantageous.]—Freehold & copyhold hereditaments were taken by a railway co., & the money paid into ct.:—*Held*: the money could not be reinvested in leasehold property, however advantageous the reinvestment might be.—*Re LANCA-SHIRE & YORKSHIRE RY. CO., Ex p. MACAULAY* (1854), 23 L. J. Ch. 815; 23 L. T. O. S. 263; 2 W. R. 667, L. JJ.

1301. — Brickfield adjoining college living—To avoid nuisance.]—*Ex p. TRINITY COLLEGE, CAMBRIDGE (MASTER, FELLOWS & SCHOLARS)* (1868), 18 L. T. 819.

— Purchase of leasehold interest—By reversioner.]—*See* Nos. 1285, 1286, 1287, *ante*.

1302. Reversion of leaseholds—Out of proceeds of sale of leaseholds.]—*Re BRASHER'S TRUST* (1858), 6 W. R. 406.

1303. Mortgage of freeholds.]—*READING v. HAMILTON, Re LUTON, DUNSTABLE & WELWYN JUNCTION RAILWAY ACT*, 1855, *Re HERTFORD, LUTON & DUNSTABLE RAILWAY ACT*, 1858, *Re LANDS CLAUSES CONSOLIDATION ACT*, 1845 (1862), 5 L. T. 628.

1304. Freeholds—Where part of money supplied by tenant for life—Power given to tenant for life to charge by will—With amount of advance.]—*Re JONES' SETTLEMENT* (1864), 3 New Rep. 632.

See, also, No. 1293, *ante*, Nos. 1331, 1722, 1723, *post*.

1305. — In Isle of Man—Out of proceeds of sale of freeholds.]—*Re TAYLOR'S ESTATE* (1871), 40 L. J. Ch. 454.

Lands taken subject to mortgages—Lands purchased made subject to same mortgages.]—*See* No. 1528, *post*.

B. Approval of Investment.

1306. On affidavit of eligibility.]—*Re CADDICK'S SETTLEMENT* (1852), 9 Hare, App. I. ix.; 22 L. J. Ch. 10; 20 L. T. O. S. 59; 16 Jur. 965;

PART XI. SECT. 2, SUB-SECT. 2.—A.

1293 i. Not equity of redemption—Not approved.]—Ct. will not, under Lands Act, 1845, s. 69, invest money deposited in purchase of an equity of redemption.—*Ex p. PORTADOWN, DUN-*

GANNON & OMAGH JUNCTION RY. CO. (1876), 1 R. 10 Eq. 368.—*IR.*

n. Lands outside the jurisdiction—Not sanctioned.]—Where settled land situate within the jurisdiction has been resumed under Public Works Act,

1900, & compensation paid into ct., such money cannot be re-invested in purchase of land outside the jurisdiction.—*Re CARNARVON (EARL)* (1904), 4 S. R. N. S. W. 628; 21 N. S. W. W. N. 217.—*AUS.*

1 W. R. 4, 12; 68 E. R. 759; *subsequent proceedings* (1853), 9 Hare, App. II. lxxxv.

1307. — By trustee or person interested — & reference to chief clerk.]—*Re* BLUNT'S DEVISEES (1853), cited in 18 Jur. 742.

1308. Opinion of surveyor—As to value of land—Not accepted.]—*Re* KINSEY (1863), 1 New Rep. 303.

1309. By reference to master.]—*Re* SOUTH DEVON RY. CO., *Ex p.* METHERELL (1851), 20 L. J. Ch. 629; 18 L. T. O. S. 85; 16 Jur. 72.

1310. — Death of petitioner before report—Supplemental order not necessary.]—*Ex p.* LEA (RECTOR) (1852), 21 L. J. Ch. 776; 19 L. T. O. S. 244.

See, also, No. 1761, *post*.

1311. By judge in chambers—Investment of balance.]—*Re* DUNRAVEN ESTATES & SOUTH WALES RAILWAY ACT, 1845 (1861), 5 L. T. 523; 10 W. R. 56.

1312. Prospective order as to alternative investment—In event of disapproval of first—Refused.]—*Re* OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., *Ex p.* PUMFREY (1846), 4 Ry. & Can. Cas. 490.

Form of order.]—*See* Nos. 1323–1326, *post*.

C. Approval of Title.

1313. By reference to master.]—*Re* SOUTH DEVON RY. CO., *Ex p.* METHERELL (1851), 20 L. J. Ch. 629; 18 L. T. O. S. 85; 16 Jur. 72.

1314. — Dispensed with—When title certified by barrister.]—*Ex p.* EAST DEREHAM (VICAR) (1852), 21 L. J. Ch. 677.

1315. By reference to conveyancing counsel.]—*Re* CADDICK'S SETTLEMENT (1852), 9 Hare, App. I. ix.; 22 L. J. Ch. 10; 20 L. T. O. S. 59; 16 Jur. 965; 1 W. R. 4, 12; 68 E. R. 759; *subsequent proceedings* (1853), 9 Hare, App. II. lxxxv.

1316. —.]—*Ex p.* SOUTH COLLINGHAM (RECTOR) (1852), 9 Hare, App. I. xii.; 68 E. R. 761.

1317. —.]—*Re* BLUNT'S DEVISEES (1853), cited in 18 Jur. 742.

1318. — Court will not specify particular counsel.]—*Re* MARTIN (1852), 22 L. J. Ch. 248; 20 L. T. O. S. 136; 17 Jur. 30; 1 W. R. 45.

1319. Reference dispensed with—When judge in chambers satisfied.]—*Re* JONES' SETTLED ESTATES (1855), 3 Eq. Rep. 735; 24 L. J. Ch. 504; 25 L. T. O. S. 223; 1 Jur. N. S. 817; 3 W. R. 564.

1320. — Sum to be invested £50.]—*Re* LAPWORTH CHARITY, [1879] W. N. 37.

1321. — By leave in chambers.]—*Re* BLOMFIELD (1876), 25 W. R. 37.

— Title certified by barristers.]—*See* No. 1314, *ante*.

Form of order.]—*See* Nos. 1323–1326, *post*.

1322. Death of petitioner—Before reference complete—Proceedings revived in favour of executors.]—*Re* YOUNG (1873), L. R. 16 Eq. 107; 42 L. J. Ch. 900.

D. The Order for Investment.

1323. Form of order—Combined with order for reference—For approval of investment & title.]—*Re* SOUTH DEVON RY. CO., *Ex p.* METHERELL (1851), 20 L. J. Ch. 629; 18 L. T. O. S. 85; 16 Jur. 72.

PART XI. SECT. 2, SUB-SECT. 3.—A.

o. Parsonage—Money arising from sale of land which was destined for a parsonage.]—Part of land purchased for building a church was resumed by the Comr. for Rys., who paid compensa-

tion money into ct. On application by trustees for payment out, to enable them to pay for land they had agreed to purchase as a site for a parsonage, & to erect parsonage thereon:—Held: as it was impossible to apply the money in conformity with the trust, ct. had

1324. Not combined with order for reference—For approval of investment & title.]—*Re* MARTIN (1852), 22 L. J. Ch. 248; 20 L. T. O. S. 136; 17 Jur. 30; 1 W. R. 45.

1325. —.]—*Ex p.* DUCKIE (1852), 16 Jur. 511.

1326. — May be combined with order for completion of draft conveyance.]—*Re* CADDICK'S SETTLEMENT (1853), 9 Hare, App. II. lxxxv.; 17 Jur. 84; 1 W. R. 212; 68 E. R. 806.

1327. May be made as on original petition—Fresh petition not necessary.]—*Re* CADDICK'S SETTLEMENT (1852), 9 Hare, App. I. ix.; 22 L. J. Ch. 10; 20 L. T. O. S. 59; 16 Jur. 965; 1 W. R. 4, 12; 68 E. R. 759; *subsequent proceedings* (1853), 9 Hare, App. II. lxxxv.

Costs of investment.]—*See* Part XII., *post*.

See, also, No. 1375, *post*.

SUB-SECT. 3.—BUILDING.

See Lands Act, 1845, s. 69.

A. New Building.

1328. Money to be laid out in land—To be settled to like uses—Erection of new buildings authorised.]—*Ex p.* SHAW (1811), 4 Y. & C. Ex. 506; 160 E. R. 1107; *sub nom.* *Re* MANCHESTER & SHEFFIELD RY. CO., *Ex p.* SHAW, 10 L. J. Ex. Eq. 92.

Annotations:—N.F. Re L. & N. W. & Rugby & Stamford Ry. etc. Act, *Ex p.* Freer (1848), 11 L. T. O. S. 471. *Folld. Re* Wigan Globe Act (1854), 3 W. R. 41; *Re* Wight's Devised Estates (1858), 6 W. R. 718. *N.F. Re* Rudyerd's Trusts (1860), 3 L. T. 232. *Folld. Ex p.* Dummer (1865), 6 New Rep. 326.

1329. Allowed—Subject to consent of remainderman.]—(1) On a petition by a tenant for life for the reinvestment of purchase-money paid into ct. under the Lands Act, 1845, the ct. will not allow any of the fund to be applied in recouping the tenant for life what he has already expended, unless such expenditure was properly a charge on the estate, nor in any proposed repairs to the mansion-house.

(2) The ct. has jurisdiction to order the reinvestment of the fund in building or rebuilding houses on the estate, & will do so if it appears beneficial to the estate, & if the remaindermen do not object.

(3) When a petition is presented by a tenant for life for the reinvestment of purchase-money in any other kind of investment than lands, the remaindermen ought to be served.

(4) Where, owing to a mistake of petitioner, the tenant for life, in not originally serving the remaindermen, there have been two hearings of a petition in the ct. below, public bodies who paid the money into ct. & did not object to an improper order being made in the absence of the remaindermen, will only have to pay so much costs as would have been incurred if there had been only one hearing, & that amount will be divided equally between them.—*Re* LEIGH'S ESTATE (1871), 6 Ch. App. 887; 40 L. J. Ch. 687; 25 L. T. 644; 19 W. R. 1105, L. J.J.

Annotations:—As to (1) *Consd.* *Jesse v. Lloyd* (1883), 48 L. T. 656. *Refd. Ex p.* Hartington (1875), 23 W. R. 484; *Re* Stock's Devised Estates (1880), 42 L. T. 46. *As to* (2) *Consd.* *Drake v. Trefusis* (1875), 10 Ch. App. 364. *Folld. Re* Speer's Trusts (1876), 24 W. R. 880; *Re* Aldred's

power to order the money to be expended on an object connected with the trust.—*Re* RAILWAYS COMR. & ST. BARNABAS' CHURCH, BATHURST TRUSTEES (1887), 8 N. S. W. Eq. 22.—*AUS.*

Sect. 2.—Permanent application: Sub-sect. 3, A., B., C. & D.; sub-sects. 4 & 5.]

Estate (1882), 21 Ch. D. 228. *Reid. Re Hotchkys, Freke v. Calmady* (1886), 55 L. J. Ch. 546; *Conway v. Fenton* (1888), 40 Ch. D. 512; *Re Arden* (1894), 70 L. T. 506; *Re De Tabley, Leighton v. Leighton* (1896), 75 L. T. 328.

1330. — On other land settled to same uses.]—Money which, under the provisions of a deed, will, or private estate Act, is to be invested in the purchase of land, as well as money so to be invested by virtue of Lands Act, 1845, or Settled Estates Act, will in a proper case be ordered by the ct. to be employed in erecting new buildings on land already settled to same uses. But the ct. will not sanction its being laid out in repairs, or in permanent improvements not placing new buildings on the land.—*DRAKE v. TREFUSIS* (1875), 10 Ch. App. 364; 33 L. T. 85; 23 W. R. 762, L. J.J.

Annotations:—Consd. Donaldson v. Donaldson (1876), 3 Ch. D. 743. *Apld. Re Speer's Trusts* (1876), 3 Ch. D. 262. *Consd. Re Venour's S. E., Venour v. Sellon* (1876), 2 Ch. D. 522; *Stanford v. Roberts* (1882), 52 L. J. Ch. 50; *Jesse v. Lloyd* (1883), 48 L. T. 656; *Vine v. Raleigh*, [1891] 2 Ch. 13; *Re Gerard's S. E.*, [1893] 3 Ch. 252. *Apld. Re Arden* (1894), 70 L. T. 506. *Consd. Re De Tabley, Leighton v. Leighton* (1896), 75 L. T. 328; *Re Montagu, Derbyshire v. Montagu*, [1897] 1 Ch. 685. *Reid. Conway v. Fenton* (1888), 40 Ch. D. 512; *Hale v. Sheldrake* (1889), 60 L. T. 292. *Mentd. Re De Teissier's Trusts, De Teissier v. De Teissier* (1892), 41 W. R. 186.

1331. Cottages—Tenant for life making up deficiency.]—*Re WIGHT'S DEVISED ESTATES* (1858), 6 W. R. 718.

See, also, Nos. 1293, 1304, ante, Nos. 1722, 1723, post.

1332. — On waste forming part of estate.]—On a petition for the application of money which had been paid into ct. by a railway co. under Lands Act, 1845, s. 69, as the purchase-money of one part of certain trust freehold premises:—*Held*: the money might be applied in the erection of cottages on waste land forming another part of the trust estate.—*Re DUMMER'S WILL* (1865), 2 De G. J. & Sm. 515; 6 New Rep. 326; 34 L. J. Ch. 496; 12 L. T. 626; 11 Jur. N. S. 615; 13 W. R. 908; 46 E. R. 475, L. J.J.

Annotations:—Consd. Re Leigh's Estate (1871), 6 Ch. App. 889, n. *Reid. Re Nether Stowey Vicarage* (1873), L. R. 17 Eq. 156. *Mentd. Re Wisbeach, St. Ives & Cambridge Junction Ry., Ex p. Holywell* (1865), 13 W. R. 960.

1333. Villas.]—*Re LYTTON'S SETTLED ESTATES*, [1884] W. N. 193.

Annotation:—Distd. Re Gerard's S. E., [1893] 3 Ch. 252.

1334. Farm buildings—Existing buildings separated from arable land—By promoters' railway.]—*Re OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., Ex p. MELWARD (OR MILWARD)* (1859), 27 Beav. 571; 29 L. J. Ch. 215; 1 L. T. 153; 6 Jur. N. S. 478; 54 E. R. 226.

Annotations:—Mentd. Re Kent Coast Ry., Ex p. Canterbury (1862), 7 L. T. 240; *Re Lathropp's Charity* (1866), L. R. 1 Eq. 467.

1335. — Money arising from sale of glebe—Where shown to be beneficial.]—*Ex p. SHIPTON-UNDER-WYCHWOOD (RECTOR)* (1871), 19 W. R. 549, L. C.

Annotation:—Folld. Ex p. Gamston (1876), 1 Ch. D. 477.

1336. — — — — —.]—*Ex p. HOLYWELL-CUM-NEEDINGWORTH (RECTOR)* (1879), 27 W. R. 707.

Annotation:—Reid. Ex p. Newton Heath (1896), 44 W. R. 645.

1337. Rectory or vicarage—Money arising from sale of glebe—Part of costs defrayed by Queen Anne's Bounty.]—*Re WHITFIELD (INCUMBENT)* (1861), 1 John. & H. 610; 30 L. J. Ch. 816;

7 Jur. N. S. 909; 70 E. R. 888; *sub nom. Re LONDON, CHATHAM & DOVER RY. CO., WHITFIELD'S (INCUMBENT) CASE*, 5 L. T. 343; 25 J. P. 693; 9 W. R. 761.

Annotations:—Folld. Ex p. Dummer (1865), 6 New Rep. 326. *Mentd. Re Lathropp's Charity* (1866), 35 Beav. 297.

1338. — — — — — With consent of bishop.]—*Ex p. BRADFELD ST. CLAIRE (RECTOR)* (1875), 32 L. T. 218.

Annotation:—Consd. Ex p. Newton Heath (1896), 44 W. R. 645.

Purchase & adaptation of house for]—*See No. 1351, post.*

1339. Corporation offices—Money arising from sale of corporation lands—Only in special circumstances—Where beneficial for all parties interested.]—The Corpn. of L. were empowered by a local Act to erect offices for the transaction of their public business, & to make rates for the purposes of the Act, & to borrow money on the security of the rates. A railway co. having taken other property of the corp., not consisting of buildings, the corp. petitioned that the purchase-money which had been paid into ct. under the Lands Act, 1845, might be applied in part payment of the expenses of erecting the offices:—*Held*: such an application of the money ought not to be ordered, as it could only be directed where there were special circumstances shewing it to be beneficial to all parties interested.—*Re LONDON & NORTH WESTERN RAILWAY ACT, 1861, Ex p. LIVERPOOL CORPN.* (1866), 1 Ch. App. 596; 35 L. J. Ch. 655; 14 L. T. 785; 12 Jur. N. S. 720; 14 W. R. 906, L. J.J.

Annotation:—Expld. Re Johnson's Settlements (1869), L. R. 8 Eq. 348.

Rendered necessary by alteration in character of building—Water supply diverted from mill—Under Defence of Realm Act, 1842 (c. 94).]—*See CONSTITUTIONAL LAW.*

In substitution for buildings taken.]—*See Subsect. 3, B., post.*

Completion of existing buildings.]—*See Nos. 1355, 1356, post.*

B. Rebuilding and Replacement of Buildings taken.

1340. Rebuilding—Under local Act authorising investment in land—& incorporating Lands Act, 1845, s. 69—Farmhouse—Allowed.]—*Re WIGAN GLEBE ACT* (1854), 3 W. R. 41.

1341. — Trade buildings—Rebuilt as dwelling-houses—Where business diverted.]—*Re JOHNSON'S SETTLEMENTS* (1869), L. R. 8 Eq. 348.

Annotations:—Folld. Re Leadbitter (1882), 30 W. R. 378. *Distd. Re Gerard's S. E.*, [1893] 3 Ch. 252.

1342. — Dilapidated houses—Rebuilt as artisans' dwellings.]—*MATTHEWS v. WILSON*, [1883] W. N. 111.

Rectory.]—*See No. 1361, post.*

1343. Replacement of buildings taken—Reference to master ordered.]—*Re BUCKINGHAMSHIRE RY. CO., Ex p. BICESTER (CHURCHWARDENS & OVERSEERS)* (1848), 5 Ry. & Can. Cas. 205.

1344. — Investment authorised by special Act in redemption of land tax & incumbrances—Not allowed.]—*Re RUDYERD'S TRUSTS* (1860), 2 Giff. 394; 3 L. T. 232; 6 Jur. N. S. 816; 66 E. R. 164.

1345. — Payment out to tenant for life ordered—Payment deferred until half contract price expended.]—*Re DE GREY'S (EARL) ENTAILED ESTATE*, [1887] W. N. 241.

Completion of existing buildings.]—*See Nos. 1355, 1356, post.*

PART XI. SECT. 2, SUB-SECT. 3. B.

1342 i. Rebuilding — Dilapidated house.]—Purchase-money or compensation, payable in respect of lands taken

from persons not entitled to sell, may be applied to the rebuilding of a house in a ruinous condition, provided the rebuilding be beneficial to the estate of

the person from whom the land is taken.—*BLAIR'S TRUSTEES* (1852), 14 Dunl. (Ct. of Sess.) 496; 24 Sc. Jur. 250; 1 Stuart, 464.—**SCOT.**

C. Repairs, Alterations and Additions.

1346. Repairs—To mansion house—Not allowed—Tenant for life liable.]—*Re LEIGH'S ESTATE*, No. 1329, *ante*.

1347. ——— Not allowed.]—*DRAKE v. TREFUSIS*, No. 1330, *ante*.

1348. ——— To rectory—Purchase-money of glebe—Allowed.]—*Re LOUTH & EAST COAST RY. CO.*, *Ex p. GRIMOLDBY (RECTOR)* (1876), 2 Ch. D. 225; 24 W. R. 723.

1349. ——— To chancel—Purchase-money of glebe—Not allowed.]—*Re LOUTH & EAST COAST RY. CO.*, *Ex p. GRIMOLDBY (RECTOR)* (1876), 2 Ch. D. 225; 24 W. R. 723.

1350. ——— Purchase-money of part of churchyard—Allowed.]—*Re LONDON COUNTY COUNCIL*, *Ex p. PENNINGTON* (1901), 84 L. T. 808; 65 J. P. 536; 17 T. L. R. 614; 45 Sol. Jo. 616.

1351. ——— & alterations—To house purchased as vicarage—Allowed.]—*Ex p. ST. BOTOLPH, ALDGATE (VICAR)*, [1894] 3 Ch. 544; 38 Sol. Jo. 682; 8 R. 649; *sub nom. Ex p. LONDON CITY SEWERS COMRS. & ST. BOTOLPH WITHOUT ALDGATE (VICAR)*, 63 L. J. Ch. 862.

——— **Contract entered into by trustee.]—***See* No. 1479, *post*.

1352. Improvements—& additions—To rectory house Purchase-money of glebe—Allowed.]—*Ex p. CLAYPOLE (RECTOR)* (1873), L. R. 16 Eq. 574; 42 L. J. Ch. 776; 29 L. T. 51.

Annotations:—Distd. Ex p. Newton Heath (1896), 44 W. R. 645. **Folld. Re L. C. C.**, *Ex p. Pennington* (1901), 84 L. T. 808.

1353. ——— Other than new buildings—Not allowed.]—*DRAKE v. TREFUSIS*, No. 1330, *ante*.

——— **Small surplus fund.]—***See* Nos. 1367, 1371,

Additions—To rectory house.]—*See* No. 1352, *ante*.

1354. ——— To house part of settled estate—Allowed.]—*Re SPEER'S TRUSTS* (1876), 3 Ch. D. 262; 24 W. R. 880.

Annotation:—Distd. Re Gerard's S. E., [1893] 3 Ch. 252.

1355. Completion of unfinished building—Not allowed.]—*Re LONDON & NORTH WESTERN & RUGBY & STAMFORD RAILWAY & LANDS CLAUSES ACT*, *Ex p. FREER* (1818), 11 L. T. O. S. 471.

1356. ——— Rectory—Purchase-money of glebe—Bulk of money found otherwise—Allowed.]—*Ex p. HARTINGTON (RECTOR)* (1875), 23 W. R. 484.

D. Repayment of Money spent.

1357. By tenant for life—In circumstances creating a charge—Allowed.]—*Re DAVIS'S ESTATE & CRYSTAL PALACE & WEST END RAILWAY ACT*, *Ex p. DAVIS*, No. 1288, *ante*.

1358. ——— In circumstances not creating a charge—Not allowed.]—*Re LEIGH'S ESTATE*, No. 1329, *ante*.

1359. ——— ———.]—*Re STOCK'S DEVISED ESTATES* (1880), 42 L. T. 46.

1360. By trustees—In reliance upon repayment—Allowed.]—*Re PARTINGTON'S ESTATE* (1862), 1 New Rep. 177; 7 L. T. 522; 11 W. R. 160.

Annotation:—Folld. Re Lands Clauses Act, 1845, Ex p. r (1865), 6 New Rep. 326.

Contract for repairs entered into—But money not spent.]—*See* No. 1479, *post*.

1361. By rector—In rebuilding rectory—Not allowed.]—An arrangement was, with the consent of all proper parties, made for the rebuilding of a rectory house, part of the money to be advanced by the Comrs. of Queen Anne's Bounty, & part to be supplied by money agreed to be paid by a railway co. for a piece of the glebe. The rebuilding proceeded, but the railway co. were unable to pay, & the money required was advanced by the rector. When the railway co. had paid the money, the rector petitioned to have it paid to him:—*Held*: the ct. had no power to make the order.

Qu.: whether money arising from the sale of glebe land can, under Lands Act, 1845, be applied towards the rebuilding of a rectory.—*WILLIAMS v. AYLESBURY & BUCKINGHAM RY. CO.* (1874), 9 Ch. App. 684; 13 L. J. Ch. 825; 31 L. T. 521, L. J. J.

Annotations:—Consd. Ex p. Newton Heath (1896), 44 W. R. 645. **Refd. Re Belm Hospital (1875), 44 L. J. Ch. 406.**

1362. ——— ———.]—*Ex p. NEWTON HEATH (RECTOR)* (1896), 44 W. R. 645; 40 Sol. Jo. 621.

1363. ——— In building farmhouse on glebe—Allowed.]—*Ex p. GAMSTON (RECTOR)* (1876), 1 Ch. D. 477; 33 L. T. 803; 24 W. R. 359.

1364. ——— Advances from Queen Anne's Bounty—Not allowed.]—*Re LOUTH & EAST COAST RY. CO.*, *Ex p. GRIMOLDBY (RECTOR)* (1876), 2 Ch. D. 225; 24 W. R. 723.

Money spent by limited owner—For purposes other than building.]—*See* Sect. 3, sub-sect. 2, *post*.

SUB-SECT. 4.—REIMBURSEMENT AND INDEMNITY OF PERSONS UNDER DISABILITY OR LIMITED OWNERS.

For money spent on buildings.]—*See* Sub-sect. 3, D., *ante*.

For personal inconvenience or loss.]—*See* Sect. 3, sub-sect. 2, A., (a), *post*.

For costs.]—*See* Sect. 3, sub-sect. 2, A. (b), *post*.

SUB-SECT. 5.—SMALL SURPLUS FUND.

1365. Payment to tenant for life—If less than —*Re EGREMONT (LORD)* (1818), 12 Jur. 618.

1366. ——— ———.]—*Re BATEMAN'S ESTATE* (1852), 21 L. J. Ch. 691.

Annotation:—Folld. Ex p. Sheffield (1901), 68 J. P. 313.

1367. ——— On undertaking to lay out in lasting improvements.]—*Ex p. BARRIETT* (1850), 19 L. J. Ch. 415; 15 L. T. O. S. 520.

1368. Payment to rector or vicar—For extra costs incurred—Not allowed.]—*Re BIRMINGHAM & GLOUCESTER RY. CO.*, *Ex p. BREDICOT (RECTOR)* (1818), 17 L. J. Ch. 414.

See, further, Sect. 3, sub-sect. 2, A. (b), post.

1369. ——— Allowed.]—*Re LONDON & BIRMINGHAM RAILWAY CO. ACT*, *Ex p. LOUGHTON (RECTOR)* (1849), 5 Ry. & Can. 13 L. T. O. S. 399;

1370. ——— If less than £20.]—*Ex p. SHEFFIELD (VICAR)* (1901), 68 J. P. 313.

Payment to limited owners—In respect of

PART XI. SECT. 2, SUB-SECT. 5.

p. Payment to tenant for life—Sum of £30.]—A sum of £30, lodged in ct. as purchase-money of lands taken under Labourers (Ir.) Acts, paid out to a tenant for life without undertaking to expend in improvements. *Re NAVAN URBAN DISTRICT COUNCIL, Ex p. FITZHERBERT*, [1902] 1 L. R. 6.—IR.

1367 i. ——— On undertaking to lay out in lasting improvements.]—A sum of £34 2s. paid into ct. under Lands Act, 1845, payment out was directed to a tenant for life, on undertaking to expend the money in lasting improvements.—*Re KEILS UNION GUARDIANS, Ex p. SMITH* (1888), 21 L. R. Ir. 346.—IR.

1367 ii. ———.]—*Re LYLE*, [1903] 1 L.

1367 iii. ———.]—*Re RURAL DISTRICT GIVENS*, [1903] 1 L. R. 447; 37 L. L. T. 173.—IR.

Sect. 2.—Permanent application: Sub-sects. 5, 6, 7 & 8. Sect. 3: Sub-sects. 1 & 2, A. (a) & (b), B.]

personal inconvenience or loss.]—See Sect. 3, sub-sect. 2, A., *post*.

1371. Payment to petitioner's solicitor—On undertaking to lay out in lasting improvements.]—*Re HICHIN'S ESTATE* (1853), 1 W. R. 505.

1372. Payment to trustees appointed under Lands Act, 1845, s. 71.]—*Re KINSEY* (1863), 1 New Rep. 303.

Payment to tenant in tail—Where total fund small.]—See Nos. 1416, 1417, 1424, *post*.

SUB-SECT. 6.—PURPOSES AUTHORISED UNDER SETTLED LAND ACTS.

See SETTLEMENTS.

SUB-SECT. 7.—COSTS OF INVESTMENT.

See Part XII., *post*.

SUB-SECT. 8.—OTHER CASES.

1373. Discharge of corporation debts—Accruing since Municipal Corporations Act, 1835 (c. 76)—Purchase-money of corporation lands—Defence of the Realm Acts, 1803 (c. 55) & 1804 (c. 95)—Dividends only applicable.]—*Re PUBLIC FORTIFICATION ACTS, Ex p. HYTHE CORPN.* (1840), 4 Y. & C. Ex. 55; 160 E. R. 917.

Annotation:—Mentd. A.-G. v. Newcastle-upon-Tyne Corpn. & N. E. Ry. (1889), 60 L. T. 791.

See, also, Nos. 1280–1292, *ante*.

1374. Improvements — Drainage of glebe — Purchase-money of glebe—Allowed.]—*Re QUEEN CAMEL (VICAR), Re GREAT WESTERN RAILWAY ACT, & WILTS, SOMERSET & WEYMOUTH AMENDMENT ACT*, 1846 (1863), 8 L. T. 233; 11 W. R. 503.

— By building.]—See Sect. 2, sub-sect. 3, *ante*.

1375. Permanent investment in funds — Of purchase-money of lands of lunatic—Name of promoters omitted from account.]—The purchase-money of a lunatic's land taken by a public body under Lands Act, 1845, was, under the circumstances, ordered to be invested in guaranteed railway stock; but the name of the public body was directed to be omitted from the title of the account, an investment of this nature being treated as equivalent to a reinvestment in land.—*Re BUCKINGHAM* (1876), 2 Ch. D. 690, C. A.

PART XI. SECT. 2, SUB-SECT. 8.

q. Improvements — Embankment of meadows & commons—Purchase-money of part of land.]—Magistrates of D. were proprietors, under charter, of meadows or common lands & were authorised to make embankments to prevent inundation by a river. Part of the land was sold to a ry. co., & the magistrates bound themselves to expend part of the purchase-money in embanking the meadows & commons:—Held: Lands (Scot.) Act, 1845, s. 67, did not authorise money payable by a ry. co. for lands taken from a party having only a limited title, being applied in permanent improvement of the remainder of the lands, as improvement of land is not purchase.—DUMBARTON MAGISTRATES (1852), 14 Duml. (Cl. of Sess.) 673; 24 Sc. Jur. 341.—SCOT.

PART XI. SECT. 3, SUB-SECT. 1.

r. Person claiming under posses-

sory title—Land taken while title inchoate.]—Money lodged in ct. under the Lands Act, 1845, paid out on a title based on continued possession by a tenant without payment of rent for 15 years after expiration of his own & the next superior interest.—Re BLACK-ROCK COMRS., Ex p. FORDE, [1894] 1 L. R. 156.—IR.

s. Tenant — Claim by landlord of lien for unpaid rent.]—A landlord has no lien upon money lodged in court by a ry. co. as compensation for his tenants' interests in portions of their holdings required by the co., although the rent was in arrear at time of the lodgment, & the arrears had been since suffered to accumulate, & the co. has made no settlement with the landlord for his interest in the lands.—Re GREAT SOUTHERN & WESTERN RY. CO. OF IRELAND, Ex p. CAREY (1847), 10

SECT. 3.—WHO ENTITLED TO MONEY DEPOSITED AND INCOME OF INVESTMENTS.

SUB-SECT. 1.—PERSONS IN POSSESSION OF OR "DEEMED TO BE LAWFULLY ENTITLED TO" LAND TAKEN.

See Lands Act, 1845, s. 79.

1376. Lands Act, 1845, s. 79—Does not affect rights of parties in dispute.]—*Ex p. SUNDERLAND (FREEMEN & STALLINGERS)*, No. 149, *ante*.

1377. Occupant—Not subjected to adverse proof of title—Title depending on construction of will.]—*Re PERRY'S ESTATE* (1855), 1 Jur. N. S. 917; *sub nom. Re STERRY'S ESTATE*, 3 W. R. 561.

1378. Person claiming under possessory title—Land taken after title complete—Payment out ordered.]—*Ex p. WEBSTER*, [1866] W. N. 246.

1379. — Land taken while title inchoate—Title interrupted by acquisition of land—Payment out refused.]—*Re GREENOUGH, Re HOLLINSWORTH* (1871), 24 L. T. 347; 19 W. R. 580; *subsequent proceedings, Ex p. WINDER* (1877), 6 Ch. D. 696.

Annotation:—Refd. Gedye v. Works Comrs., [1891] 2 Ch. 630.

1380. — — — — Claim by true owner after title would have become complete disallowed.]—*Ex p. WINDER* (1877), 6 Ch. D. 696; 46 L. J. Ch. 572; 25 W. R. 768.

Annotation:—Distd. Gedye v. Works Comrs., [1891] 2 Ch. 630.

1381. — — — — Payment out ordered.]—*Re EVANS* (1873), 42 L. J. Ch. 357.

Annotation:—Consd. Gedye v. Works Comrs., [1891] 2 Ch. 630.

1382. — — — — Land taken by agreement—Payment out ordered after title would have become complete.]—*Ex p. WINDER* (1877), 6 Ch. D. 696; 46 L. J. Ch. 572; 25 W. R. 768

Annotation:—Distd. Gedye v. Works Comrs., [1891] 2 Ch. 630.

1383. — — After expiration of long term—Land taken after title complete—Payment out ordered.]—*Re METROPOLITAN STREET IMPROVEMENT ACT*, 1877, *Ex p. CHAMBERLAIN* (1880), 14 Ch. D. 323; 49 L. J. Ch. 354; 42 L. T. 358; 28 W. R. 565.

Annotations:—Dbtd. Gedye v. Works Comrs., [1891] 2 Ch. 630. *Folld. Re Harris, Hansler v. Harris*, [1909] W. N. 181.

1384. — — — — Land taken during term—Payment out refused.]—Certain land was purchased compulsorily as freehold. On examination of the title the land was discovered to be held on a long term of which a few years were still to run. The owner received compensation as leaseholder & the purchasers went into possession, paying into ct. the value of the reversion. Twelve years after the term had expired, the representative of the leaseholder, there being no other claimant, applied to have the reversion money paid out to him:—

L. T. O. S. 37.—IR.

t. — — — —.]—Re DUBLIN & BAKER, Ex p. T 1 L. R. 498.—IR.

u. Tenant at will.]—A tenant at will, having agreed to give possession of lands to co. for £23, subsequently refused unless a person having an equal interest in the lands was also satisfied. The co. lodged the purchase money in ct. to credit of the tenant, solely:—Held: the tenant was entitled to draw the entire money out of ct.—Re SOUTH EASTERN RY. CO. (1819), 12 L. Eq. R. 398.—IR.

w. Money subject to annuity—Consent of annuitant necessary for payment out.]—Re DUBLIN, WICKLOW & WEXFORD RY. CO., Ex p. JORDAN (1891), 27 L. R. Ir. 79.—IR.

Held: the leaseholder was not in possession when the term expired & never had any inchoate possession of or title to the reversion.—*GEDYE v. WORKS & PUBLIC BUILDINGS COMRS.*, [1891] 2 Ch. 630; 60 L. J. Ch. 587; 65 L. T. 359; 39 W. R. 598; 7 T. L. R. 488, C. A.

— — — — —.]—*See, generally*, LIMITATION OF ACTIONS.

1385. Mortgagee in possession—Payment of dividends ordered—Though evidence that trust unperformed.—*Re COOK'S ESTATE* (1863), 8 L. T. 759; 11 W. R. 1015.

1386. Annuitant in possession—After term for lives—On dropping of last life—Dividends ordered to be paid to occupant for twelve years.—*Re HARRIS, Ex p. LONDON COUNTY COUNCIL*, [1901] 1 Ch. 931; 70 L. J. Ch. 432; 84 L. T. 203; 53 Sol. Jo. 716.

1387. — — — — — Payment out ordered after twelve years.—*Re HARRIS, HANSLER v. HARRIS*, [1909] W. N. 181.

Whether purchase-money taken as realty or personalty.—*See Nos.* 1513, 1514, *post*.

SUB-SECT. 2.—PERSONS UNDER DISABILITY AND LIMITED OWNERS.

A. Compensation for Personal Inconvenience or Loss.

(a) Personal Inconvenience.

See Lands Act, 1845, s. 73.

1388. Rector—For injury & annoyance—& necessary alteration of fences—Independently of actual value of land.—*Re EAST LINCOLNSHIRE RY. CO., Ex p. LITTLE STEEPING (RECTOR)* (1848), 5 Ry. & Can. Cas. 207.

1389. — — — — — If allowed for in fixing compensation—Though no particular sum apportioned.—*Re SAUNDERTON GLEBE LANDS, Ex p. SAUNDERTON (RECTOR)*, [1903] 1 Ch. 480; 72 L. J. Ch. 276; 88 L. T. 267; 51 W. R. 522.

— — — — — **For unpaid costs.**—*See No.* 1615, *post*.

1390. Tenant for life—For injury & inconvenience—Special stipulation for compensation—Reference ordered as to amount.—Where the tenant for life of an estate through which a railway passed stipulated for a special compensation over & above the value of the land, severance, etc. according to Lands Act, 1845, s. 73:—*Held:* it was a matter of inquiry to what part of such sum he was absolutely entitled, & a reference to inquire was directed.—*Re MARLBOROUGH'S (DUKE) ESTATE ACT, Ex p. CHURCHILL (LORD)* (1850), 15 L. T. O. S. 341.

1391. — — — — — Tenant for life in possession.—*Re COLLIS'S ESTATE* (1866), 14 L. T. 352.

Annotation:—Folld. Re Saunderton Glebe Lands, Ex p. Saunderton & Ex p. G. W. & G. C. Rys. (1903), 88 L. T. 267.

1392. Person having partial or qualified estate—For injury & annoyance.—*TAYLOR v. CHICHESTER & MIDHURST RY. CO. (DIRECTORS, ETC.)*, No. 441, *ante*.

Payment out of small surplus fund.—*See Sect. 2, sub-sect. 5, ante*.

Costs incurred by limited owner.—*See Sect. 3, sub-sect. 2, A., (b), post*.

Apportionment between tenant for life & remainderman—Of purchase-money of wasting assets.—*See Sect. 4, sub-sect. 1, Sect. 5, post*.

(b) Costs Incurred.

1393. Of arbitration—Where amount awarded less than offered—Of tenant for life.—*Re AUBREY'S ESTATES & SOUTH WALES RAILWAY ACT* (1853), 1

Eq. Rep. 249; 7 Ry. & Can. Cas. 611; 21 L. T. O. S. 192; 17 Jur. 874; 1 W. R. 464.

Annotations:—Folld. Re Oldham's Estate, [1871] W. N. 190; *Re Strathmore Estates* (1874), L. R. 18 Eq. 338. **Consd. Re Berkeley's Will, Re Gloucester & Berkeley Canal Act, 1870 (1874), 10 Ch. App. 56.**

1394. — — — — — Of perpetual curate.—*Ex p. WHITWORTH (PERPETUAL CURATE)* (1871), 24 L. T. 126.

1395. Mortgagee's extra costs incurred in assessing price—Court will not insert special words providing for—In directing mortgage accounts.—*REES v. METROPOLITAN BOARD OF WORKS* (1880), 14 Ch. D. 372; 49 L. J. Ch. 620; 42 L. T. 685; 28 W. R. 614.

1396. Of preliminary negotiations—By tenant for life.—*Re OLDHAM'S ESTATE*, [1871] W. N. 190.

1397. Of unsuccessful attempt to obtain compensation—Undertaking abandoned.—*Re LOPES' TRUSTS* (1874), cited in L. R. 18 Eq. 340.

Annotation:—Folld. Re Strathmore Estates (1874), L. R. 18 Eq. 338.

1398. — — — — — Re STRATHMORE ESTATES (1874), L. R. 18 Eq. 338.

Annotation:—Folld. Re Berkeley's Will, Re Gloucester & Berkeley Canal Act, 1870 (1874), 10 Ch. App. 56.

1399. Of opposing bill in Parliament—By tenant for life.—A tenant for life opposed the passing of a canal bill, but only claimed the insertion of some clauses for the protection of the estate. Lands Act, 1845, was incorporated with the Act when passed. After its passing the co. took part of the settled estate & paid the money into ct. In the proceedings for ascertaining the value of the land taken, the tenant for life had incurred costs beyond what the co. were liable to pay, & he presented a petition for payment of those costs & of the costs of opposing the bill out of the fund:—*Held:* petitioner was entitled to be paid out of the fund all costs properly incurred by him in relation to the purchase since the passing of the Act, but not any costs of opposing the bill in Parliament.—*Re BERKELEY'S (EARL) WILL, Re GLOUCESTER & BERKELEY CANAL ACT, 1870* (1874), 10 Ch. App. 56; 44 L. J. Ch. 3; 31 L. T. 531; 23 W. R. 195, L. J. J.

Annotations:—Refd. Re Bethlem Hospital (1875), L. R. 19 Eq. 457; *Re Gaselee*, [1901] 1 Ch. 923.

1400. — — — — — By trustee.—*Re NICOLL'S ESTATE*, [1878] W. N. 154.

1401. — — — — — By rector.—*Re LONDON COUNTY COUNCIL, Ex p. PENNINGTON* (1901), 84 L. T. 808; 65 J. P. 536; 17 T. L. R. 614; 45 Sol. Jo. 616.

Costs of investment, reinvestment & payment out.—*See Part XII.*

B. Income of Interim Investments.

See Lands Act, 1845, ss. 69–80.

1402. Receiver under Court of Chancery—Land taken under administration of Court of Chancery.—*Re SOUTHAMPTON & LONDON RAILWAY ACT, Ex p. WINCHESTER (BP.)* (1837), 6 L. J. Ex. Eq. 72; 1 Jur. 283.

1403. Owner—Land subject to annuity—Although no conveyance executed.—*Ex p. COFIELD* (1847), 9 L. T. O. S. 410; 11 Jur. 1071.

1404. Ecclesiastical corporations sole—Archbishop—For time being.—*Re EAST LINCOLNSHIRE RAILWAY CO.'S ACTS, Ex p. CANTERBURY (ARCHBP.)* (1848), 2 De G. & Sm. 365; 5 Ry. & Can. Cas. 699; 12 Jur. 1042; 64 L. R. 161.

Annotation:—Mentd. Ex p. Hereford, Ex p. Saye & Sele (1852), 5 De G. & Sm. 265.

1405. — — — — — Vicar—For time being & churchwardens & overseers—Or either of them.—*Re BUCKINGHAMSHIRE RY. CO., Ex p. BICESTER*

Sect. 3.—Who entitled to money deposited and income of investments: Sub-sect. 2, B.; sub-sect. 3, A. & B. (a) & (b).]

(CHURCHWARDENS & OVERSEERS) (1848), 5 Ry. & Can. Cas. 702.

Annotations:—Folld. Re Whitfield (1861), 7 Jur. N. S. 909. *Consd. Re Kent Coast Ry., Ex p. Canterbury* (1862), 7 L. T. 240; *Re Lathropp's Charity* (1866), L. R. 1 Eq. 467. *Refd. Re L. B. & S. C. Ry. & A.-G. v. Haberdashers' Co.* (1854), 18 Beav. 608. *Mentd. Re Oxford, Worcester & Wolverhampton Ry., Ex p. Melward* (1859), 27 Beav. 571.

1406. ————.]—*Re WILLENHALL CHAPEL OF EASE* (1863), 8 L. T. 599; 11 W. R. 850.

1407. Successive life interests—Wife for life—After death to husband for life.]—*Re HOW'S TRUST* (1850), 15 L. T. O. S. 342; 15 Jur. 266.

1408. ———— Order for payment out on death of survivor refused.]—*Re LOWNDES' TRUST* (1851), 20 L. J. Ch. 422.

1409. Tenant for life—Before conveyance executed—Where company in possession.]—*Re HUNGERFORD* (1855), 1 K. & J. 413; 1 Jur. N. S. 845; 69 E. R. 520.

Annotation:—Mentd. Re Hatfield's Estate (1861), 29 Beav. 370.

1410. ———— By all parties.]—*Re WREY* (1865), 12 L. T. 171; 11 Jur. N. S. 296; 13 W. R. 543.

1411. Who has granted annuities—On undertaking by annuitants not to distrain.]—*Re LONDON & TILBURY RY. CO., Re PEDLEY'S ESTATE* (1855), 1 Jur. N. S. 654.

1412. ———— Under settlement before Apportionment Act, 1834 (c. 22)—Act does not apply.]—*Re LAWTON ESTATES* (1866), L. R. 3 Eq. 469.

Annotation:—Folld. Jodrell v. Jodrell (1869), 20 L. T. 349.

Apportionment generally.]—*See EQUITY.*

1413. Trustees—Or either of them.]—*Re CLINTON* (1860), 6 Jur. N. S. 601; 8 W. R. 492.

1414. ———— Capital carried to account of trustees.]—*Re COULSON'S SETTLEMENT* (1867), 17 L. T. 27.

1415. ————.]—*Re FOY'S TRUSTS* (1875), 33 L. T. 161; 23 W. R. 744.

Investment of cash under the control of the court.]—*See Sect. 1, ante.*

Apportionment of dividends between successive owners.]—*See EQUITY.*

SUB-SECT. 3.—PERSONS BECOMING ABSOLUTELY ENTITLED.

See Lands Act, 1845, s. 69.

A. Tenants in Tail.

1416. Without disentailing deed—Amount small—Under £200.]—*SOWRY v. SOWRY* (1860), 2 L. T. 79; 6 Jur. N. S. 337; 8 W. R. 339.

1417. ————.]—The practice of dispensing with a disentailing deed on the payment out to a tenant in tail of a small sum paid in under Lands Act, 1845, though apparently inconsistent with the

PART XI. SECT. 3, SUB-SECT. 3. A.

y. Without disentailing deed.]—Where compensation moneys in respect of land compulsorily resumed are claimed by a person who but for resumption would have been tenant in tail, it is unnecessary for him to execute a disentailing deed as a condition of payment out.—*Re MACKENZIE BOWMAN* (1909), 9 S. R. N. S. W. 670; 26 N. S. W. W. N. 116.—AUS.

z. ————.]—The ct., without requiring a disentailing deed, paid out to a tenant in tail in possession money in ct.—*Re GREAT SOUTHERN &*

WESTERN RY. CO., Ex p. MAUNSELL (1868), L. R. 2 Eq. 32.—IR.

a. Disentailing deed necessary.]—A ry. co. having purchased settled land, the tenant for life conveyed to them, under their Act, & he & the tenant in tail applied to draw the purchase-money out of the court. No disentailing deed had been executed:—*Held*: a disentailing deed was necessary to enable the parties to draw the money.—*Re GREAT SOUTHERN & WESTERN RY.* (1816), 9 L. Eq. R. 482.—IR.

b. ————.]—*Re LIMERICK & JENNIS RY. CO., Ex p. SMYTH* (1875), L. R.

Act is now established by a series of authorities.—*Re WATSON* (1864), 4 New Rep. 528; 10 Jur. N. S. 1011, L. JJ.

Annotation:—Folld. Re Row (1874), L. R. 17 Eq. 300.

See, also, No. 1424, post.

1418. ———— Payment to husband—With consent of wife.]—*Re TYLER'S ESTATE* (1860), 8 W. R. 540.

Annotation:—Appld. Gibbons v. Kibbey (1861), 10 W. R. 53.

1419. ———— After conveyance.]—*Re SOUTH EASTERN RY. CO.* (1861), 30 Beav. 215; 30 L. J. Ch. 602; 7 Jur. N. S. 890; 9 W. R. 404; 54 E. R. 870.

Annotations:—Folld. Notley v. Palmer (1865), L. R. 1 Eq. 241. *N.F. Re Butler's Will* (1873), L. R. 16 Eq. 479.

Refd. Gibbons v. Kibbey (1861), 10 W. R. 55.

1420. ———— With consent of tenant for life.]—*Re HOLDEN, Re LONDON & NORTH WESTERN RY. CO.* (1863), 1 Hem. & M. 445; 71 E. R. 194.

1421. ———— On joint petition.]—*Re HOLDEN'S ESTATE, Re SOUTH STAFFORDSHIRE RAILWAY ACT 1847, & LANDS CLAUSES CONSOLIDATION ACT 1845, Ex p. HOLDEN* (1864), 10 L. T. 127; 10 Jur. N. S. 308.

1422. ———— Sum exceeding £600.]—*NOTLEY v. PALMER* (1865), L. R. 1 Eq. 241; *sub nom. NOTTLEY v. PALMER, NOTTLEY v. NOTTLEY*, 13 L. T. 647; 11 Jur. N. S. 968; 14 W. R. 170.

Annotations:—N.F. Re Butler's Will (1873), L. R. 16 Eq. 479. *Distd. Re Howarth* (1873), 8 Ch. App. 416, n.

1423. ————.]—*Re ROW* (1874), L. R. 17 Eq. 300; 43 L. J. Ch. 347; 29 L. T. 824.

1424. Disentailing deed necessary—Fund exceeding £200.]—*Re TYLDEN'S TRUST* (1863), 2 New Rep. 413; 8 L. T. 631; 9 Jur. N. S. 942; 11 W. 869.

1425. ———— *Re BUTLER'S WILL* (1873), L. R. 16 Eq. 479, L. C.

Annotations:—Folld. Re Norcop's Will (1874), 31 L. T. 85; *Re Reynolds* (1876), 3 Ch. D. 61. *Refd. Re Row* (1874), L. R. 17 Eq. 300.

1426. ————.]—*Re NORCOP'S WILL* (1874), 31 L. T. 85.

B. Trustees.

(a) Apart from Settled Land Acts.

1427. Under settlement or will—Payment out refused.]—*Re HORWOOD'S ESTATE* (1861), 3 Giff. 218; 66 E. R. 389.

Annotations:—Folld. Re Reaston's Estate (1872), 20 W. R. 355. *Refd. Re Smith, Ex p. L. & N. W. Ry. & Mid. Ry.* (1888), 58 L. J. Ch. 108.

1428. ———— Trust created by appointment under power in will—Payment out ordered.]—*Re ILLMAN'S WILL* (1870), 39 L. J. Ch. 760; 22 L. T. 836; 18 W. R. 962.

Annotation:—Refd. Re Smith, Ex p. L. & N. W. Ry. & Mid. Ry. (1888), 58 L. J. Ch. 108.

1429. ———— With power of sale—Lands taken subject to contingent charges—Payment out ordered.]—*Re DEFENCE ACT, 1860, Ex p. MORSHEAD* (1863), 33 Beav. 254; 3 New Rep. 280; 9 L. T. 597; 10 Jur. N. S. 61; 12 W. R. 236; 55 E. R. 365.

1430. ———— *Cestui que trust an infant*—

10 Eq. 66.—IR.

PART XI. SECT. 3, SUB-SECT. 3. B. (a).

c. Under settlement or will—With power of sale.]—Trustees of a will with power of sale are persons "absolutely entitled" within Public Works Act, 1888, s. 62; & entitled to payment out of mono.—*Re KING'S TRUSTS* (1893), 14 N. S. W. Eq. 363; 9 N. S. W. W. N. 103.—AUS.

d. ————.]—*Re RATHMINES, ETC. DRAINAGE ACT, Ex p. VERSCHOYLE* (1885), 15 L. R. Ir. 576.—IR.

Payment out refused—Fund carried to separate account of infant.]—*Re* REASTON'S ESTATE (1872), L. R. 13 Eq. 564; 41 L. J. Ch. 832; 26 L. T. 148; 20 W. R. 355.

Annotations:—**Distd.** *Re* Spurstowe's Charity (1874), 43 L. J. Ch. 512. **Refd.** *Re* Smith, *Ex p.* L. & N. W. Ry. & Mid. Ry. (1888), 58 L. J. Ch. 108.

1431. ——— Payment out ordered.]—*Re* GOOCH'S ESTATE (1876), 3 Ch. D. 742.

Annotation:—**Consd.** *Re* Hobson's Trusts (1877), 7 Ch. D. 709, n.

1432. ——— Exercisable at future date—Petition for payment when power exercisable.]—

Land was vested in trustees in trust to sell as soon as the youngest of a class of children attained twenty-one & to divide the proceeds among such of the children, as should be then living & the issue of such of them as should be dead. Part of the land was taken under Lands Act, 1845, before the youngest child attained twenty-one & the purchase-money was paid into ct. After the youngest child attained twenty-one the trustees & some of the *cestuis que trust* presented a petition, asking that the fund might be paid out to the trustees, or in the alternative that the shares of those *cestuis que trust* who were petitioners might be paid out, leaving the other shares in trust in the matter of the Act. The ct. below refused to order payment out to the trustees, but expressed willingness to make an order according to the other alternative. Petitioners did not object to this, but the co. insisted that the order ought to be for payment of the whole fund to the trustees:—*Held*: as petitioners did not object to the order proposed, the co. could not complain of it.

Qu.: whether the ct. would in such a case order payment of the whole fund to the trustees if they required it. —*Re* SOWRY (1873), 8 Ch. App. 736; 21 W. R. 717, L. J.J.

Annotation:—**Consd.** *Re* Hobson's Trusts (1877), 7 Ch. D. 709, n.

1433. ——— Payment out ordered.]—*Re* LONDON, BRIGHTON & SOUTH COAST RY. CO., *Ex p.* BOWMAN, [1888] W. N. 179.

1434. ——— On termination of life estate—Payment out ordered.]—*Re* EVANS' SETTLEMENT (1880), 14 Ch. D. 511; 43 L. T. 172.

Annotation:—**Folld.** *Re* Thomas's Settlement (1882), 45 L. T. 746.

1435. ——— Payment out ordered.]—*Re* ST. LUKE'S, MIDDLESEX VESTRY, [1880] W. N. 58.

1436. ——— Payment out ordered.]—Where purchase-money for land has been paid into ct. under Lands Act, 1845, it may be ordered to be paid out to trustees of a settlement or will with a power of sale, as persons becoming absolutely entitled under s. 69.—*Re* HOBSON'S TRUSTS (1878), 7 Ch. D. 708; 47 L. J. Ch. 310; 38 L. T. 365; 26 W. R. 470, C. A.

Annotations:—**Folld.** *Re* Thomas's Settlement (1882), 45 L. T. 746; *Re* L. B. & S. C. Ry., *Ex p.* Bowman, [1888] W. N. 179. **Dbtd.** *Re* Smith, *Ex p.* L. & N. W. Ry. & Mid. Ry. (1888), 40 Ch. D. 386. **Consd.** *Re* Morgan, Smith v. May, [1900] 2 Ch. 474. **Folld.** *Re* Sheffield Corpn. & St. William's Roman Catholic Chapel & Schools, Sheffield, Trustees, [1903] 1 Ch. 208.

1437. ———.]—*Re* THOMAS'S SETTLEMENT (1882), 45 L. T. 746; 30 W. R. 244.

1438. ——— At request of settlor—Settlor joining in petition—Payment out ordered.]—*Re* WARD'S ESTATES (1884), 28 Ch. D. 100; 54 L. J. Ch. 231; 33 W. R. 149.

Annotation:—**Refd.** *Re* Morgan, Smith v. May, [1900] 2 Ch. 474.

1439. ——— Not entitled as of right—Discretion of court to order.]—*Re* SMITH, *Ex p.* LONDON & NORTH WESTERN RY. CO. & MIDLAND RY. CO., No. 1445, *post*.

1440. Of charity.]—*Re* PETERBOROUGH, WISBEACH & SUTTON RAILWAY ACT 1863, *Ex p.* TID ST. GILES CHARITY TRUSTEES (1869), 17 W. R. 158.

See, also, Nos. 1498, 1499, *post*.

1441. Official Trustees of Charitable Funds.]—*Re* BISHOP MONK'S HORFIELD TRUST (1881), 43 L. T. 793; 29 W. R. 462.

Trustees appointed under Lands Act, 1845, s. 71.]—*See* No. 1372, *ante*.

(b) Under Settled Land Acts.

See, further, SETTLEMENTS; TRUSTS & TRUSTEES.

1442. Trustees of will without power of sale—Payment to trustees appointed for purposes of Act—With liberty to pay to trustees of will money advanced by them—On declaration of trust in favour of Settled Land Act trustees.]—*Re* HARROP'S TRUSTS (1883), 24 Ch. D. 717; 53 L. J. Ch. 137; 48 L. T. 937.

Annotations:—**Folld.** *Re* Wright's Trusts (1883), 24 Ch. D. 662; *Re* Wootton's Estate, [1890] W. N. 158. **Mentd.** *Tempest v. Camoys* (1888), 58 L. T. 221.

1443. ——— To hold on trusts of will.]—*Re* WRIGHT'S TRUSTS (1883), 24 Ch. D. 662; 53 L. J. Ch. 139.

Annotation:—**Folld.** *Re* Wootton's Estate, [1890] W. N. 158.

1444. ———.]—*Re* WOOTTON'S ESTATE, [1890] W. N. 158.

1445. ——— Discretion of court under Settled Land Act, 1882 (c. 38)—Payment refused where same solicitor represented all parties.]—Where purchase-money of settled lands taken by a railway co. have been paid into ct. under Lands Act, 1845, trustees for sale of such lands are not, either under Lands Act, 1845, s. 69, or Settled Land Act, 1882, s. 21, entitled as of right to payment out. Under Settled Land Act, 1882, the ct. has a discretion to order such payment. *Qu.*: whether it has such discretion under Lands Act, 1845.

A railway co. took lands, held by the two trustees of a will, upon trust for the separate use of A., a married woman, during her life, with remainder to her children as she should appoint, & in default, to such children as tenants in common in fee simple, & paid the purchase-moneys into ct. The two trustees of the will were afterwards appointed trustees under the settlement made by the will for the purposes of Settled Land Act, 1882. A. & the two trustees then petitioned that the fund in ct. might be transferred to the two trustees to be held by them upon the trusts of the will. At the date of the petition A. was sixty-five years old & had three children who had all attained twenty-one & these children were resps. to the petition & appeared to consent. One of the two trustees was a solicitor & the firm of which he was a member acted as solicitors to the trust, & as solicitors both for petitioners & resps.:—*Held*: petitioners were not entitled as of right to payment out or transfer of the fund.—*Re* SMITH, *Ex p.* LONDON & NORTH WESTERN RY. CO. & MIDLAND RY. CO. (1888), 40 Ch. D. 386; 58 L. J. Ch. 108; 60 L. T. 77; 37 W. R. 199, C. A.

Annotations:—**Refd.** *Re* Morgan, Smith v. May, [1900] 2 Ch. 474; *Re* Sheffield Corpn. & St. William's Roman Catholic Schools (1902), 72 L. J. Ch. 71; *Re* Piggin, *Ex p.* Mansfield Ry., [1913] 2 Ch. 326. **Mentd.** *Re* Clergy Orphan Corpn. (1894), 64 L. J. Ch. 66; *Ex p.* Castle Bytham, *Ex p.* Mid. Ry., [1895] 1 Ch. 348.

1446. Trustees with power of sale—But not reserving minerals—Sale under Lands Act, 1845, s. 7—Payment out ordered.]—*Re* RUTLAND'S (DUKE) SETTLEMENT (1883), 49 L. T. 196; 31 W. R. 947.

Sect. 3.—Who entitled to money deposited and income of investments: Sub-sect. 3, C., D. & E.; sub-sects. 4, 5 & 6. Sect. 4: Sub-sect. 1.]

C. Married Women.

See, further, HUSBAND & WIFE.

1447. Without deed acknowledged—On examination—Payment to husband & wife—Form of order.]

—Re LANCASHIRE & YORKSHIRE RAILWAY ACT, Ex p. WORTHINGTON (1853), 9 W. R. 769, n.

Annotation:—Fold. Re Hayes (1861), 9 W. R. 769.

1448. ——— Payment to husband — Wife consenting.]—Re ROBINS' ESTATE (1879), 27 W. R. 705.

1449. ——— ——— ———.]—Re TYLER'S ESTATE (1860), 8 W. R. 540.

Annotation:—Reid. Gibbons v. Kibbey (1861), 10 W. R. 55.

1450. ——— ——— Payment to wife.]—Re HAYES (1861), 9 W. R. 769.

Annotations:—Reid. Gibbons v. Kibbey (1861), 10 W. R. 55; Standerling v. Hall (1879), 11 Ch. D. 652.

1451. To wife on her separate receipt—Title to fund accruing before commencement of Married Women's Property Act, 1882 (c. 75)—Vesting in possession after commencement of Act.]—Re HUGHES' TRUSTS, [1885] W. N. 62.

Annotations:—N.F. Re Hobson's Settlement, Webster v. Rickards (1885), 55 L. J. Ch. 300; Re Tucker, Emanuel v. Parfitt (1885), 54 L. J. Ch. 874. Refd. Reid v. Reid (1886), 31 Ch. D. 402.

Dowress.]—See No. 1459, post.

D. Statutory

1452. With no power of sale.]—Re CHELSEA WATERWORKS CO. (1887), 56 L. J. Ch. 640; 56 L. T. 421; 3 T. L. R. 461.

1453. ——— Consent of Local Government Board not necessary.]—Ex p. WATFORD URBAN DISTRICT COUNCIL (1914), 78 J. P. Jo. 160.

1454. With power of sale—Consent of Local Government Board necessary—Absolutely entitled under Sale of Exhausted Parish Lands Act, 1876 (c. 62), s. 1.]—Re BRUMBY & FRODINGHAM URBAN DISTRICT COUNCIL (1904), 69 J. P. 96; 3 L. G. R. 258.

1455. ——— Consent of Local Government Board not necessary—Absolutely entitled under Lands Act, 1845, s. 69.]—Re ISLINGTON COUNCIL (1907), 97 L. T. 78; 71 J. P. 396; 5 L. G. R. 1203.

1456. ——— Refusal of Local Government Board to consent to sale—Absolutely entitled under Lands Act, 1845, s. 69.]—Ex p. WOOLWICH CORPN. (1908), 24 T. L. R. 370.

Annotation:—N.F. Re G. W. Ry. (New Rys.) Act, 1905, Ex p. G. W. Ry. (1909), 74 J. P. 21.

1457. ——— Not entitled under Lands Act, 1845, s. 69.]—A railway co. acquired from a metropolitan borough council under the compulsory powers of Lands Act, 1845, certain land of which the borough council were owners in fee simple & paid the purchase-money into ct. The Local Government Board had not given their consent to the sale as provided by London Government Act, 1899 (c. 11), s. 6 (5):—Held: the vendors were not entitled to have the purchase-money paid out of ct. to them inasmuch as they were

not persons absolutely entitled within Lands Act, 1845, s. 69.—Re GREAT WESTERN RY. (NEW RAILWAYS) ACT, 1905, Ex p. GREAT WESTERN RY. CO. (1909), 74 J. P. 21, C. A.

E. Other Cases.

1458. Beneficiary under will with power of pre-emption.]—Testator, by his will, gave all his real & personal estate to be enjoyed by his widow for life & after her death to be sold & the proceeds to be divided among his ten children equally. Testator directed that one of his sons should have a right of pre-emption for £450 of a particular parcel of garden land, part of the real estate. After the death of testator & before that of the widow, the parcel of garden land was purchased by a railway co. under their compulsory powers; the compensation money paid therefor, when free from incumbrance, being represented at the death of his widow by the sum of £882 18s. 2d. standing in ct.:—Held: testator's son to whom the right of pre-emption was given was entitled to the compensation money, subject to the deduction of the price fixed by testator.—Re CANT'S ESTATE (1859), 4 De G. & J. 503; 28 L. J. Ch. 641; 33 L. T. O. S. 280; 5 Jur. N. S. 829; 45 E. R. 196, L. JJ.

Annotation:—Mentd. Re Kerry, Boccock v. Kerry, Arnall v. Kerry, [1889] W. N. 3.

1459. Land taken belonging to infant subject to dower—Dowress entitled to payment out of value of dower.]—Re HALL'S ESTATE (1870), L. R. 9 Eq. 179; 39 L. J. Ch. 392.

Annotation:—Distd. Re Wilson, Wilson v. Clark, [1916] 1 Ch. 220.

1460. Person entitled to land taken—Under rule in Shelley's Case.]—Re YOUMAN'S WILL, [1901] 1 Ch. 720; 70 L. J. Ch. 430; 84 L. T. 201; 49 W. R. 509; 45 Sol. Jo. 426.

SUB-SECT. 4.—PROMOTERS.

1461. Right to excess of amount paid in—Over value of interest assessed by court.]—A jury or arbitrator, acting under Lands Act, 1845, simply, can only assess the value of the interest claimed & not the right to that interest, & if the money value so assessed is paid into ct. under s. 76 the ct. is bound to decide the question of right, & if it turns out that claimant has not the interest he claimed, but some different interest, the ct. will apply its own ordinary machinery to ascertain the value of the actual interest, & after paying the amount of such value to claimant, will return the remainder of the money to the co. paying it into ct.—BRANDON v. BRANDON (1861), 2 Drew. & Sm. 305; 5 New Rep. 214; 34 L. J. Ch. 333; 11 L. T. 658; 11 Jur. N. S. 30; 13 W. R. 251; 62 E. R. 637.

Annotations:—Consd. Re N. L. Ry., Ex p. Cooper (1865), 2 Drew. & Sm. 312. Refd. Bogg v. Mid. Ry. (1867), L. R. 4 Eq. 310; Re Winder (1877), 25 W. R. 768.

1462. ——— ———.]—Re NORTH LONDON RY. CO. (CITY BRANCH), Ex p. COOPER, No. 2044, post.

1463. No right to return of compensation paid

PART XI. SECT. 3, SUB-SECT. 3.—E.

e. Tenant in common—Estate pur autre vie—Set off for improvements.]—Applt. was for several years in exclusive possession of the profits of land, of which he believed himself to have purchased the fee simple, whereas he had only an estate pur autre vie of the entirety, with an equitable tenancy in common with the respts. in remainder, his share being one fourth. Permanent improvements had been

erected upon the land by one of applt.' predecessors in title. After the death of cestui qui vie the land was resumed under Public Works Act (N.S.W.), 1900. The Minister paid applt. one fourth of the compensation moneys, & at request of applt., paid balance into ct.

In petition by the other tenants in common for payment out, under above Act, s. 48:—Held: applt. was in the position of a deft., & entitled to assert an equitable lien upon the fund equal

to three fourths of the increase in the value of the land attributable to the improvements, but that, before being allowed the benefit of this equity, he should account for the rents & profits he had received while in exclusive possession after the death of the cestui qui vie, to be set off against amount due to him for improvements.—BRICKWOOD v. YOUNG & PUBLIC WORKS MINISTER OF NEW SOUTH WALES (1905), 2 C. L. R. 387; 22 S. W. W. N. 171.—AUS.

in—Assessed in wrong manner—Until value correctly ascertained & paid in.]—*Ex p.* LONDON & SOUTH WESTERN RY. CO. (1869), 38 L. J. Ch. 527.

Recovery of purchase-money paid into court—By promoters taking transfer of mortgage.]—*See* No. 1536, *post*.

SUB-SECT. 5.—AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN IN RESPECT OF WASTING ASSETS.

As regards minerals.]—*See* Sect. 5, *post*.

As regards leases.]—*See* Sect. 4, sub-sect. 1, *post*.

SUB-SECT. 6.—AS BETWEEN HEIR-AT-LAW AND NEXT OF KIN.

See Sect. 6, *post*.

SECT. 4.—MONEY DEPOSITED IN RESPECT OF LEASES AND REVERSIONS.

See Lands Act, 1845, s. 74.

SUB-SECT. 1.—LEASES.

1464. Tenant for life entitled to income equal to rent—Deficiency in dividends made up from capital.]—

JEFFREYS v. CONNER (1860), 28 Beav. 328; 3 L. T. 45; 6 Jur. N. S. 986; 8 W. R. 572; 54 E. R. 392.

Annotation:—Mentd. *Re* Booth, *Pickard v. Booth*, [1900] 1 Ch. 768.

1465. ——— Purchase of government annuity equal to net rent.]—*Re* PFLEGER (1868), L. R. 6 Eq. 426.

Annotation:—Consd. *Askew v. Woodhead* (1880), 14 Ch. D. 27.

See, also, Nos. 1477, 1478, *post*.

1466. Increase allowed—Where rent would have been increased.]—*Re* NORTH'S ESTATE (1868), 19 L. T. 43.

1467. ——— Surplus dividends accumulated.]—*Re* WILKES' ESTATE (1880), 16 Ch. D. 597; 50 L. J. Ch. 199.

Annotations:—Folld. *Re* Griffith's Will (1883), 49 L. T. 161; *Cottrell v. Cottrell* (1885), 28 Ch. D. 628.

1468. Tenant for life not entitled to income equal to rent—Deficiency partly made up from capital.]—*Re* BIRCH, *Ex p.* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1864), 10 L. T. 690; 10 Jur. N. S. 673.

1469. ——— Though income diminished.]—*Re* WOOD'S ESTATE (1870), L. R. 10 Eq. 572; 40 L. J. Ch. 59; 23 L. T. 430; 19 W. R. 59.

Annotations:—Consd. *Maddy v. Hale* (1876), 3 Ch. D. 327. *Folld.* *Re* Barber's Settled Estates (1881), 18 Ch. D. 624. *Refd.* *Re* Ranelagh's Will (1884), 26 Ch. D. 590.

1470. Tenant for life entitled to fixed proportion of capital—As will exhaust capital at expiration of lease.]—Where leaseholds which are taken by a railway co. are limited to a tenant for life & remainderman, the purchase-money paid for such leaseholds must be divided according to the number of years of the lease remaining unexpired

at the time of taking such lands, & the representatives of the tenant for life are entitled to the portions in respect of the years during which the tenant for life lived, & the residue is payable to the remainderman.—*Re* MONEY'S TRUSTS (1862), 2 Drew. & Sm. 94; 31 L. J. Ch. 496; 10 W. R. 399; 62 E. R. 556.

Annotations:—Consd. *Maddy v. Hale* (1876), 3 Ch. D. 327. *Refd.* *Re* Wood's Estate (1870), L. R. 10 Eq. 572.

1471. ——— Payable annually.]—Where a railway co. took leaseholds, whereof one was tenant for life *in specie*:—*Held*: the invested purchase-money, or so much as from time to time remained, & the interest thereon, should, in each year, be divided by the number of years which would have remained yet unexpired of the lease had it still existed, & the amount of the quotient should be paid yearly to the tenant for life.—*LITTLEWOOD v. PATTISON* (1864), 10 Jur. N. S. 875.

1472. ——— Payable half-yearly—Together with dividends.]—T. being entitled to a moiety in certain leaseholds, that interest was settled on her marriage, after reserving £40 a year thereout, on herself & husband & children. The Metropolitan Board of Works took the property under the Metropolis Improvement Act, 1863 (c. 45), & paid the money into ct. On petition to deal with the fund, ordered that sufficient of the purchase-money should be invested to produce the £40 a year, & the residue being also invested, & there being six & a quarter years of the lease to run, two twenty-fifths should be sold every half year to be paid to T. for her life, & also the dividends.—*Re* TREACHER'S SETTLEMENT (1868), 18 L. T. 810.

1473. ——— ——— ———.]—*Re* PFLEGER (1868), L. R. 6 Eq. 426.

Annotation:—Consd. *Askew v. Woodhead* (1880), 14 Ch. D. 27.

1474. Tenant for life not entitled to fixed proportion of capital—As will exhaust capital at expiration of lease.]—*Re* CHAMBERLAIN'S TRUSTS (1866), 10 Sol. Jo. 910.

1475. Tenant for life entitled to fixed annual sum—Made up of annual dividends & such proportion of capital—As will exhaust capital at date of expiration of lease—Annual sum ascertained by actuary.]—*Re* SEWELL'S ESTATE (1870), L. R. 11 Eq. 80; *sub nom.* *Re* LONDON & NORTH WESTERN RAILWAY (NEW WORKS & ADDITIONAL POWERS) ACT, 1869, *Re* SEWELL'S TRUSTS, 23 L. T. 835.

Annotation:—Mentd. *Re* Piteairn, *Brandreth v. Colvin*, [1896] 2 Ch. 199.

1476. Share of tenant for life—To be fixed by actuary.]—*Re* PHILLIPS' TRUSTS (1868), L. R. 6 Eq. 250.

Annotation:—Consd. *Askew v. Woodhead* (1880), 14 Ch. D. 27.

1477. Capital invested to produce annuity—For number of years lease would have run—Whether income greater or less than rent.]—Petitioner was entitled for life under a marriage settlement to leaseholds which had eight years to run. The trustees of the settlement had power to sell the leaseholds with his consent which he declined to give. The leaseholds were taken under Lands Act, 1845, & the proceeds of sale were paid into ct. & invested. The purchase-money was sufficient to provide an annuity for eight years of much larger amount than the net annual proceeds of the leaseholds:—*Held*: petitioner was entitled to receive

PART XI. SECT. 4, SUB-SECT. 1.

1464 i. Tenant for life entitled to income equal to rent—Deficiency in dividends made up from capital.]—*Re* WALSH'S TRUST (1881), 7 L. R. Ir. 554.—IR.

1464 ii. Tenant for life not entitled to

*income equal to rent—Deficiency in income not thrown on corpus.]—*Land under lease belonging to tenant for life & remaindermen was resumed. At the date of the resumption the land was under lease. The interest arising from the resumption moneys was less

than the amount of the annual rent:—*Held*: the tenant for life was only entitled to the interest on the purchase moneys, & was not entitled to throw deficiency of income on *corpus*.—*Re* SUTHERLAND (1910), 11 S. R. N. S. W. 5; 27 N. S. W. N. 217.—AUS.

Sect. 4.—Money deposited in respect of leases and reversions: Sub-sects. 1 & 2. Sects. 5, 6 & 7: Sub-sect. 1.]

an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leaseholds had to run.—*ASKEW v. WOODHEAD* (1880), 14 Ch. D. 27; 49 L. J. Ch. 320; 42 L. T. 567; 44 J. P. 570; 28 W. R. 874, C. A. *Annotations:—Folld. Re Hunt's Estate*, [1884] W. N. 181; *Re Lingard, Lingard v. Squirrel*, [1908] W. N. 107. *Refd. Re Simpson, Clarke v. Simpson*, [1913] 1 Ch. 277.

1478. ———— *—Re HUNT'S ESTATE*, [1884] W. N. 181.

1479. Part of purchase-money applied to repairs of copyhold house—Remainder invested & dividends paid to trustee.]—Re ALDRED'S ESTATE (1882), 21 Ch. D. 228; 51 L. J. Ch. 912; 46 L. T. 379; 30 W. R. 777.

Investment of purchase-money of leaseholds in other lands.]—See Sect. 2, sub-sect. 2, A., ante.

Leasehold interest & reversion sold for lump sum.]—See Nos. 2049, 2050, post.

1480. Annuity charged on leaseholds—Income of investments insufficient to pay annuity—Deficiency made up out of corpus.]—Re LONDON, BRIGHTON & SOUTH COAST RY. CO., Ex p. WILKINSON (1849), 3 De G. & Sm. 633; 19 L. J. Ch. 257; 14 L. T. O. S. 171; 11 Jur. 301; 64 E. R. 638.

Annotations:—Apld. Re Howarth, Howarth v. Makinson, [1909] 2 Ch. 19. *Refd. Re Boden, Boden v. Boden*, [1907] 1 Ch. 132.

1481. Expiration of lease during life of tenant for life—Tenant for life entitled to fund.]—Re BEAUF-FOY'S ESTATE (1852), 1 Sm. & G. 20; 22 L. J. Ch. 430; 20 L. T. O. S. 176; 16 Jur. 1081; 65 E. R. 9.

SUB-SECT. 2.—REVERSIONS.

1482. Lease at nominal rent—Income to accumulate—With liberty to apply.]—Re SOUTH WESTERN RAILWAY CO.'S ACTS, Ex p. LAMBERTH (RECTOR) (1846), 4 Ry. & Can. Cas. 231; 7 L. T. O. S. 221, L. C.

Annotation:—Refd. Ex p. St. Paul's Cathedral, London (1855), 3 Eq. Rep. 634.

1483. Lease containing covenant to lay out money—Tenant for life entitled to dividends.]—Re STEWARD'S ESTATE, Ex p. BRISCOE (1853), 1 Drew. 636; 1 W. R. 489; 61 E. R. 591.

Annotation:—Distd. Re Mette's Estate (1868), L. R. 7 Eq. 72.

1484. ——— Tenant for life entitled to dividends equal to rent—Residue to accumulate for reversioner.]—Re WOOTTON'S ESTATE (1866), L. R. 1 Eq. 589; 35 L. J. Ch. 305; 11 L. T. 125; 14 W. R. 469.

Annotations:—Folld. Re Mette's Estate (1868), L. R. 7 Eq. 72; *Re Wilkes' Estate* (1880), 16 Ch. D. 597; *Cottrell v. Cottrell* (1885), 28 Ch. D. 628.

1485. Income of investments exceeding rent—Lessors entitled to amount of rent—Residue of income to accumulate—Until expiration of term.]—Ex p. GLOUCESTER (DEAN & CHAPTER) (1850), 19 L. J. Ch. 400; 15 L. T. O. S. 520; 15 Jur. 239.

Annotations:—Consd. Ex p. Christchurch (1853), 23 L. J. Ch. 149. *Apprvd. Re Hampstead Junction Ry. Co., Ex p. Westminster* (1858), 5 Jur. N. S. 232.

1486. ———.]—Ex p. CHRISTCHURCH (DEAN & CHAPTER) (1853), 23 L. J. Ch. 149.

1487. ———.]—Ex p. BATTEL (DEAN) (1853), 21 L. T. O. S. 55; 1 W. R. 271.

1488. ——— Lease at rack rent by tenant for life & reversioner—Tenant for life entitled to amount of rent—Residue of income to accumulate—During residue of term.]—Re METTE'S ESTATE (1868), L. R. 7 Eq. 72; 38 L. J. Ch. 445.

Annotations:—Folld. Re Wilkes' Estate (1880), 16 Ch. D. 597. *Apld. Cottrell v. Cottrell* (1885), 28 Ch. D. 628.

1489. Reversion only valued—Rents to be paid during term—Reversioners entitled to whole income.]—Re WESTMINSTER (DEAN & CHAPTER), Re HAMPSTEAD JUNCTION RY. CO. (1858), 26 Beav. 214; 28 L. J. Ch. 144; 32 L. T. O. S. 115; 23 J. P. 563; 5 Jur. N. S. 232; 7 W. R. 81; 53 E. R. 879.

Annotation:—Refd. Ex p. St. Paul's (1863), 11 W. R. 482.

1490. Lessee continuing to pay rent to tenant for life—Dividends accumulated—Till expiration of lease.]—Re GRIFFITH'S WILL (1883), 49 L. T. 161.

1491. Land subject to renewable lease—Lessor not immediately entitled to rents—Not entitled to dividends—Until lease would have become renewable.]—Ex p. WINCHESTER (BP.) (1852), 10 Hare 137; 20 L. T. O. S. 28; 16 Jur. 649; 68 E. R. 87.

1492. ———.]—Re BATH & WELLS (BP.) (1853), 2 W. R. 1.

1493. ——— Lessor entitled to amount of rent—Remainder of dividends accumulated until expiration of lease.]—Ex p. CANTERBURY (ARCHBP.) (1851), 2 Eq. Rep. 728; 23 L. T. O. S. 219.

1494. ———.]—Ex p. MERTON COLLEGE (WARDEN, ETC.) (1862), 1 New Rep. 176.

Annotation:—Consd. Ex p. St. Paul's (1863), 1 New Rep. 553.

1495. ———.]—Ex p. ST. PAUL'S (DEAN & CHAPTER) (1863), 1 New Rep. 553; 11 W. R. 482.

1496. ——— Omission to renew owing to abortive notice to treat—Lands subsequently taken by other promoters—Lessor not entitled to payment out of purchase-money of fine omitted to be taken.]—Ex p. WESTMINSTER (DEAN & CHAPTER) (1851), 18 Jur. 1113.

1497. ——— Lessor entitled to periodical sum—Equal to amount of fine payable on renewal.]—Ex p. ST. PAUL'S (PRECENTOR) (1855), 1 K. & J. 538; 3 Eq. Rep. 634; 24 L. J. Ch. 395; 1 Jur. N. S. 414; 3 W. R. 430; 69 E. R. 573; *sub nom. Ex p. BELL* (PRECENTOR OF ST. PAUL'S CATHEDRAL, LONDON), 25 L. T. O. S. 93; 19 J. P. 324.

Annotations:—Apprvd. Re Hampstead Junction Ry., Ex p. Westminster (1858), 5 Jur. N. S. 232. *Folld. Ex p. St. Paul's* (1863), 11 W. R. 482.

1498. Charity lands subject to leases for lives—Income paid to trustees—Without accumulation.]—Ex p. ST. THOMAS'S CHURCH LANDS, BRISTOL, TRUSTEES (1870), 23 L. T. 135.

1499. ———.]—Ex p. TEMPLE CHURCH LANDS, BRISTOL, TRUSTEES (1870), 23 L. T. 135.

SECT. 5.—MONEY DEPOSITED IN RESPECT OF MINERALS.

1500. Compensation for minerals—Comprised in lease & rendered unworkable—Minerals capable of being won during life of existing tenant for life—Tenant for life entitled to whole compensation.]—Re BARRINGTON, GAMBLER v. LYON (1886), 33 Ch. D. 523; 56 L. J. Ch. 175; 55 L. T. 87; 35 W. R. 161; 2 T. L. R. 774.

Annotations:—Consd. & Distd. Re Robinson's Settlement Trusts, [1891] 3 Ch. 129. *Consd. Re Fullerton's Will*, [1906] 2 Ch. 138.

1501. ——— Money treated as rent accruing de die in diem—For residue of lease.]—CARDIGAN v. CURZON-HOWE (1898), 14 T. L. R. 550.

1502. ——— Tenant for life entitled to half yearly instalments—Representing royalties accruing due.]—Re FULLERTON'S WILL, [1906] 2 Ch. 138; 75 L. J. Ch. 552; 94 L. T. 667.

1503. ——— Tenant for life without impeachment for waste—Entitled to income only.]—Re ROBINSON'S SETTLEMENT TRUSTS, [1891] 3 Ch. 129; 60 L. J. Ch. 776; 65 L. T. 244; 39 W. R. 632. *Annotation:—Apld. Re Fullerton's Will*, [1906] 2 Ch. 138.

SECT. 6.—WHETHER PAYMENT INTO COURT OPERATES AS CONVERSION.

See Lands Act, 1845, ss. 69, 78.

1504. No conversion—Under special Act—Where owner has not assented—& no special provision in Act.]—MIDLAND COUNTIES RY. CO. v. OSWIN (1844), 1 Coll. 74; 3 Ry. & Can. Cas. 497; 13 L. J. Ch. 209; 2 L. T. O. S. 399; 8 Jur. 138; 63 E. R. 327.

*Annotations:—*Consd. *Re Stewart's Trusts* (1852), 22 L. J. Ch. 369. Distd. *Re Bagot's Settlement* (1862), 31 L. J. Ch. 772. Refd. *Re Harrop's Estate* (1857), 26 L. J. Ch. 516; *Kelland v. Fulford* (1877), 6 Ch. D. 491.

1505. ————.]—*Re STEWART* (1852), 1 Sm. & G. 32; 22 L. J. Ch. 369; 20 L. T. O. S. 87; 16 Jur. 1063; 1 W. R. 17; 65 E. R. 15.

*Annotation:—*Folld. *Re Harrop's Estate* (1857), 3 Drew. 726.

1506. ———— Where tenant for life entitled to remainder in fee—Intermediate limitations having failed.]—*Re HORNER'S ESTATE* (1852), 5 De G. & Sm. 483; 7 Ry. & Can. Cas. 373; 22 L. J. Ch. 369; 19 L. T. O. S. 199; 16 Jur. 1063; 64 E. R. 1209.

*Annotations:—*Consd. *Re Stewart's Trusts* (1852), 22 L. J. Ch. 369; *Re Harrop's Estate* (1857), 26 L. J. Ch. 516.

1507. ———— Infant convicted of felony—No forfeiture to Crown.]—*Re HARROP'S ESTATE* (1857), 3 Drew. 726; 26 L. J. Ch. 516; 29 L. T. O. S. 49; 21 J. P. 325; 3 Jur. N. S. 380; 5 W. R. 449; 61 E. R. 1080.

*Annotation:—*Refd. *Talbot v. Jevers*, [1917] 2 Ch. 363.

1508. ———— Sale by tenant for life with ultimate reversion in fee.]—*Re BAGOT'S SETTLEMENT* (1862), 31 L. J. Ch. 772; 6 L. T. 771; 10 W. R. 607.

1509. ———— Existence of fund overlooked—Accumulations pass as personalty.]—*DIXIE v. WRIGHT* (1863), 32 Beav. 662; 55 E. R. 260.

1510. ———— Under Lands Act, 1845, s. 69—Where infant seised in fee.]—*KELLAND v. FULFORD* (1877), 6 Ch. D. 491; 47 L. J. Ch. 94; 25 W. R. 506.

*Annotations:—*Refd. *Ex p. Castle Bytham & Mid. Ry.* (1894), 13 R. 21; *Re Morgan, Smith v. May*, [1900] 2 Ch. 474.

1511. ————.]—*DEARBERG v. LETCHFORD* (1895), 72 L. T. 489.

*Annotations:—*Refd. *Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752; *Re Nutt's Settlement*, *McLaughlin v. McLaughlin*, [1915] 2 Ch. 431.

1512. ———— Under Lands Act, 1845, s. 78—Owner a lunatic not so found.]—*Re TUGWELL* (1884), 27 Ch. D. 309; 53 L. J. Ch. 1006; 51 L. T. 83; 33 W. R. 132.

*Annotation:—*Mentd. *Re S. S. B.*, [1906] 1 Ch. 712.

1513. Conversion—Under Lands Act, 1845, s. 78—Owner a lunatic not so found.]—*Re CROSS'S ESTATE & EAST LINCOLNSHIRE RAILWAY ACT. Ex p. FLAMANK* (1851), 1 Sim. N. S. 260; 16 L. T. O. S. 532; 61 E. R. 101.

*Annotations:—*Consd. *Re Stewart* (1852), 1 Sm. & G. 32. Distd. *Re Harrop's Estate* (1857), 3 Drew. 726; *Re Bagot's Settlement* (1862), 31 L. J. Ch. 772. Consd. & N.F. *Re Tugwell* (1884), 27 Ch. D. 309. Mentd. *Cooke v. Dealey* (1855), 22 Beav. 196.

1514. Death of absolute owner after

PART XI. SECT. 6.

1. No conversion—As regards of married woman.]—Com] money, as regards the capacity of married women to deal with it, is regarded in equity as land.—*KEARNEY v. KEAN* (1879), 3 S. C. R. 332.—CAN.

1514.1. Conversion—Death of absolute owner after award.]—Where notice to treat has been given, & claim made by owner, & refused by co., & the money has been paid into ct. & possession taken by co., & the owner dies before payment out land is converted into money & the executor is entitled to the sums awarded.—*HOSKIN v. TORONTO*

GENERAL TRUSTS CO. (1886), 12 O. R. 480.—CAN.

PART XI. SECT. 7, SUB-SECT. 1.

g. To order payment out—To equitable mortgagee.]—*R.* deposited the title deeds of land with *M.* & gave him a memorandum acknowledging the debt. *R.* was never afterwards heard of. *A. co.* took the land under their Act & paid its value into a Bank to the credit of *R.* or other the person or persons interested in the land. On petition by *M.* that the money with all interest accrued might be paid to

award.]—*Re WOOTTON'S TRUSTS* (1862), 1 New Rep. 193; 7 L. T. 620.

Whether mere notice to treat operates as conversion.]—See Part VI., Sect. 2. sub-sect. 5, *H.*, ante.

Whether notice to treat followed by further acts operates as conversion.]—See Part X., Sect. 1, sub-sect. 1, ante.

SECT. 7.—APPLICATION TO COURT.

See Lands Act, 1845, ss. 70, 74.

SUB-SECT. 1.—JURISDICTION OF COURT ON APPLICATION.

1515. To settle dispute—As to title of land taken—On petition in matter of promoters' Act.]—*Re EASTERN COUNTIES RAILWAY ACT, Ex p. ISSAUCHAUD* (1839), 3 Y. & C. Ex. 721; 160 E. R. 892.

1516. ———— Not where title subject of inconclusive verdict of jury.]—*Ex p. SUNDERLAND (FREEMEN & STALLINGERS)* (1852), 1 Drew. 184; 22 L. J. Ch. 145; 18 L. T. O. S. 329; 16 Jur. 370; 61 E. R. 422.

—.]—*BRANDON v. BRANDON*, No. 1461, ante.

1518. ———— Question ordered to be tried by action of ejectment.]—*METROPOLITAN BOARD OF WORKS v. SANT* (1868), L. R. 7 Eq. 197; 38 L. J. Ch. 7; 19 L. T. 260; 17 W. R. 25.

1519. ———— Not while information by Crown against petitioner pending.]—A railway co. under the powers of its Act gave notice to a lord of the manor to take a piece of land on the seashore, which he claimed as part of the waste of his manor. The purchase-money was assessed by arbn., but an adverse claim having been made by the Crown, the co. paid the purchase-money into ct. under Lands Act, 1845, s. 76. The Crown filed an information against the lord of the manor claiming the land together with other land as part of the foreshore. The lord of the manor having filed a petition for payment of the purchase-money to him: —*Held:* as the Crown could not be brought before the ct. under Lands Act to contest the claim of petitioner, the petition ought to stand over till the information had been heard.—*Re LOWESTOFF MANOR & GREAT EASTERN RY. CO., Ex p. REEVE* (1883), 24 Ch. D. 253; 52 L. J. Ch. 912; 49 L. T. 523; 32 W. R. 309, C. A.

*Annotation:—*Mentd. *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101.

See, also, Nos. 902, 903, 905, 908, ante.

1520. To apportion fund—Title partly defective.]—*Re PERKS' ESTATE* (1853), 1 Sm. & G. 545; 7 Ry. & Can. Cas. 605; 2 W. R. 21; 65 E. R. 239.

1521. Claim as to part withdrawn by petitioners—Petitioners liable for costs of

him under Lands Act, ss. 76, 77 & 78: —*Held:* the ct. had no jurisdiction to make the order prayed.—*Re MELBOURNE & SUBURBAN RAILWAY ACT, 1857, Ex p. MURDOCH* (1862), 1 W. & W. 269.—AUS.

h. ———— To tenant for life—For purpose of improving the property.]—The ct. has no jurisdiction, on application of tenant for life, to pay him money in ct., on undertaking to lay it out in making roads on the property, for the purpose of improving & increasing value of the inheritance.—*Re BELFAST WATER COMRS.* (1870), 1 R. 5 Eq. 63.—IR.

Sect. 7.—Application to court: Sub-sects. 1 & 2, A., B., C., D. & E.; sub-sect. 3,

apportionment.]—*Re ALSTON'S ESTATE* (1856), 28 L. T. O. S. 337; 21 J. P. 163; 5 W. R. 189.

Annotation:—Reid. Re St. Pancras Burial Ground (1866), L. R. 3 Eq. 173.

— **Land taken subject to lease.]—See** Part XIII., Sect. 5, *post*.

— **Land taken subject to mortgage.]—See** Part XIII., Sect. 3, *post*.

1522. To order payment out—Money paid into court—In respect of glebe lands—No jurisdiction to deal with corpus.]—Ex p. KIDDERMINSTER (VICAR) (1859), 23 J. P. 756; 7 W. R. 482.

Annotation:—Mentd. Re Shakespeare Walk School (1879), 12 Ch. D. 178.

1523. ——— After decree for specific performance of agreement.]—GALLIERS v. METROPOLITAN RY. CO. (1871), L. R. 11 Eq. 410; 40 L. J. Ch. 544; 19 W. R. 795.

1524. To order payment of dividends—To one of two joint tenants for life—One a lunatic not so found—Direction in will for rents to be paid to one.]—Re SCOTT (1844), 3 L. T. O. S. 177, L. C.

1525. Statutory authority to deal with money “on petition”—Jurisdiction of court to proceed by bill not ousted.]—HYDE v. EDWARDS (1849), 12 Beav. 160; 13 L. T. O. S. 462; 13 Jur. 757; 50 E. R. 1021; *subsequent proceedings*, 12 Beav. 253; 1 Mac. & G. 410, L. C.

Annotation:—Mentd. Haynes v. Haynes (1861), 1 Drew. & Sm. 426.

See, also, No. 1519, post.

1526. To assess value of actual interest of claimant—Interest differing from that claimed. *BRANDON v. BRANDON*, No. 1461, *ante*.

1527. ———.]—Re NORTH LONDON RY. CO. (CITY BRANCH), Ex p. COOPER, No. 2044, *post*.

1528. To make lands purchased on reinvestment—Subject to same mortgages as lands taken.]—Re EASTERN COUNTIES RY. CO., Re LANDS CLAUSES CONSOLIDATION ACT, 1845, Ex p. PEYTON'S SETTLEMENT (1856), 2 Jur. N. S. 1013; 4 W. R. 380.

SUB-SECT. 2.—PROCEDURE.

A. To what Court Application must be made.

1529. Not necessarily to same branch of court—Application for outlay in farm buildings—Fund belonging to charity.]—Ex p. HAYTER'S TRUST TRUSTEES (1862), 10 W. R. 557.

See, also, No. 1532, post.

1530. To same branch of court—Application for payment out—Though relating also to fund in another branch of court.]—Lands were devised by A. & by B. upon trusts almost identical; a railway co. took part of A.'s lands, & an order for investment of the purchase-money was made by Stuart, V.C. Subsequently the co. took part of B.'s lands, & a similar order for investment was made by Wood, V.C. One petition for payment out of both funds was presented to Wood, V.C., who made the order, but entertained some doubt as to his jurisdiction:—*Held*: (1) all subsequent orders in a matter should be made where the first order was made; & (2) in dealing with both funds, that in Wood, V.C.'s jurisdiction should have been transferred to Stuart, V.C., to whom the application for payment out should then have been made.—

PART XI. SECT. 7, SUB-SECT. 2.—A.

j. To same branch of court.—Application for payment out to another branch—Order refused.]—A ry. co., being notified not to pay to certain

debtors, paid compensation into common pleas. The judgment creditors, having obtained judgment in ct. of Queen's Bench, attached the claim, & applied to take the money

Re BROWSE'S TRUSTS (1866), 14 L. T. 37; 12 Jur. N. S. 153; 14 W. R. 298, L. J.J.

Annotation:—As to (2) Reid. Carr v. Atkinson (1872), 20 W. R. 620.

1531. Where two funds already dealt with in separate branches—Second fund should be transferred—To branch where first fund dealt with.]—Re BROWSE'S TRUSTS, No. 1530, *ante*.

1532. ——— Both funds may be dealt with together—By leave.]—Where two funds paid into ct. under Lands Act, 1845, have been dealt with by different branches of the ct., & it is desired to deal with both funds at the same time, the ct. will give leave to present one petition in both matters in one branch of the ct., without transferring either of the matters.—Re ARDEN'S (LORD) ESTATES (1875), 10 Ch. App. 445; 24 W. R. 190, L. J.J.

B. Who may apply.

1533. Person entitled to rents—Not incumbrancer—Annuitant whose annuity charged on lands taken.]—Re ST. KATHERINE DOCK CO. (1828), 2 Y. & J. 386; 148 E. R. 968.

Annotation:—Reid. Re Marriage, Ex p. L. T. & S. Ry. & Eastern Counties & London & Blackwall Ry. (1861), 9 W. R. 777.

1534. ——— Not remainderman.]—NASH v. NASH (1868), 37 L. J. Ch. 927; 19 L. T. 256; 16 W. R. 1105.

— **Widow entitled for life or until remarriage—For payment to trustees.]—See** No. 1434, *ante*.

1535. Churchwardens & overseers of parish—In whom parish lands vested—As feoffees to charitable uses.]—Re STRATFORD BRIDGE IMPROVEMENT ACT, Ex p. ANNESLEY (1836), 2 Y. & C. Ex. 350; 6 L. J. Ex. Eq. 81; 160 E. R. 431.

Annotation:—Mentd. Re Paddington Charity (1838), 2 Jur. 344.

1536. Promoters—Taking transfer of mortgage.]—A railway co. having taken lands under their compulsory powers, & paid the purchase-money into ct., may take a transfer of a mtge. on the land & recover the purchase-money by virtue of it.—Re MARRIAGE, Ex p. LONDON, TILBURY & SOUTHBEND RY. CO. & EASTERN COUNTIES & LONDON & BLACKWALL RY. CO. (1861), 9 W. R. 843, L. J.J.

— **Whether entitled to money deposited.]—See** Sect. 3, sub-sect. 4, *ante*.

Land taken subject to mortgage.]—See, generally, Part XIII., Sect. 3, *post*.

C. Whether by Summons or Petition.

1537. Application for payment out—Arrears of dividends due to deceased tenant for life—By summons.]—Re JOLLIFFE'S ESTATE (1870), L. R. 9 Eq. 668; 23 L. T. 303.

1538. ——— R. S. C., Ord. 55, r. 2 (1)—After declaration of rights—By summons.]—Re BRANDRAM (1883), 25 Ch. D. 366; 53 L. J. Ch. 331; 49 L. T. 558; 32 W. R. 180.

Annotations:—Fold. Re Madgwick (1883), 53 L. J. Ch. 333. *Consd. Re Rhodes* (1886), 31 Ch. D. 499.

1539. ——— R. S. C., Ord. 55, r. 2 (2)—Person absolutely entitled to fund not exceeding £1,000—By summons.]—Re CALTON'S WILL (1883), 25 Ch. D. 240; 53 L. J. Ch. 329; 49 L. T. 566; 32 R. 167.

ns:—Reid. Re Maldstone & Ashford Rty., Re Bala & Festiniog Ry. (1883), 53 L. J. Ch. 127; *Re Barker*, [1884] W. N. 237.

out of ct., or an order on co. to pay it:—Held: the money being in the common pleas, the Queen's Bench could not interfere.—FRENCH v. LEWIS (1857), 16 U. C. R. 547.—CAN.

1540. —————.]—*Re* MADGWICK (1883), 25 Ch. D. 371; 53 L. J. Ch. 333; 49 L. T. 560; 32 W. R. 512.

1541. —————.]—*Ex p.* MAIDSTONE & ASHFORD RY. CO., *Ex p.* BALA & FESTINOG RY. CO. (1883), 25 Ch. D. 168; 53 L. J. Ch. 127; 49 L. T. 777; 32 W. R. 181.

Annotation :—*Folld.* *Re* Calton's Will (1883), 25 Ch. D. 240.

1542. ————— Cash & nominal value of securities together exceeding £1,000—By petition.]—*Re* HAWORTH, [1885] W. N. 48.

1543. ————— R. S. C., Ord. 55, r. 2 (7)—Not an application for interim & permanent investment—Though coupled with an undertaking to apply fund in building.]—*Ex p.* JESUS COLLEGE, CAMBRIDGE (1884), 50 L. T. 583.

Annotations :—*Refd.* *Re* Bethlehem & Bridewell Hospitals (1885), 30 Ch. D. 541; *Ex p.* Castle Bytham, *Ex p.* Mid. Ry., [1895] 1 Ch. 348.

1544. —————.]—*Re* TRUST, *Ex p.* BRADFORD CORPN. (1888), 58 L. T. 367. *See, also*, Nos. 1927–1931, *post*.

1545. Application for investment & payment of dividends—By summons.]—*Re* NEW RIVER COMPANY'S ACT, 1852, & LANDS CLAUSES CONSOLIDATION ACT, 1845, & BICKERTON HARGRAVE'S EN-TAILED ESTATE (1854), 23 L. T. O. S. 139.

1546. —————.]—*Ex p.* LONDON CORPN. (1883), 25 Ch. D. 384; 53 L. J. Ch. 6; 49 L. T. 437; 32 W. R. 87.

1547. Application for payment of dividends—Apportioned part of accrued dividends & future dividends—By summons.]—*Re* JOLLIFFE'S ESTATE (1870), L. R. 9 Eq. 668; 23 L. T. 303.

1548. Application involving construction of will—By petition.]—*Re* HICKS, *Ex p.* NORTH EASTERN RY. CO. (1894), 63 L. J. Ch. 568; 70 L. T. 529; 8 R. 319.

Discretion of court—R. S. C., Ord. 70, r. 1.]—*See* No. 1918, *post*.

D. Form of Petition.

1549. Title of petition for payment out—Under local Act incorporating Lands Act, 1845—Entitled in matter of both Acts.]—*Re* CLARKE'S ESTATE (1864), 10 L. T. 366.

Whether seal necessary—Company joined as co-petitioner.]—*See* No. 1576, *post*.

Petition for payment of dividends—To officers of corporation.]—*See* CORPORATIONS.

E. Service of Petition.

1550. For investment—Petition by rector—Proceeds of sale of glebe—Promoters need not be served.]—*Re* LEEDS & THIRSK RY. CO., *Ex p.* KIRKBY OVERBLOW (RECTOR) (1850), 19 L. J. Ch. 329.

1551. ————— Petition by occupant—Money paid into court under Lands Act, 1845, s. 79—Promoters only need be served.]—*Re* PERRY'S ESTATE (1855), 1 Jur. N. S. 917; *sub nom.* *Re* STERRY'S ESTATE, 3 W. R. 561.

1552. ————— Petition by promoters—Landowner need not be served.]—*Ex p.* CARMARTHEN & CARDIGAN RY. CO. (1863), 2 New Rep. 515.

1553. ————— Petition by tenant for life of leaseholds—Remainderman should be served—Although income less than rent.]—Where purchase-money has been paid in under Lands Act, 1845, in respect of lands let on lease at rack rent, & settled to the use of a tenant for life, with remainder over, it is proper to make the remainderman a resp. to a petition by the tenant for life for investment & payment of dividends, although the interest of the proposed investment of the money will be less than the rent reserved by the lease.—*Re* CRANE'S ESTATE (1869), L. R. 7 Eq. 322; 17 W. R. 3

1554. For reinvestment—In land—Petition by tenant for life—Cestuis que trust & trustees must be served.]—*Re* CHELTENHAM & GREAT WESTERN UNION RY. CO., *Ex p.* HOLLAND (1852), 18 L. T. O. S. 220.

1555. ————— Remainderman need not be served.]—The petition of a tenant for life under the Lands Act, 1845, for reinvestment in the purchase of land of the proceeds of settled property taken by a railway co. need not be served upon any person entitled in remainder.—*Re* BROWNE & OXFORD & BLECHLEY JUNCTION & BUCKINGHAMSHIRE RAILWAY ACTS, *Ex p.* STAPLES (1852), 1 De G. M. & G. 294; 6 Ry. & Can. Cas. 732; 21 L. J. Ch. 251; 18 L. T. O. S. 231; 16 Jur. 158; 42 E. R. 565, L. JJ.

Annotations :—*Consd.* *Re* Gore Langton's Estates (1874), 10 Ch. App. 330, n. *Refd.* *Re* Ground's Estate (1852), 1 W. R. 32.

1556. ————— Incumbrancers need not be served.]—*Re* HUNGERFORD (1855), 1 K. & J. 413; 1 Jur. N. S. 845; 69 E. R. 520.

Annotation :—*Consd.* *Re* Hatfield's Estate (1861), 29 Beav. 370.

1557. ————— Otherwise than in lands—Petition by tenant for life—Remainderman must be served.]—*Re* LEIGH'S ESTATE, No. 1329, *ante*.

1558. For payment of dividends—Petition by surviving tenant for life—Promoters need not be served.]—*Re* DRYLAND'S ESTATE (1853), 20 L. T. O. S. 216; 1 W. R. 139.

1559. ————— Petition by tenant for life—Lands taken mortgaged by tenant for life—Mortgagees need not be served.]—*Re* HUNGERFORD'S TRUST (1857), 3 K. & J. 455; 69 E. R. 1188.

Annotation :—*Refd.* *Re* Gore Langton's S. E., *Re* Bristol & North Somerset Ry., *Re* Bath Act 1870 (1875), 44 L. J. Ch. 405.

1560. For payment out—Petition by party entitled to aliquot share—Parties entitled to other shares need not be served.]—*Re* MIDLAND RY. CO. (1847), 11 Jur. 1095.

1561. ————— Petition by trustees with power of sale—Cestui que trust need not be served.]—*Re* EAST, *Ex p.* EAST (1853), 22 L. T. O. S. 197; 2 W. R. 111.

Annotation :—*Folld.* *Re* Thomas's Settlement. (1882), 45 L. T. 746.

1562. —————.]—*Re* THOMAS'S SETTLEMENT (1882), 45 L. T. 746; 30 W. R. 244.

————— Lands taken under Defence Acts.]—*See* CONSTITUTIONAL LAW.

Payment out of deposit.]—*See* Part VIII., Sect. 2, sub-sect. 3, C., *ante*.

SUB-SECT. 3.—PROOF OF TITLE OF APPLICANT.

A. On Application for Payment out.

1563. By affidavit—Verifying title—& showing exclusive right.]—*Re* FLEET-MARKET IMPROVEMENT ACT, *Ex p.* SHEARS (1828), 2 Y. & J. 493; 148 E. R. 1013, Ex. Ch. in Eq.

1564. ————— By person claiming as absolute owner—Though title to land objected to by promoters.]—*Ex p.* GRAINGE (1838), 3 Y. & C. Ex. 62; 2 Jur. 640; 160 E. R. 614.

1565. ————— Showing exclusive right in deponent—Statement that deponent not aware of any other interest insufficient.]—*Re* LANDS CLAUSES CONSOLIDATION ACT, *Ex p.* O'KEEFE (1847), 9 L. T. O. S. 436.

1566. —————.]—*Re* BRAYE (BARONESS) (1852), 9 Hare, App. I. vii.; 22 L. J. Ch. 285; 68 E. R. 758; *sub nom.* *Re* LONDON & NORTH WESTERN RY. CO., *Ex p.* BRAGE, 20 L. T. O. S. 176.

Annotation :—*Folld.* *Re* Milne's Estate (1863), 8 L. T. 199.

Sect. 7.—Application to court: Sub-sect. 3, A., B. & C.; sub-sects. 4 & 5. Part XII. Sect. 1: Sub-sect. 1, A. & B.]

1567. Of one of several petitioners—Verifying title of all.]—*Re VALE OF NEATH RAILWAY ACT, 1863, JERSEY v. JERSEY (1866), 14 L. T. 13.*

1568. Verdict in court of law insufficient—If inconclusive—Owing to failure to discharge onus of proof.]—*Ex p. SUNDERLAND (FREEMEN & STALLINGERS) (1852), 1 Drew. 184; 22 L. J. Ch. 145; 18 L. T. O. S. 329; 16 Jur. 370; 61 E. R. 422.*

1569. Proof of deed affecting title—Disentailing deed—Must be set out in petition—Or made an exhibit—Abstract insufficient.]—A railway co. having taken lands which were entailed & paid the purchase-money into ct. under Lands Act, 1845, it became necessary to execute a disentailing deed as to that portion, but it was made to embrace other & much larger properties. A petition was then presented to have the purchase-money paid out of ct., & an abstract of the disentailing deed was set out in the petition, & its execution proved by the attesting witness:—*Held*: the deed must either be fully set out or made an exhibit.—*Re FIELD'S ESTATE (1863), 8 L. T. 722; 11 W. R. 927.*

Payment out to tenants in tail generally, see Sect. 3, sub-sect. 3, A., *ante*.

1570. — Proof of handwriting of attesting witnesses—Sufficient proof of execution.]—*Re MAIR'S ESTATE (1873), 42 L. J. Ch. 882; 28 L. T. 760; 21 W. R. 749.*

See, also, No. 1578, post.

Proof of title by adverse possession.]—*See Sect. 3, sub-sect. 1, ante.*

1571. Where title to lands taken disputed—Reference as to title refused—Action of ejectment ordered.]—*METROPOLITAN BOARD OF WORKS v. SANT (1868), L. R. 7 Eq. 197; 38 L. J. Ch. 7; 19 L. T. 260; 17 W. R. 25.*

B. On Application for Investment and Payment of Dividends.

1572. Tenant for life—By affidavit—That solely entitled.]—*Re MILNE'S ESTATE (1863), 1 New Rep. 516; 8 L. T. 199.*

1573. — Too infirm to make affidavit—Affidavit by solicitor sufficient.]—*Re HALSEY'S ESTATE (1870), 22 L. T. 11.*

See, also, No. 1577, post.

1574. Corporation—College—Affidavit of title required.]—*Ex p. ST. MARY'S COLLEGE, WINCHESTER (WARDEN, SCHOLARS & CLERKS) (1866), 14 L. T. 543; 14 W. R. 788.*

1575. — — — Affidavit of sole right dispensed with.]—*Re MAGDALEN COLLEGE, OXFORD (PRESIDENT ETC.) (1880), 42 L. T. 822.*

1576. Charity trustees—Affidavit of title by clerk sufficient.]—(1) Where the trustees of a charity petitioned for the investment & payment of dividends of a fund in ct. under the Lands Act,

1845, the affidavit of no incumbrances was accepted as sufficient, though made by their clerk, & not by the petitioners themselves, as required by Consolidated Order 34, s. 3.

(2) Where a co. are joined as co-petitioners, but the petition asks no payment to them, it need not bear the co.'s seal.—*Re CHARITY OF KING EDWARD VI.'S ALMSHOUSES AT SAFFRON WALDEN (1868), 37 L. J. Ch. 664; 19 L. T. 80; 16 W. R. 841.*

1577. When affidavit dispensed with—Not though tenant for life old & infirm—& promoters consenting to petition.]—*Re EASTERN COUNTIES RY. CO., Ex p. HOLICK (1846), 4 Ry. & Can. Cas. 498; sub nom. Re ELY, BRANDON & PETERBOROUGH RAILWAY ACT, Ex p. HOLICK, 16 L. J. Ch. 71; 9 J. P. Jo. 115.*

See, also, No. 1573, ante.

1578. Proof of execution of deed—Money to be applied in paying off incumbrance—Proof by attesting witness of mortgage deed required—In ex parte cases.]—*Re REAY'S ESTATE (1855), 3 Eq. Rep. 512; 24 L. T. O. S. 323; 1 Jur. N. S. 222; 3 W. R. 312.*

Annotations:—N.F. Re Mair's Estate (1873), 42 L. J. Ch. 882. Refd. Jearrad v. Tracey (1862), 11 W. R. 97; Re Dierden's Arbitration (1864), 4 New Rep. 394; Worthington v. Moore (1891), 64 L. T. 338.

See, now, Criminal Procedure Act, 1865 (c. 18), s. 7.

See, also, Nos. 1569, 1570, ante.

Application of money in payment off of incumbrances generally.]—*See Sect. 2, sub-sect. 1, ante.*

Proof of title by adverse possession.]—*See Sect. 3, sub-sect. 1, ante.*

Mortgagees in possession.]—*See No. 1385,*

C. On Application for Payment of Dividends.

1579. Party claiming under will—On production of probate copy—Supported by affidavit of correctness—Where sum involved small.]—*Re LOWNDES' TRUST (1851), 20 L. J. Ch. 422.*

1580. Tenant for life—Affidavit of sole right—Not required.]—*Re BRAYE (BARONESS) (1852), 9 Hare. App. I, vii; 22 L. J. Ch. 285; 68 E. R. 758; sub nom. Re LONDON & NORTH WESTERN RY. CO., Ex p. BRAGE, 20 L. T. O. S. 176.*

Annotation:—Folld. Re Milne's Estate (1863), 8 L. T. 199.

1581. — — — — —.]—*Re SMITH'S LEASEHOLDS (1866), 14 W. R. 949.*

Jurisdiction of court.]—*See No. 1524, ante.*

Proof of title by adverse possession.]—*See Sect. 3, sub-sect. 1, ante.*

SUB-SECT. 4. — FORM OF ORDER.

See Sect. 2, sub-sect. 2, D., ante.

SUB-SECT. 5.—COSTS OF APPLICATION

See Part XII., post.

Part XI Costs when Money Deposited Liability of Promoters.

SECT. 1.—JURISDICTION OF COURT TO ORDER COSTS.

SUB-SECT. 1.—UNDER LANDS ACT, 1845.

See Lands Act, 1845, s. 80.

A. In General.

1582. "Purposes aforesaid"—Confined to s. 80.]

-Re BUCKINGHAMSHIRE RAILWAY ACT, 1847, *Ex p.* MIDDLE CLAYDON TRUST (1850), 16 L. T. O. S. 123; 14 Jur. 1065.

Annotations:—Distd. *Re* L. B. & S. C. Ry. (1854), 18 Beav. 608. *Folld.* *Ex p.* Melward (1859), 27 Beav. 571; *Re* Whitfield (1861), 7 Jur. N. S. 909. *Distd.* *Re* Kent Coast Ry., *Ex p.* Canterbury (1862), 7 L. T. 240; *Re* Lathropp's Charity (1866), L. R. 1 Eq. 467.

1583. ———.] -Re OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., *Ex p.* MELWARD (OR MILWARD) (1859), 27 Beav. 571; 29 L. J. Ch. 245; 1 L. T. 153; 6 Jur. N. S. 478; 51 E. R. 226.

Annotations:—N.F. *Re* Lathropp's Charity (1866), L. R. 1 Eq. 467. *Refd.* *Re* Kent Coast Ry., *Ex p.* Canterbury (1862), 7 L. T. 240.

1584. Money deposited under s. 85.] -Re LONDON, BRIGHTON & SOUTH COAST RY. CO., *Ex p.* FLOWER (1866), 1 Ch. App. 599; 36 L. J. Ch. 193; 15 L. T. 258; 12 Jur. N. S. 872; 14 W. R. 1016, L. J. J.

Annotations:—Folld. *Ex p.* Morris (1871), L. R. 12 Eq. 418. *Consd.* *Re* Mutfow's Estate (1878), 10 Ch. D. 131. *Refd.* *Ex p.* Neath & Brecon Ry. (1874), 43 L. J. Ch. 277.

1585. Entry under s. 85—After notice to treat—"Lands taken or purchased."—CHARLTON *v.* ROLLESTON (1884), 28 Ch. D. 237; 54 L. J. Ch. 233; 51 L. T. 612; 1 T. L. R. 51, C. A.

1586. Although arbitrator empowered to award costs—Under special Act.] -Re PARDOE'S ACCOUNT & EPPING FOREST ACT, 1878, [1882] W. N. 33.

B. Incorporation of Acts.

1587. General rule—"Act incorporated therewith." (1) Lands which were settled, & under the trusts of which several persons were entitled absolutely, were taken by a railway co. for the purposes of their line, & the money was paid into ct. under the special Act. The Act provided that the co. should pay the costs of a reinvestment in land, but provided for nothing more. This co. was amalgamated with two other cos., & the three were constituted one co., & it was provided that any sums which were paid into ct. by any of the three cos. should be applied & disposed of according to their respective special Acts, which special Acts were declared to remain in force for such purposes, & Lands Act, 1845, was incorporated with the amalgamation Act, subject to such provisions as to costs. The parties entitled to the money representing the land sold, petitioned for payment of same out of ct., & that the amalgamated co. might pay the costs:—*Held*: the money should be paid out of ct., & the co. should pay the costs.

(2) Where a railway co.'s special Act contains certain provisions & by an Act amalgamating the railway with another the special Act is repealed, but its provisions are adopted in the amalgamation Act, the latter Act is an Act incorporated with the special Act within the meaning of Lands Act, 1845, s. 80.—*Re* ELLISON'S ESTATE (1856), 8 De G. M. & G. 62; 25 L. J. Ch. 379; 26 L. T. O. S. 267; 2 Jur. N. S. 293; 4 W. R. 306; 44 E. R. 312, L. J. J.

Annotation:—As to (1) *Folld.* *Ex p.* Keel, Comrs. of England (1865), 11 Jur. N. S. 461.

1588. Promoters not liable under original Act prior to Lands Act, 1845—Subsequent amalgamation Act—Incorporating Lands Act, 1845—Promoters ordered to pay costs.] -Re LONDON & BIRMINGHAM RAILWAY CO.'S ACT, 1833, *Re* LONDON & NORTH WESTERN RAILWAY CO.'S ACT, 1846, *Ex p.* ETON COLLEGE (1850), 20 L. J. Ch. 1; 16 L. T. O. S. 121; 15 Jur. 45, L. C.

Annotations:—Distd. *Re* Holden's Estate (1855), 25 L. J. Ch. 382, n.; *Re* Neachell's Trusts (1855), 25 L. T. O. S. 280. *Folld.* *Re* Ellison's Estate (1856), 8 De G. M. & G. 62. *Mentd.* *L. & Y. v. Evans* (1851), 15 Beav. 322; *St. Thomas' Hospital v. Charing Cross Ry.* (1861), 7 Jur. N. S. 256.

1589. ———.] -Re BRISTOL DOCK ACT & COLSTON ALMSHOUSES, *Ex p.* SOCIETY OF MERCHANTS (1853), 21 L. T. O. S. 17.

1590. ———. Promoters not ordered to pay costs.] -Re NEACHELL'S TRUSTS (1855), 25 L. J. Ch. 382, n.; 25 L. T. O. S. 280; 3 W. R. 634.

1591. ———.] -Re HOLDEN'S ESTATE (1855), 25 L. J. Ch. 382, n.; 26 L. T. O. S. 13; 1 Jur. N. S. 995; 3 W. R. 644.

1592. ———. Subject to provisions as to costs.] -Re ELLISON'S ESTATE, No. 1587, *ante*.

1593. ———. Not incorporating Lands Act, 1845—Promoters not ordered to pay costs.] -Re DONCASTER'S ESTATE (1855), 25 L. J. Ch. 381, n.; 3 W. R. 635, n.

Annotation:—Refd. *Re* Neachell's Estate (1855), 25 L. T. O. S. 280.

1594. Whether Lands Act, 1845, s. 80, incorporated in subsequent Act—General rules of determination.] -If the special Act, being subsequent in date to Lands Act, 1845, under which cos. & trustees of public undertakings are authorised to take land, itself gives a complete rule on the subject of the payment of costs, not only of purchases of land, but of the reinvestment of the purchase-money, the operation of the rule contained in s. 1, which provides that the Act shall, without the necessity of any further enactment, be incorporated in the special Act, is excluded. If the special Act gives only a partial rule, *e.g.*, if it provides only for the costs of the reinvestment of purchase-money paid into ct., omitting all provision as to the costs of the original purchase of the land, the provisions of Lands Act, 1845, with regard to the omitted portion of the subject, will be held to apply.—*Re* WESTMINSTER ESTATE OF ST. SEPULCHRE, LONDON, *Re* WESTMINSTER BRIDGE ACTS, 1853 & 1859, & 9 & 10 VICT. c. 39, *Ex p.* ST. SEPULCHRE (VICAR & CHURCHWARDENS) (1864), 4 De G. J. & Sm. 232; 3 New Rep. 591; 33 L. J. Ch. 372; 9 L. T. 819; 10 Jur. N. S. 298; 12 W. R. 499; 46 E. R. 907, L. C.

Annotations:—Consd. *Re* Wood's Estate, *Ex p.* Works & Buildings Comrs. (1886), 31 Ch. D. 607. *Refd.* *Re* Mercoron (1877), 7 Ch. D. 181. *Mentd.* *Re* St. Dunstan's Charity Schools (1871), 24 L. T. 613; L. C. & D. Ry. *v.* Wandsworth Board of Works (1873), L. R. 8 C. P. 185; *The Tynwald*, [1895] P. 143.

1595. ———. Subsequent Act retaining enactments of former Act—Lands Act, 1845, excluded.] -Re CHERRY'S SETTLED ESTATES (1862), 4 De G. F. & J. 332; 31 L. J. Ch. 351; 6 L. T. 31; 8 Jur. N. S. 446; 10 W. R. 305; 45 E. R. 1211, L. C.

Annotations:—Expld. *Re* Westminster Estate of St. Sepulchre, London, *Ex p.* St. Sepulchre (1864), 4 De G. J. & Sm. 232. *Distd.* *Re* St. Katherine's Dock Co. (1866), 14 W. R. 978. *Folld.* *Re* St. Dunstan-in-the-West Charity Schools (1871), L. R. 12 Eq. 537. *Apprvd.* *Re*

L. T. 62; 42 W. R. 241; 38 Sol. Jo. 190; 7 R. 97, C. A.

Annotations:—*Consd. Re Schmarr*, [1902] 1 Ch. 326. *Reid. Re Arden* (1894), 70 L. T. 506; *Re Wrexham Mold & Connah's Quay Ry.*, [1900] 1 Ch. 261; *Dartford Brewery Co. v. Moseley*, [1906] 1 K. B. 462.

1605. Whether new jurisdiction to award costs acquired—When no antecedent jurisdiction.]—*Re WOOD'S ESTATE, Ex p. WORKS & BUILDINGS COMRS.*, No. 1596, *ante*.

1606. ——— Mode in which costs dealt with regulated—R. S. C., 1875, Ord. 55.]—*Re MILLS' ESTATE, Ex p. WORKS & PUBLIC BUILDINGS COMRS.*, No. 1597, *ante*.

1607. Discretionary power to order payment—In cases excepted by Lands Act, 1845, s. 80—Judicature Act, 1890 (c. 44), s. 5.]—(1) Notwithstanding that in Lands Act, 1845, s. 80, certain cases are excepted from the power thereby given to the ct. to order costs to be paid by the promoters of an undertaking when money has been deposited in ct., the ct. has now by Jud. Act, 1890, s. 5, a discretionary power to order payment of costs in the excepted cases.

(2) The sheriff's costs of a warrant to give possession of land, incurred after payment of the purchase-money into ct. by the promoters, by reason of the wilful default of the owner to make out a title to the property, were ordered to be paid out of the fund in ct.—*Re SCHMARR*, [1902] 1 Ch. 326; 71 L. J. Ch. 219; 86 L. T. 71; 50 W. R. 245; 18 T. L. R. 270; 46 Sol. Jo. 229, C. A.

2. OUT OF WHAT FUND COSTS PAYABLE.

1608. Deposit under Lands Act, 1845, s. 85—Not subject to lien for costs of vendor.]—(1) The sum deposited by a railway co. in ct. under Lands Act, 1845, s. 85, is not subject to any lien for the costs of the vendor, but upon due performance of the condition of the bond mentioned in the sect. the co. are entitled to have the money paid out to them notwithstanding the pendency of a question between them & the vendor with respect to such costs.

(2) A party served with a petition does not forfeit his right to the costs of his appearance merely because his counsel at the hearing has raised an unsuccessful opposition to the prayer.—*Re LONDON & SOUTH WESTERN RAILWAY EXTENSION ACT, Ex p. STEVENS* (1848), 2 Ph. 772; 5 Ry. & Can. Cas. 437; 13 L. T. O. S. 338; 13 Jur. 2; 41 E. R. 1142, L. C.

Annotations:—*As to* (1) *Expld. Re Tottenham & Hampstead Junction Ry.* (1866), 14 W. R. 669. *Apld. Re Neath & Brecon Ry.* (1874), 9 Ch. App. 263. *Reid. Re Pollock, Ex p. Windsor, Staines, & S. W. Ry.* (1849), 13 Jur. 760; *Re Mutlow's Trusts* (1878), 27 W. R. 245.

1609. ———.]—*Ex p. GREAT NORTHERN RY. CO.* (1848), 16 Sim. 169; 5 Ry. & Can. Cas. 269; 11 L. T. O. S. 285; 12 Jur. 885; 60 E. R. 837, L. C.

1610. ——— Purchase abandoned with concurrence of owner.]—*Ex p. BIRMINGHAM, WOLVERHAMPTON & DUDLEY RY. CO.* (1863), 1 Hem. & M. 772; 71 E. R. 338.

1611. ———.]—*Re NEATH & BRECON RY. CO.* (1874), 9 Ch. App. 263; 43 L. J. Ch. 277; 30 L. T. 3; 22 W. R. 242, L. J.J.

Annotation:—*Reid. Re Mutlow's Estate* (1878), 10 Ch. D. 131.

1612. Fund arising from sale—Under London Bridge Act, 1829—Tenant for life not entitled—

Costs of surveying & valuation of property.]—*Re LONDON BRIDGE ACTS, Ex p. PASMORE* (1834), 1 Y. & C. Ex. 75; 4 L. J. Ex. Eq. 17; 160 E. R. 32. *Annotation*:—*Expld. Re Laws* (1847), 1 Exch. 441.

1613. ——— Trustees entitled—Necessary expenses in valuing & computing compensation.]—*Re LONDON BRIDGE ACT* (1834), 4 L. J. Ex. Eq. 17.

1614. ——— Trustees not entitled—Costs arising from sale.]—*Re LONDON BRIDGE ACTS, Ex p. TOWGOOD* (1835), 1 Y. & C. Ex. 588; 5 L. J. Ex. Eq. 97; 160 E. R. 240.

1615. Fund invested in Consols—Promoters ordered to pay costs—Insolvency before full payment—Sale of part of fund invested.]—*Re GREAT YELDHAM GLEBE LANDS* (1869), L. R. 9 Eq. 68; 21 L. T. 481; *sub nom. Re COLNE VALLEY & HALSTEAD RY. CO., Re GREAT YELDHAM GLEBE LANDS*, 18 W. R. 84.

SECT. 3.—COSTS ON “WILFUL REFUSAL” TO CONVEY, RECEIVE PURCHASE-MONEY, ETC.

1616. What amounts to “wilful refusal”—Vendor insisting on payment of costs & purchase-money before giving possession—Dispute as to amount of costs—Refusal to receive purchase-money.]—*Re TURNER'S ESTATE & METROPOLITAN RAILWAY ACT, 1860* (1861), 5 L. T. 524; 10 W. R. 128.

1617. ——— Order for purchase confirmed under Small Holdings & Allotments Act, 1908 (c. 36)—Refusal to convey on advice of counsel—Doubting validity of order.]—*Re JONES & CARDIGANSHIRE COUNTY COUNCIL* (1913), 57 Sol. Jo. 374.

1618. What does not amount to “wilful refusal”—Owner disputing validity of award of purchase-money—Objection not capricious nor unsubstantial.]—*Re EAST INDIA DOCKS & BIRMINGHAM JUNCTION RAILWAY ACT, Ex p. BRADSHAW* (1848), 16 Sim. 174; 5 Ry. & Can. Cas. 432; 17 L. J. Ch. 454; 12 Jur. 888; 60 E. R. 839.

Annotation:—*Reid. Re Ryde Comrs., Ex p. Dashwood* (1856), 26 L. J. Ch. 299.

1619. ———.]—*Re METROPOLITAN DISTRICT RY. CO., Ex p. LAWSON* (1869), 17 W. R.

1620. ——— Vendor insisting on simultaneous completion of lease by promoters.]—*Re WINDSOR, STAINES & SOUTH WESTERN RAILWAY ACT* (1850), 12 Beav. 522; 50 E. R. 1161.

Annotation:—*Reid. Re Ryde Comrs., Ex p. Dashwood* (1856), 26 L. J. Ch. 299.

1621. ——— Refusal to appear before jury summoned to ascertain value—On ground of insufficient notice.]—*Ex p. RAILSTONE* (1851), 18 L. T. O. S. 134; 15 Jur. 1028.

Annotation:—*Reid. Re Ryde Comrs., Ex p. Dashwood* (1856), 5 W. R. 125.

1622. ——— Vendor unable to convey on account of unpaid incumbrances—Of larger amount than land taken.]—*Re CRYSTAL PALACE RY. CO., Re DIVERS* (1855), 1 Jur. N. S. 995.

1623. ——— Owner disputing right of purchasers to take—On advice of counsel.]—*Re RYDE COMRS., Ex p. DASHWOOD* (1856), 26 L. J. Ch. 299; 28 L. T. O. S. 187; 3 Jur. N. S. 103; 5 W. R. 125.

1624. ——— Refusal of land society to stamp reconveyances from allottees—Offer of joint conveyance by trustees of society & allottees.]—*Ex p. BIRKBECK FREEHOLD LAND SOCIETY* (1883), 24 Ch. D. 119; 52 L. J. Ch. 777; 49 L. T. 265; 31 W. R. 716.

PART XII. SECT. 3.

k. What does not amount to “wilful refusal”—Refusal to convey by

*mortgagee.]—*A mtgee. refused to join in a conveyance of lands purchased under compulsory powers:—*Held*: the mtgor. was not disentitled thereby to

any part of the costs necessarily payable to him under Lands Act, 1845.—*O'BRIEN v. POOR LAW COMRS.* (1856), 9 Ir. Jur. 97.—*IR.*

Sect. 3.—Costs on “wilful refusal” to convey, receive purchase-money, etc. Sect. 4: Sub-sects. 1, 2, 3 & 4. Sect. 5: Sub-sects. 1, 2, 3, 4 & 5.]

1625. — Vendors holding under agreement for sale—Refusal to furnish abstract of title.]—*Re* ST. LUKE'S VESTRY, MIDDLESEX, & LONDON SCHOOL BOARD, [1889] W. N. 102.

1626. — Legal estate in Official Trustee of Charity Lands—Official Trustee not bound to receive purchase-money tendered.]—*Re* LEEDS GRAMMAR SCHOOL, [1901] 1 Ch. 228; 70 L. J. Ch. 89; 83 L. T. 499; 65 J. P. 88; 49 W. R. 120; 45 Sol. Jo. 78.

1627. Sheriff's costs to give possession—On wilful refusal to receive purchase-money—Payable by vendor.]—*Re* TURNER'S ESTATE & METROPOLITAN RAILWAY ACT, 1860 (1861), 5 L. T. 524; 10 W. R. 128.

1628. — On wilful neglect to make out title—Payable out of fund in court.]—*Re* SCHMARR, No. 1607, *ante*.

SECT. 4.—COSTS OF PURCHASING AND TAKING LAND.

See Lands Act, 1845, ss. 24, 34, 51, 67, 80, 82, 83.

SUB-SECT. 1.—ADDITIONAL COSTS OF

1629. Lands of lunatic—Sale by committee—Reference to master—Costs & expenses incidental to—Promoters liable.]—*Re* TAYLOR (1849), 1 H. & Tw. 432; 1 Mac. & G. 210; 6 Ry. & Can. Cas. 741; 47 E. R. 1480, L. C.

Annotations:—Distd. Ex p. Stevens (1851), 15 Jur. 243. **Expld. & Distd.** *Re* North Staffordshire Ry., *Ex p. Alsager Incumbent* (1854), 22 L. T. O. S. 314. **Consd.** *Haynes v. Barton* (1861), 1 Drew. & Sm. 483.

1630. Land subject of administration suit—Reference to master—Costs, charges & expenses of petition & reference—Promoters liable.]—*PICARD v. MITCHELL* (1850), 12 Beav. 486; 50 E. R. 1147.

Annotations:—Distd. Re North Staffordshire Ry., *Ex p. Alsager Incumbent* (1854), 22 L. T. O. S. 314. **Apld.** *Re* Manchester & Leeds Ry., *Henniker v. Chafy* (1860), 28 Beav. 621. **Consd.** *Haynes v. Barton* (1861), 1 Drew. & Sm. 483. **Apld.** *Re* L. & S. W. Ry. Act, 1855 (1862), 2 John. & H. 390; *Sidney v. Wilmer* (1862), 31 Beav. 338.

1631. — Costs of all parties obtaining orders in suit—Costs of application for transfer of fund into suit—Promoters not parties to proceedings—Promoters liable.]—*EGREMONT (LORD) v. THOMPSON* (1858), cited in 7 Jur. N. S. 89.

Annotation:—Folld. Henniker v. Chafy (1860), 28 Beav.

1632. — — — — —.]—*HENNIKER v. CHAFY, Re* MANCHESTER & LEEDS RY. (1860), 28 Beav. 621; 7 Jur. N. S. 87; 54 E. R. 505; *subsequent proceedings, sub nom. HENNIKER v. CHAFY* (1865), 35 Beav. 124.

Annotations:—Apld. Sidney v. Wilmer (1862), 31 Beav. 338; *Paterson v. Paterson* (1864), 3 New Rep. 657.

1633. — All costs rendered necessary by suit—Promoters liable.]—*HAYNES v. BARTON* (1861), 1 Drew. & Sm. 483; 30 L. J. Ch. 804; 4 L. T. 764; 7 Jur. N. S. 699; 9 W. R. 777; 62 E. R. 463.

Annotations:—Distd. Re L. & S. W. Ry., *Ex p. Phillips* (1862), 7 L. T. 452. **Apld.** *Re* Braye (1863), 9 Jur. N. S. 454; *Paterson v. Paterson* (1864), 3 New Rep. 657. **Folld.** *Haynes v. Barton* (1866), L. R. 1 Eq. 422.

1634. — — — — —.]—*HAYNES v. BARTON* (1866), L. R. 1 Eq. 422; 35 L. J. Ch. 233; 13 L. T. 787; 14 W. R. 257.

Annotation:—Apld. Re English's Settlement. (1888), 39 Ch. D.

1635. Charity lands—Costs of settling new scheme—Too remote—Promoters not liable.]—*Re* ST. PAUL'S SCHOOLS, FINSBURY (1883), 52 L. J. Ch. 454; 48 L. T. 412; 31 W. R. 424.

Annotation:—Distd. Re Wood Green Gospel Hall Charity, *Ex p. Middlesex County Council*, [1909] 1 Ch. 263.

1636. — — — — — Direct result of taking of land—Promoters liable.]—*Re* WOOD GREEN GOSPEL HALL CHARITY, *Ex p. MIDDLESEX COUNTY COUNCIL*, [1909] 1 Ch. 263; 78 L. J. Ch. 193; 100 L. T. 194.

1637. Form of order.]—*Re* HAYWARD'S ESTATE, *Ex p. ST. JAMES, GARLICKHITHE (RECTOR & CHURCHWARDENS)* (1863), 9 L. T. 320; 9 Jur. N. S. 1222.

Costs of conveyance.]—*See* Part X., Sect. 2, sub-sect. 2, B., *ante*.

SUB-SECT. 2.—ABORTIVE PROCEEDINGS.

1638. Costs of assessing compensation—Summoning of jury for Price fixed by subsequent agreement—Promoters liable.]—*Ex p. MORRIS* (1871), L. R. 12 Eq. 418; 40 L. J. Ch. 543; 19 W. R. 943; *sub nom. Re* MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO., *Ex p. MORRIS*, 25 L. T.

Annotation:—Refd. Re Mutlow's Trusts (1878), 27 W. R. 245.

See, generally, Part VII., Sect. 5, sub-sect. 12, Sect. 6, sub-sect. 9, ante.

SUB-SECT. 3. APPORTIONMENT OF RENTS.

1639. Incidental to ascertainment of price—Agreement to pay sum equal to thirty-five years' purchase on ground rents—Promoters not liable.]—*Re* HAMPSTEAD JUNCTION RY. CO., *Ex p. BUCK* (1863), 1 Hem. & M. 519; 3 New Rep. 110; 33 L. J. Ch. 79; 9 L. T. 374; 9 Jur. N. S. 1172; 12 W. R. 100; 71 E. R. 227.

Annotation:—Refd. Ex p. Morris (1871), L. R. 12 Eq. 418.

1640. Rendered necessary by purchase—Land subject to building leases—Promoters liable.]—*Re* LONDON, BRIGHTON & SOUTH COAST RY. CO., *Ex p. FLOWER* (1866), 1 Ch. App. 599; 36 L. J. Ch. 193; 15 L. T. 258; 12 Jur. N. S. 872; 11 W. R. 1016, L. J.

Annotations:—Apld. Ex p. Morris (1871), L. R. 12 Eq. 418. **Consd.** *Ex p. Neath & Brecon Ry.* (1874), 43 L. J. Ch. 277. **Mentd.** *Re* Mutlow's Estate (1878), 10 Ch. D. 131.

SUB-SECT. 4.—PARTIES.

General costs of purchasing & taking lands.]—*See* Sect. 4, sub-sects. 1, 2, 3, *ante*.

1641. Sale by committee of lunatic—Costs of attendance of heir-at-law—Before master & on petitions—Promoters liable.]—*Re* WALKER (A LUNATIC), *Ex p. MANCHESTER & LEEDS RY. CO.* (1851), 7 Ry. & Can. Cas. 129; 20 L. J. Ch. 474; 15 Jur. 161, L. C.

Annotation:—Refd. Ex p. Stevens (1851), 15 Jur. 243.

1642. — — — Costs of attendance of next of kin—At sale Promoters liable.]—*Re* BRISCOE (1864), 2 De G. J. & Sm. 249; 4 New Rep. 311; 10 Jur. N. S. 859; 46 E. R. 371, L. J.

1643. Land subject to pending suit—All parties necessarily served—Promoters liable for costs of service & appearance.]—*HAYNES v. BARTON* (1866), L. R. 1 Eq. 422; 35 L. J. Ch. 233; 13 L. T. 787; 14 W. R. 257.

Annotation:—Consd. Re English's Settlement. (1888), 39 Ch. D.

SECT. 5.—COSTS OF INTERIM INVESTMENT.

See Lands Act, 1845, s. 80.

SUB-SECT. 1.—IN GENERAL.

1644. When no provision in special Act—No jurisdiction to make promoters liable.]—*Re LIVERPOOL & MANCHESTER RY. CO., Ex p. COOKE* (1843), 3 Ry. & Can. Cas. 135; 7 Jur. 639.

Annotations:—Consd. Ex p. Crober (1849), 13 Jur. 481. *Refd. Re Strachan's Estate* (1851), 9 Hare, 185; *Melling v. Bird* (1853), 22 L. J. Ch. 599.

1645. ———.]—*Ex p. CROBER* (1849), 13 Jur. 481.

1646. ——— Incorporation of Lands Act, 1845, in later Act—Promoters liable.]—*Re LONDON & BIRMINGHAM RAILWAY CO.'S ACT, 1833, Re LONDON & NORTH WESTERN RAILWAY CO.'S ACT, 1816, Ex p. ETON COLLEGE* (1850), 20 L. J. Ch. 1; 16 L. T. O. S. 121; 15 Jur. 45, L. C.

Annotations:—Folld. L. & Y. Ry. v. Evans (1851), 15 Beav. 322. *Distd. Re Holden's Estate* (1855), 25 L. J. Ch. 382, n.; *Re Neachell's Trusts* (1855), 25 L. J. Ch. 382, n. *Apld. Re Ellison's Estate* (1856), 8 De G. M. & G. 62.

1647. Under Lands Act, 1845, s. 80—Payment out & investment—Promoters liable.]—*Ex p. VINCENT* (1847), 9 L. T. O. S. 217.

1648. ——— Incorporated in private Act—Promoters liable.]—*Re SHUTTLEWORTH'S ESTATE ACT, BLACKBURN RAILWAY AMALGAMATION ACT & LANCASHIRE & YORKSHIRE RY.* (1862), 4 Giff. 87; 7 L. T. 266; 8 Jur. N. S. 1090; 66 E. R. 631.

1649. ——— Purchase of charity lands—Purchase-money tendered to Official Trustee Promoters liable.]—*Re LEEDS GRAMMAR SCHOOL, [1901]* 1 Ch. 228; 70 L. J. Ch. 89; 83 L. T. 499; 65 J. P. 88; 49 W. R. 120; 45 Sol. Jo. 78.

SUB-SECT. 2.—IN GOVERNMENT SECURITIES.

1650. Under provisions of special Act—Expenses & costs of purchase Costs of application for interim investment not included—Promoters not liable.]—*Re LONDON & BIRMINGHAM RAILROAD CO., Ex p. TAYLOR* (1835), 1 Y. & C. Ex. 229; 4 L. J. Ex. Eq. 33; 160 E. R. 93.

1651. ——— Expenses of investment of purchase-money in land—"Or other disposition of the same"—Promoters liable.]—*Re LONDON & BIRMINGHAM RAILWAY ACT, Ex p. ONSLOW* (1835), 1 Y. & C. Ex. 553; 160 E. R. 226; *sub nom. Re LONDON & SOUTHAMPTON RAILWAY ACT, Ex p. ONSLOW*, 5 L. J. Ex. Eq. 85.

1652. ——— Expenses of interim investment not included—Promoters not liable.]—*Re LONDON & NORTH WESTERN RY. CO., Ex p. WORCESTER COLLEGE, OXFORD* (1848), 17 L. J. Ch. 193.

1653. ——— Expenses of "all purchases"—Promoters liable.]—*Re NEWCASTLE & CARLISLE RAILWAY ACT, Ex p. DURHAM (BP.)* (1839), 3 Y. & C. Ex. 690; 9 L. J. Ex. Eq. 14; 160 E. R. 879.

Annotation:—Folld. R. Sewers Amendment Act, Ex p. Ely (1839), 3 Y. & C. Ex. 691, n.

1654. ———.]—*Re SEWERS AMENDMENT ACT, Ex p. ELY (BP.)* (1839), 3 Y. & C. Ex. 691, n.; 160 E. R. 879.

1655. ——— "From time to time made"—Promoters not liable.]—*Re GOULD* (1857), 24 Beav. 442; 53 E. R. 428.

Annotation:—Refd. Re Harrison's Estate (1870), L. R. 10 Eq. 532.

1656. ——— Promoters liable.]—*Re J.—VOL. XI.*

MERCERON (1877), 7 Ch. D. 184; 47 L. J. Ch. 114; 38 L. T. 15; 26 W. R. 187.

Annotation:—Mentd. Ex p. Mercers' Co. (1879), 10 Ch. D. 481.

1657. ——— Not "costs in consequence of the purchase"—Promoters not liable.]—*Re BIRMINGHAM & DERBY JUNCTION RAILWAY ACT, Ex p. HIRST* (1811), 4 Y. & C. Ex. 468; 160 E. R. 1090.

1658. ——— Costs "on purchases from infants & incapacitated persons"—Purchase from incapacitated person with doubtful title—For public objects—Promoters not liable.]—*Re TRINITY HOUSE LIGHTHOUSE ACT, Ex p. ANGELL* (1841), 4 Y. & C. Ex. 496; 160 E. R. 1102.

1659. ——— Petition for temporary investment after agreement to invest in land—Proceeding not vexatious—Promoters liable.]—*Re LIVERPOOL, ETC. RY.* (1853), 17 Beav. 392; 51 E. R. 1085.

SUB-SECT. 3.—IN REAL SECURITIES.

1660. Mortgage of real estate—Costs of all parties—Promoters liable.] *READING v. HAMILTON, Re LUTON, DUNSTABLE & WELWYN JUNCTION RAILWAY ACT, 1855, Re HERTFORD, LUTON & DUNSTABLE RAILWAY ACT, 1858, Re LANDS CLAUSES CONSOLIDATION ACT, 1845* (1862), 5 L. T. 628.

1661. ——— Future costs—Promoters not liable.] *Re LOMAX* (1864), 34 Beav. 294; 55 E. R. 648. *Annotations:—Folld. Re Wilkinson's Estate* (1868), 37 L. J. Ch. 384; *Re Flemon's Trusts* (1870), L. R. 10 Eq. 612. *Distd. Re Gedling Rectory* (1885), 53 L. T. 244. *Consd. Re Nepton's Charity* (1906), 22 T. L. R. 442.

1662. ———.]—*Re WILKINSON'S ESTATE* (1868), 37 L. J. Ch. 384; 18 L. T. 17; 16 W. R. 537.

1663. ———.]—*Re FLEMON'S TRUSTS* (1870), L. R. 10 Eq. 612; 40 L. J. Ch. 86.

Annotations:—Distd. Re Gedling Rectory (1885), 53 L. T. 244. *Consd. Re Nepton's Charity* (1906), 22 T. L. R. 442.

1664. ——— Promoters liable.]—*Re BLYTH'S TRUSTS* (1873), L. R. 16 Eq. 468; 28 L. T. 890; 21 W. R. 819.

Annotations:—Folld. Re Sewart's Estate (1874), L. R. 18 Eq. 278. *Consd. Re Nepton's Charity* (1906), 22 T. L. R. 442. *Refd. Re Gedling Rectory* (1885), 53 L. T. 244.

1665. ———.]—*Re SEWART'S ESTATE* (1874), L. R. 18 Eq. 278; 30 L. T. 355; 22 W. R. 625.

Annotation:—Refd. Re Gedling Rectory (1885), 53 L. T. 244.

1666. ——— Of second reinvestment—Promoters not liable.]—*Re GEDLING RECTORY* (1885), 53 L. T. 244.

Annotation:—Consd. Re Nepton's Charity (1906), 22 T. L. R. 442.

—— Interim reinvestment.]—See Sect. 6, *post*.

SUB-SECT. 4.—IN OTHER SECURITIES.

1667. Debenture stock—Under Settled Land Act, 1882 (c. 38), s. 32—Though not authorised by special Act—Promoters liable.]—*Re HANBURY* (1883), 52 L. J. Ch. 687; 31 W. R. 784.

1668. Railway securities—Allowed by R. S. C., Ord. 22, r. 17—Promoters liable.]—*Re GASLEE, [1901]* 1 Ch. 923; 70 L. J. Ch. 411; 84 L. T. 386; 49 W. R. 372; 45 Sol. Jo. 380.

SUB-SECT. 5.—BROKERAGE.

1669. Part of costs of investment—Under 6 & 7 Will. 4 (c. 79) Promoters liable.]—*Ex p.*

Sect 5.—Costs of interim investment: Sub-sects. 5 & 6. Sects. 6 & 7: Sub-sect. 1, A., B. & C. (a) & (b).]

TRINITY HOUSE CORPN. (1843), 3 Hare, 95; 1 L. T. O. S. 359; 67 E. R. 311.

1670. Not deducted before investment—Paid by petitioner—Repayment by promoters.]—*Re KENDAL & WESTMORELAND RAILWAY ACT, 1845, & Re BRAITHWAITE'S TRUST (1853)*, 1 Sm. & G. App. xv.; 7 Ry. & Can. Cas. 901; 1 Eq. Rep. 163; 22 L. J. Ch. 915; 17 Jur. 753; 11 E. R. 1324. *Annotation:—Folld. Re Buckinghamshire Ry., Ex p. New College, Oxford (1853)*, 2 W. R. 2.

1671. ————.]—*Re WILSON (1853)*, 1 W. R. 504.

1672. Deducted before investment—Paid to tenant for life by promoters.]—*Re LONDON & NORTH WESTERN RY. CO., Ex p. HARBOROUGH (EARL) (1853)*, 2 Eq. Rep. 320; 23 L. J. Ch. 260; 22 L. T. O. S. 115; 17 Jur. 1045; 2 W. R. 53.

1673. Reference to brokerage as part of order.]—*Re BUCKINGHAMSHIRE RY. CO., Ex p. NEW COLLEGE, OXFORD (WARDEN, ETC.) (1853)*, 2 W. R. 2.

1674. Costs payable include increased costs of brokerage—Occasioned by investment in railway stock.]—*Re GASELEE, [1901]* 1 Ch. 923; 70 L. J. Ch. 441; 81 L. T. 386; 49 W. R. 372; 45 Sol. Jo. 380.

Costs of payment out.]—*See Sect. 8, sub-sect. 4, post.*

Apportionment of between several promoters.] *See Sect. 11, sub-sect. 4, post.*

SUB-SECT. 6.—PARTIES.

1675. Promoters paying money into court—Appearing upon petition presented by vendor—Not entitled to costs out of fund.]—*Re EXETER MARKET ACT, Re SERCOMBE (A LUNATIC) & Ex p. EXETER CORPN. (1844)*, 3 L. T. O. S. 373; 8 Jur. 653, L. C.

1676. Parties interested—Appearing in separate sets—Transfer of fund to credit of cause—Ascertainment of rights of claimants—Each set entitled to costs against promoters.]—*HAIRE v. LOVITT (1848)*, 12 L. T. O. S. 306.

1677. Parties to pending suits—Appearing to consent—Entitled to costs against promoters.]—*Re HULL & SELBY RY. CO. (1848)*, 5 Ry. & Can. Cas. 458.

Annotation:—Refd. Haynes v. Barton (1861), 1 Drew. & Sm. 483.

1678. Incumbrancers—Served with & appearing on petition by tenant for life—Whether entitled to costs against promoters—Promoters not liable.]—*Re LANCASHIRE & YORKSHIRE RY. CO., Ex p. SMITH (1849)*, 6 Ry. & Can. Cas. 150; 19 L. J. Ch. 56.

Annotation:—Refd. Re Hungerford (1855), 1 K. & J. 413.

1679. ————.]—*Re WEBSTER'S (DECEASED) SETTLED ESTATES, SOUTH EASTERN RAILWAY ACT & LANDS CLAUSES CONSOLIDATION ACT (1854)*, 2 Sm. & G. App. vi.

1680. ————.]—*Promoters liable.*]—*Re NASH, Re LONDON, TILBURY & SOUTHBEND RAILWAY ACT, 1852 (1855)*, 25 L. J. Ch. 20; 1 Jur. N. S. 1082; 4 W. R. 28.

Annotation:—Refd. Re Thames Tunnel (Rotherhithe & Ratcliff) Act, 1900, [1908] 1 Ch. 493.

1681. ————.]—*Re BROOKE (1861)*, 30 Beav. 233; 54 E. R. 878.

1682. ————.]—*Promoters not liable.*]—*Re THOMAS'S ESTATE, Re ELY VALLEY RAILWAY ACT, 1857 & LANDS CLAUSES CONSOLIDATION ACT,*

1845, *Ex p. COZENS (1864)*, 10 L. T. 127; 10 Jur. N. S. 307; 12 W. R. 546.

1683. ————.]—*Promoters liable.*]—*Re SMITH (1865)*, 13 L. T. 626; 14 W. R. 218.

1684. ————.]—*Promoters not liable.*]—*Re MORRIS' SETTLED ESTATES (1875)*, L. R. 20 Eq. 470; 45 L. J. Ch. 63; 23 W. R. 851.

1685. Receiver—Appointed to receive rents of estate for benefit of incumbrancers—Served with & appearing upon petition—Entitled to costs against promoters.]—*Re NASH, Re LONDON, TILBURY & SOUTHBEND RAILWAY ACT, 1852 (1855)*, 25 L. J. Ch. 20; 1 Jur. N. S. 1082; 4 W. R. 28.

Annotation:—Refd. Re Thames Tunnel (Rotherhithe & Ratcliff) Act, 1900, [1908] 1 Ch. 493.

1686. Trustees—Made respondents—Entitled to costs against promoters.]—*Re CLEVELAND'S (DUKE) HARTE ESTATES (1860)*, 1 Drew. & Sm. 46; 8 W. R. 336; 62 E. R. 295; *sub nom. Re & SALES OF SETTLED ESTATES ACT, Re HARTE ESTATES ACT*, 29 L. J. Ch. 530; 2 L. T. 78.

1687. ———— & lessee for life—Freehold vested in trustees—Entitled to costs against promoter.]—*Re FINCH'S ESTATE (1866)*, 14 L. T. 394; 14 W. R. 472.

1688. ————.]—*Tenant for life serving petition for own purposes—Costs of service not payable by promoters.*]—*Re DOWLING'S TRUSTS (1876)*, 45 L. J. Ch. 568; 24 W. R. 729.

1689. Remainderman—Not party to suit—Served with petition & obtaining leave to attend—Entitled to costs against promoters.]—*PATERSON v. PATERSON (1864)*, 3 New Rep. 657; 10 L. T. 183.

1690. ————.]—*Land subject to lease for ninety-nine years—Not entitled to costs against promoters.*]—*Re FINCH'S ESTATE (1866)*, 14 L. T. 394; 14 W. R. 472.

1691. Heir & next of kin of lunatic—Attending inquiry & appearing upon petition—Entitled to costs against promoters.]—*Re BRISCOE (1864)*, 2 De G. J. & Sm. 249; 4 New Rep. 311; 10 Jur. N. S. 859; 46 E. R. 371, L. JJ.

1692. Husband of petitioner—Made respondent instead of co-petitioner—Not entitled to costs against promoters.]—*Re OSBORNE'S ESTATE, [1878]* W. N. 179.

SECT. 6.—COSTS OF INTERIM REINVESTMENT.

1693. On real security—Treated as permanent investment for future costs.]—*Re LOMAX (1864)*, 34 Beav. 291; 55 E. R. 648.

Annotations:—Folld. Re Wilkinson's Estate (1868), 37 L. J. Ch. 384; *Re Flemon's Trusts (1870)*, L. R. 10 Eq. 612. *Consd. Re Gedling Rectory (1885)*, 53 L. T. 244. *Refd. Re Nepton's Charity (1906)*, 22 T. L. R. 442.

1694. ————.]—*Re WILKINSON'S ESTATE (1868)*, 37 L. J. Ch. 384; 18 L. T. 17; 16 W. R. 537.

1695. ————.]—*Re FLEMON'S TRUSTS (1870)*, L. R. 10 Eq. 612; 40 L. J. Ch. 86.

Annotations:—Consd. Re Gedling Rectory (1885), 53 L. T. 244; *Re Nepton's Charity (1906)*, 22 T. L. R. 442.

1696. ————.]—*Not treated as permanent investment for future costs.*]—*Re BLYTH'S TRUSTS (1873)*, L. R. 16 Eq. 468; 28 L. T. 890; 21 W. R. 819.

Annotations:—Folld. Re Sewart's Estate (1874), L. R. 18 Eq. 278. *Consd. Re Nepton's Charity (1906)*, 22 T. L. R. 442. *Refd. Re Gedling Rectory (1885)*, 53 L. T. 244.

1697. ————.]—*Re SEWART'S ESTATE (1874)*, L. R. 18 Eq. 278; 30 L. T. 355; 22 W. R. 625.

Annotation:—Refd. Re ——— Rectory (1885), 53 L. T. 244.

1698. ————.]—*Treated as permanent investment for future costs—Costs of one reinvestment already borne by promoters—Order providing former*

reinvestment to be treated as permanent investment.]—*Re GEDLING RECTORY* (1885), 53 L. T. 244.

Annotation:—*Consd. Re Nepton's Charity* (1906), 22 T. L. R. 442.

1699. ——— Not necessarily treated as permanent investment for future costs—Rule of practice.]—*Re NEPTON'S CHARITY* (1906), 22 T. L. R. 442.

1700. Fund invested originally in Government securities—Change rendered necessary by act of Government—Promoters liable.]—*Re BROWN* (1890), 59 L. J. Ch. 530; 63 L. T. 131; 38 W. R. 529, C. A. *Annotation*:—*Refd. Re Gaselee*, [1901] 1 Ch. 923.

SECT. 7.—COSTS OF REINVESTMENT IN OTHER LAND.

See Lands Act, 1845, s. 80.

SUB-SECT. 1.—REINVESTMENT GENERALLY.

A. Title of Fund.

1701. Money standing to credit of cause—& not of matter of Act—Promoters not liable.]—*BROWN v. FENWICK* (1866), 35 L. J. Ch. 241; 13 L. T. 787; 14 W. R. 257.

Annotation:—*Consd. Drake v. Greaves* (1886), 33 Ch. D. 609.

1702. ——— Promoters liable.]—*DRAKE v. GREAVES* (1886), 33 Ch. D. 609; 56 L. J. Ch. 133; 55 L. T. 353; 34 W. R. 757.

B. When Persons absolutely entitled.

1703. Promoters liable.]—A railway co. took under their compulsory powers land which was settled in such a way that a father & son had at that time between them the absolute beneficial interest. The purchase-money as fixed by arbn. was paid into ct. The petition asked that part of the fund should be applied in paying off a mtge. created after the payment into ct.:—*Held*: (1) the owners were entitled to have part of the fund paid out to them as absolutely entitled, & at the same time to have another part reinvested in the purchase of land, to be settled to somewhat different uses, at the expense of the co.; (2) petitioners must pay the costs of the mtgees.' appearance.—*Re JONES'S TRUST ESTATE* (1870), 39 L. J. Ch. 190; 18 W. R. 312.

Annotations:—*As to* (2) *N.F. Re Olive's Estate* (1890), 44 Ch. D. 316. *Refd. Re Ruck's Trusts* (1895), 13 R. 637.

1704. ——— Purchase-money of leaseholds—Reinvestment in freeholds.]—*Re PARKER'S ESTATE* (1872), L. R. 13 Eq. 495; 41 L. J. Ch. 473; 26 L. T. 12; 20 W. R. 289.

1705. ——— Purchase-money of land devised to trustees upon trust—Reinvestment in property to be settled upon trusts of will.]—*Re DODD'S ESTATE*, *Re LANDS CLAUSES CONSOLIDATION ACT*, 1845, *Re HOLBORN VALLEY IMPROVEMENT ACT*, 1864 (1871), 24 L. T. 542; 19 W. R. 741.

1706. Promoters not liable—Payment out to official trustees of charitable funds—Scheme approved by Charity Commissioners.]—*Re BISHOP MONK'S HORFIELD TRUST* (1881), 43 L. T. 793; 29 W. R. 462.

1707. Promoters liable—Devise of real estate in strict settlement by person absolutely entitled—Land taken subsequent to date of will—Petition by

tenant for life for reinvestment.]—*Re DE BEAUVOIR* (1860), 2 De G. F. & J. 5; 29 L. J. Ch. 567; 2 L. T. 364; 6 Jur. N. S. 593; 8 W. R. 425; 45 E. R. 523, L. J. J.

Annotations:—*Refd. Re Pick's Settlement*, (1862), 31 L. J. Ch. 495; *Re Jones's Trust Estate* (1870), 39 L. J. Ch. 190.

C. More than one Reinvestment.

(a) Under Special Acts.

1708. General rule—Liability for as many investments as necessary—To consume whole purchase-money.]—Where purchase-money of land taken by a railway co. is in ct. to be invested in the purchase of other land the ct. will allow all costs, charges & expenses, according to the Act, of as many investments as may be necessary to consume the whole purchase-money.—*Re LONDON & BIRMINGHAM RY. CO. TO NORTHAMPTON*, *Ex p. BOUVERIE* (1846), 4 Ry. & Can. Cas. 229.

1709. Promoters liable if not unreasonable nor vexatious—Numerous reinvestments.]—*Ex p. FISHMONGERS' CO.* (1862), 1 New Rep. 85; *sub nom. Re LONDON BRIDGE APPROACHES ACT*, *Ex p. FISHMONGERS' CO.*, 7 L. T. 668; 11 W. R. 81.

1710. ——— Two investments.]—*Re LONDON & BIRMINGHAM RY. CO.*, *Ex p. ETON COLLEGE (PROVOST & FELLOWS)* (1842), 3 Ry. & Can. Cas. 271; 6 Jur. 908.

1711. ———.]—*Re LONDON & BIRMINGHAM RY. CO.*, *Ex p. BOXMOOR WASTE LANDS TRUSTEES* (1844), 3 Ry. & Can. Cas. 513; 3 L. T. O. S. 1; 8 Jur. 307.

1712. ———.]—*Re LONDON & BIRMINGHAM RAILWAY CO. ACT*, *Ex p. LOUGHTON (RECTOR)* (1849), 5 Ry. & Can. Cas. 591; 13 L. T. O. S. 399; 14 Jur. 102.

1713. ——— Four investments.]—*Re MERCHANT TAYLORS' CO.* (1847), 10 Beav. 185; 50 E. R. 669.

Annotation:—*Refd. Jones v. Lewis* (1850), 2 H. & Tw. 406.

1714. ——— Purchase-money large—Three investments.]—*Re ST. KATHERINE'S DOCK CO.* (1844), 3 Ry. & Can. Cas. 511; 8 Jur. 456.

1715. ——— Four investments.]—*Re LONDON BRIDGE IMPROVEMENT ACT* (1847), 11 Jur. 958.

1716. ———.]—*JONES v. LEWIS* (1850), 2 Mac. & G. 163; 2 H. & Tw. 406; 19 L. J. Ch. 539; 14 Jur. 873; 42 E. R. 63.

Annotations:—*Consd. Ex p. Fishmongers' Co.* (1862), 1 New Rep. 85. *Refd. Re Olive, Olive v. Westerman* (1886), 34 Ch. D. 70.

1717. ——— Six investments.]—*Ex p. ST. KATHARINE'S HOSPITAL* (1881), 17 Ch. D. 378; 44 L. T. 52; 29 W. R. 195.

Annotations:—*Refd. Re Carriage Co-op. Assocn.* (1883), 48 L. T. 308. *Mentd. Re Wood's Estate, Ex p. Works & Comrs.* (1886), 31 Ch. D. 607.

(b) Under Lands Act, 1845.

1718. Investments not vexatious—Or in very small amounts.]—*Re WOOLLEY'S TRUST*, *Re EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RAILWAY ACT*, 1846 (1853), 1 Eq. Rep. 160; 21 L. T. O. S. 149; 17 Jur. 850; 1 W. R. 407.

Annotations:—*Consd. Re Hardy's Estate* (1854), 2 Eq. Rep. 634; *Re Lands Clauses Consolidation Act*, 1845, *Ex p. Copley* (1858), 4 Jur. N. S. 297. *Refd. Re Ipswich & Bury St. Edmunds Ry.*, *Ex p. Eton College* (1859), 7 W. R. 710.

1719. ——— For benefit of parties—Several investments.]—*Re ST. BARTHOLOMEW'S HOSPITAL (TRUSTEES)* (1859), 4 Drew. 425; 7 W. R. 224; 62 E. R. 163.

1720. ——— Portion of fund.]—*Re BRANDON'S ESTATE* (1862), 2 Drew. & Sm. 162; 32

PART XII. SECT. 7, SUB-SECT. 1.—B.

1. Promoters not liable—Purchase-money of settled land—*Lands (Scot.) Act*, 1845, s. 79.]—In application by marriage-contract trustees to uplift

money consigned by a ry. co. under above Act & invest as authorised by the marriage-contract or prescribed by the Trusts Acts, or in the purchase of heritable subjects:—*Held*: the trustees

were not entitled under above sect. to receive from the promoters the expenses of re-investing the money.—*GLOVER (MANUEL'S TRUSTEES)* (1893), 30 Sc. L. R. 658.—SCOT.

Sect. 7.—Costs of reinvestment in other land: Sub-sect. 1, C. (b), D., E. & F.; sub-sect. 2, A. & B.]

L. J. Ch. 20; 7 L. T. 499; 9 Jur. N. S. 11; 11 W. R. 53; 62 E. R. 583.

1721. — — — — Second investment.] — Re APPERLEY'S ESTATE, & Re HEREFORD, HAY & BRECON RY. CO. (1864), 11 L. T. 335; 13 W. R. 131.

D. F. — — — — Price exceeding Amount deposited—Balance provided by Petitioners.

advantageous purchase beyond money in ct. & will direct the extra costs to be paid out of the money in ct.—*Re MANCHESTER & BIRMINGHAM RAILWAY ACT, Ex p. NEWTON* (1841), 4 Y. & C. Ex. 518; 10 L. J. Ex. Eq. 49; 160 E. R. 1112.

1723. — — — — Costs of promoters increased.]—Re NORTH MIDLAND RY. CO., Ex p. PALMERSTON

Re SHEFFIELD & LINCOLNSHIRE RAILWAY ACT (1848), 16 Sim. 159;

1725. — — — — No extra costs incurred by increased investment.]—Re BRANMER'S ESTATE (1849), 14 L. T. O. S. 83; 11 Jur. 236.

Annotations:—Folld. Re Loveband's S. E. (1860), 30 L. J. Ch. 94; *A.-G. v. Rochester Corp.* (1867), 16 L. T. 408.

1726. — — — — Re ELLIOTT'S TRUST (1851), 17 L. T. O. S. 241.

1727. — — — — Re SOUTHAMPTON & RY. CO., Ex p. KING'S COLLEGE,

1270.

Re LOVERAND'S SETTLED ESTATE (1860), 30 L. J. Ch. 91; 9 W. R. 12.

1729. — — — — Part of purchase-money paid by Crown.]—A.-G. v. ROCHESTER CORPN. (1867), 16 L. T. 408; *sub nom. A.-G. v. ROCHESTER CORPN., Re WATT'S CHARITY TRUSTEES*, 15 W. R.

Consd. Re Met. Ry. & Gonville & Caius College (1887), [1906] 1 Ch. 619, n.

— Costs of petition apportioned in stamp & other costs. Re POWER'S

Re ESTATE ACT, [1876]

Annotation:—Dtd. Re

Act 1880 (1909), 100

Ry. (Extension)

1732. — — — — Re LONDON & NORTH-WESTERN RY. CO. (PERPETUAL CURATE) (1889), 37 W. R. 460.

Annotations:—Consd. Re Clark, [1906] 1 Ch. 615. *Re Ad. Re* Adamson, *Ex p. Metropolitan Board of Works* (1891), [1906] 1 Ch. 620, n.

Apportionment of costs when several funds, see Sub-sect. 5, *post*.

— Form of order.]—Re LONDON & NORTH-WESTERN RY. CO.

1734. — — — — Re METROPOLITAN BOARD OF WORKS (1891), cited in [1906] 1 Ch. 620, n.

Annotation:—Re Clark, [1906] 1 Ch. 615.

PART XII. SECT. 7, SUB-SECT. 1.—C. (b).

1721 i. Investments not vexatious—For or of parties—Second investment.]—

Expenses of reinvesting the money is not confined to one applica-

1735. — — — — Ex p. CHRIST CHURCH,

D (1905), cited in [1906] 1 Ch. 618.

Annotation:—Distd. Re Clark, [1906] 1 Ch. 615.

1736. — — — — Re CLARK, [1906] 1 Ch. 615; 75 L. J. Ch. 325; 95 L. T. 143; 54 W. R. 385; 50 Sol. Jo. 310.

Annotation:—Folld. Re Lynn & Fakenham Ry. (Extension) Act, 1880 (1909), 100 L. T. 432.

1737. — — — — Re METROPOLITAN RY. CO. & GONVILLE & CAIUS COLLEGE, CAMBRIDGE (1887), [1906] 1 Ch. D. 619, n.

Re Adams & Sons v. Metropolitan

1738. — — — — Under special Act giving no power to apportion costs—Promoters not liable for any costs.]—Re GREAT NORTH OF ENGLAND RY. CO., Ex p. TETLEY (1845), 4 Ry. & Can. Cas. 55.

Annotation:—Consd. Re Sheffield & Lincolnshire Ry. Act, Ex p. Hodge (1848), 16 Sim. 159.

1739. Promoter liable for costs of application.]—Re BAGOT'S SETTLED ESTATES (1866), 14 L. T. 159; 14 W. R. 471.

E. Abortive Proceedings.

Pro-

1 K. & J. 413; 1 Jur. N. S. 15; 520.

Annotation:—Consd. Re Hatfield's Estate (1861), 29 Beav. 370.

1741. Abortive attempts to reinvest—Under Lands Act, 1845, s. 80—Promoters not liable.]—

1858), 4 Jur. N. S. 297.

Re Ipswich & Bury St. Edmunds Ry., Carney's Trusts (1872), 20 W. R. 407.

1742. — — — — Under special Act—Promoters' liability doubtful.]—Re McDONALD'S TRUSTS OF THE WILL,

(1860), 2 L. T. 100; 1 W. R. 100. **1743. Proposed investment disapproved of by court—Promoters not liable.]—Ex p. STEVENS**

1. *Re Hardy's Estate* (1854), 2 Eq. Rep.

1744. — — — — Re HARDY'S ESTATE (1851), 2 Eq. Rep. 634; 23 L. T. O. S. 125; 18 Jur. 370; 2 W. R. 396.

1745. Proposed investment approved of by court—Subsequently abandoned—On account of expense—Promoters liable.]—Re NORTH STAFFORDSHIRE RY. CO., Ex p. VAUDREY'S TRUSTS (1861), 3 Giff. 224; 31 L. J. Ch. 885; 4 L. T. 735; 7 Jur. N. S. 391.

— For want of good title—Proble.]—Ex p. HOLYWELL (RECTOR) (1865), 31 L. J. Ch. 463; 6 New Rep. 350; 11 Jur. N. S. 696; *sub nom. Re WISBEACH, ST. IVES & CAMBRIDGE RY. CO., Ex p. HOLYWELL (RECTOR)*, 35 L. J. Ch. 28; 12 L. T. 726; 13 W. R. 960.

Annotation:—Folld. Re Carney's Trusts (1872), 20 W. R. 407.

1747. — — — — Re CARNEY'S TRUSTS (1872), 26 L. T. 308; 20 W. R. 407.

1748. Bonâ fide attempt to reinvest—Promoters

LEY'S TRUST, Re EAST & WEST

Re Ipswich & Bury St. Edmunds Ry. Co. (1859), 7 W. R. 710.

against promoters.—*GRANT v. EDINBURGH, PERTH & DUNDEE RY. CO.* (1851), 13 Duil. (Ct. of Sess.) 1015; 23 Sc. Jur. 467.—**SCOT.**

F. Other Cases.

1749. Private Act providing for costs of reinvestment—Provisions extended to subsequent Act—Promoters liable.]—*Re TREASURY LORDS, Ex p. FISHMONGERS' CO.* (1836), 1 My. & Cr. 676; 40 E. R. 535.

Annotation:—Mentd. A.-G. v. Avon Corpn. (1863), 33 Beav. 67.

1750. Money paid in under private Act—Subsequent Act repealing former Act & incorporating Lands Act, 1845—Promoters liable under former Act.]—*Re ST. KATHERINE'S DOCK CO.* (1866), 14 W. R. 978.

1751. Tenant for life with power to sell under Lands Act, 1845, or Settled Land Acts—Agreeing to sell under promoters' Act incorporating Lands Act, 1845—Sale treated as if under Lands Act, 1845—Promoters liable for costs.]—*Re BENTINCK (LADY) & LONDON & NORTH WESTERN RY. CO.* (1895), 12 T. L. R. 100; 40 Sol. Jo. 130.

1752. Form of order—"Upon approval & execution of conveyance" to be inserted.]—*Re IPSWICH & BURY ST. EDMUNDS RY. CO., Ex p. ETON COLLEGE* (1859), 7 W. R. 710.

SUB-SECT. 2.—REINVESTMENT IN PARTICULAR CASES.

A. Building, Rebuilding, etc.

See Lands Act, 1845, s. 69.

1753. Erection of new building—Costs of obtaining orders—Reinvestment not within terms of special Act—Promoters not liable.]—*Re GREAT WESTERN RY. CO., Ex p. MADON* (1845), 4 Ry. & Can. Cas. 49; 9 Jur. 74.

1754. ——— Promoters not liable.]—*Re OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., Ex p. MELWARD (OR MILWARD)* (1859), 27 Beav. 571; 29 L. J. Ch. 245; 1 L. T. 153; 6 Jur. N. S. 478; 51 E. R. 226.

Distd. Re Kent Coast Ry., Ex p. Canterbury (1862), 7 L. T. 240; *Re Lathropp's Charity* (1866), L. R. 1 Eq. 467.

1755. ——— Promoters liable.]—*Re WHITFIELD (INCUMBENT)* (1861), 1 John. & H. 610; 30 L. J. Ch. 816; 7 Jur. N. S. 909; 70 E. R. 888; *sub nom. Re LONDON, CHATHAM & DOVER RY. CO., WHITFIELD'S (INCUMBENT) CASE*, 5 L. T. 313; 25 J. P. 693; 9 W. R. 764.

Folld. Re Lathropp's Charity (1866), L. R. 1 Eq. 467. *Mentd. Re Lands Clauses Act, 1845, Ex p. Dummer* (1865), 6 New Rep. 326.

1756. ——— Architect's & surveyor's fees—Promoters not liable.]—*Re BUTCHERS' CO.* (1885), 53 L. T. 491.

1757. ——— Promoters liable.]—*Re ARDEN* (1894), 70 L. T. 506, C. A.

1758. Rebuilding—Costs of obtaining orders—Promoters liable.]—*Re SOUTHAMPTON & DORCHESTER RAILWAY ACT, Ex p. THORNER'S CHARITY* (1848), 12 L. T. O. S. 266.

Annotation:—Apld. Ex p. Whitfield (1861), 30 L. J. Ch. 816.

PART XII. SECT. 7, SUB-SECT. 1.—F.

*m. Expenses of re-entailing—Promoters liable.]—*An heir of entail in possession of an entailed estate, part of which had been taken by a ry. co. under compulsory powers, presented a petition to uplift the purchase money of the lands taken, & apply it in purchasing a heritable property held by him in fee simple, to be settled on the heirs under the entail:—*Held: under Land (Scot.) Act, 1845, s. 79, the promoters were liable for expenses of a remit to a man of skill as well as to a man of business; but not liable for expense of service of petition upon next heirs of entail.*—*BLYTHSWOOD (LORD) v.*

GLASGOW & SOUTH WESTERN RY. CO., [1914] S. C. 726; 51 Sc. L. R. 623.—SCOT.

PART XII. SECT. 7, SUB-SECT. 2.—A.

*n. Alterations & improvements—Costs of applying the price—Promoters liable.]—*A ry. co. took lands under Lands (Scot.) Act, 1845, & consigned the price:—*Held: liable for costs of applying it in paying for improvements on an entailed estate.*—*GRANT v. EDINBURGH, PERTH & DUNDEE RY. CO.* (1851), 13 Dunl. (Ct. of Sess.) 1015; 23 Sc. Jur. 467.—SCOT.

PART XII. SECT. 7, SUB-SECT. 2.—B.

o. Costs of petition so to apply

1759. ———.]—*Re KENT COAST RY. CO., Ex p. CANTERBURY (DEAN & CHAPTER)* (1862), 7 L. T. 240; 10 W. R. 505.

1760. ——— & expenses consequent thereon—Promoters liable.]—*Ex p. ST. ALPHAGE (PARSON, ETC.)* (1886), 55 L. T. 314.

1761. Alterations & improvements—Costs of obtaining orders—Promoters not liable.]—*Re BUCKINGHAMSHIRE RY. CO.* (1850), 14 Jur. 1065.

Annotations:—Distd. Re L. B. & S. C. Ry. (1854), 18 Beav. 608. *Folld. Ex p. Melward* (1859), 27 Beav. 571; *Re Whitfield* (1861), 7 Jur. N. S. 909. *Distd. Re Kent Coast Ry., Ex p. Canterbury* (1862), 7 L. T. 240; *Re Lathropp's Charity* (1866), L. R. 1 Eq. 467.

1762. ——— Promoters liable.]—*Re CHELSEA WATERWORKS CO., Ex p. ST. JOHN'S CHURCH, FULHAM (MINISTER & CHURCHWARDENS)* (1856), 28 L. T. O. S. 173; 21 J. P. 19.

1763. ———.]—*Re LATHROPP'S CHARITY* (1866), L. R. 1 Eq. 467; 35 Beav. 297; 13 L. T. 784; 14 W. R. 326; 55 E. R. 910.

1764. ———.]—*Ex p. CLAYPOLE* (1873), L. R. 16 Eq. 574; 42 L. J. Ch. 776; 29 L. T. 51.

Annotations:—Mentd. Ex p. Newton Heath (1896), 44 W. R. 645; *Re L. C. C., Ex p. Pennington* (1901), 81 L. T. 808.

1765. ———.]—*Re LYMINGTON BAPTIST CHAPEL TRUSTEES, [1877] W. N. 226.*

1766. Procuring & fitting up temporary accommodation—Costs of petition for payment out—Promoters liable.]—*Re ST. THOMAS'S HOSPITAL* (1863), 11 W. R. 1018.

Costs of payment out generally, *see Sect. 8, post.*

B. Discharge of Incumbrances.

See Lands Act, 1845, s. 80.

1767. Costs of petition so to apply purchase-money—Payable by promoters.]—*Re LIVERPOOL & MANCHESTER RAILWAY ACT, Ex p. TRAFFORD* (1837), 2 Y. & C. Ex. 522; 160 E. R. 503.

Annotations:—Folld. Re Bethlehem Hospital (1875), L. R. 19 Eq. 457. *N.F. Re Mark's Trusts, [1877] W. N. 63. Consd. Re Gaselce, [1901] 1 Ch. 923.*

1768. ———.]—*Re SHEFFIELD WATERWORKS CO., Ex p. SHEFFIELD TOWN TRUSTEES* (1860), 21 J. P. 819; 8 W. R. 602.

1769. ———.]—*Re STANLEY OF ALDERLEY'S (LORD) ESTATE* (1872), L. R. 14 Eq. 227; 26 L. T. 822.

1770. ———.]—*Re MARK'S TRUSTS, [1877] W. N. 63.*

1771. Costs of application of purchase-money in—Not payable by promoters.]—*Re EASTERN COUNTIES RY. CO., Ex p. HARDWICKE (EARL)* (1848), 17 L. J. Ch. 422; 12 Jur. 508.

Annotations:—Distd. Re L. & B. & S. C. Ry., etc., Ex p. Haberdashers' Co. (1854), 23 L. T. O. S. 246. *Folld. Re M. S., etc. Ry., Ex p. Sheffield Corpn.* (1855), 21 Beav. 162.

1772. ———.]—*Re MANCHESTER, SHEFFIELD, ETC. RY. CO., Ex p. SHEFFIELD CORPN.* (1855), 21 Beav. 162; 25 L. J. Ch. 587; 26 L. T. O. S. 146; 2 Jur. N. S. 31; 4 W. R. 70; 52 E. R. 821.

Annotations:—Folld. Re Hadfield (1861), 30 L. J. Ch. 278; *Ex p. London Corpn.* (1868), L. R. 5 Eq. 418. *Distd. Ex p. Manchester* (1873), 28 L. T. 184.

*purchase-money—Not payable by promoters—When costs borne in prior application.]—*Where an order had been made on petition by a tenant for life for payment out of dividends of purchase-money of lands compulsorily taken, costs of which have been borne by a ry. co., & the tenant subsequently seeks to have the purchase-money applied in discharge of incumbrances, the ct. will not order the co. to bear costs of the latter application, except for advertisements where these were dispensed with on the prior application. —*Re DUBLIN, WICKLOW & WEXFORD RY. CO., Ex p. RICHARDS* (1890), 25 L. R. Ir. 175.—IR.

Sect. 7.—Costs of reinvestment in other land: Sub-2, B., C., D. & E.; sub-sects. 3 & 4, A. & B.]

1773. ————.]—*Re SHEFFIELD WATERWORKS Co., Ex p. SHEFFIELD TOWN TRUSTEES* (1860), 24 J. P. 819; 8 W. R. 602.

1774. ————.]—*Re MARK'S TRUSTS*, [1877] W. N. 63.

C. Purchase of Leaseholds.

1775. Petitioners being reversioners in fee—Promoters liable.]—Ex p. MANCHESTER (DEAN & CANONS) (1873), 28 L. T. 184.

D. Copyholds.

1776. Enfranchisement of—Promoters liable.]—Upon a petition that certain money paid into ct. by a railway co. upon the purchase of land might be applied for the purpose of enfranchising other property belonging to the vendor:—*Held*: under Lands Act, 1845, enfranchisement of copyholds was equivalent to reinvestment in other lands, & the ct. had power to direct such an application of the money, & the railway co. must pay the costs incurred thereby.—*DIXON v. JACKSON* (1856), 25 L. J. Ch. 588; 27 L. T. O. S. 53; 4 W. R. 150.

1777. Costs of two sets of trustees—Promoters liable.]—Re CHESHUNT COLLEGE, Re NEW RIVER CO.'S ACT, 1852 (1855), 1 Jur. N. S. 995; 3 W. R. 638.

Annotation:—*Refd.* *Dixon v. Jackson* (1856), 27 L. T. O. S. 53.

1778. Investment in—Fine on admission—Promoters not liable.]—Re EASTERN COUNTIES RY. Co., Ex p. WADHAM COLLEGE (1858), cited in 25 L. J. Ch. at p. 757; 31 L. T. O. S. at p. 129; 4 Jur. N. S. at p. 474; 6 W. R. at p. 493.

Annotation:—*Consd.* *Re Eastern Counties Ry., Ex p. Sawston* (1858), 27 L. J. Ch. 755.

1779. ————.]—*Re EASTERN COUNTIES RY. Co., Ex p. SAWSTON (VICAR)* (1858), 27 L. J. Ch. 755; 31 L. T. O. S. 129; 22 J. P. 800; 4 Jur. N. S. 473; 6 W. R. 492.

E. Redemption of Land Tax.

See Lands Act, 1845, s. 80.

1780. Under private Act—Redemption by tenant for life before Act—Right to reimbursement out of purchase-money—Promoters liable.]—Re LONDON & BIRMINGHAM RY. Co., Ex p. NORTH-WICK (1834), 1 Y. & C. Ex. 166; 160 E. R. 68.

Annotations:—*Folld.* *Re Liverpool & Manchester Ry. Act*, 1837, *Ex p. Trafford* (1837), 2 Y. & C. Ex. 522. *Consd.* *Re Bethlem Hospital* (1875), L. R. 19 Eq. 457. *Mentd.* *Re Oakham Canal* (1843), 1 L. T. O. S. 12; *Cousens v. Harris* (1848), 17 L. J. Q. B. 273.

1781. ———— Authorising reinvestment in "lands, tenements & hereditaments"—Promoters liable.]—Ex p. ST. KATHARINE'S HOSPITAL (1881), 17 Ch. D. 378; 44 L. T. 52; 29 W. R. 495.

Annotations:—*Mentd.* *Re Carriage Co-op. Supply Assocn.* (1883), 48 L. T. 308; *Re Wood's Estate, Ex p. Works & Buildings Comrs.* (1886), 31 Ch. D. 607.

1782. Under Lands Act, 1845, s. 80—Though not specifically mentioned—Promoters liable.]—Re SHREWSBURY & HEREFORD RAILWAY ACT, 1846, *Ex p. BEDDOES* (1854), 2 Sm. & G. 466; 3 Eq. Rep. 137; 21 L. J. Ch. 175; 65 E. R. 481.

Annotation:—*Consd.* *Re Bethlem Hospital* (1875), L. R. 19 Eq. 457.

1783. ————.]—*Re LONDON, BRIGHTON & SOUTH COAST RY. Co.* (1854), 18 Beav. 608; 23 L. T. O. S. 216; 52 E. R. 239.

Annotations:—*Consd.* *Re Bethlem Hospital* (1875), L. R.

Eq. 457. *Refd.* *Re Gaselee*, [1901] 1 Ch. 923. *Mentd.* *Rendall v. Blair* (1890), 45 Ch. D. 139.

1784. ————.]—*Re BETHLEM HOSPITAL* (1875), L. R. 19 Eq. 457; 44 L. J. Ch. 406; 23 W. R. 644.

Annotations:—*Consd.* *Re Gaselee*, [1901] 1 Ch. 923. *Refd.* *Ex p. St. Katharine's Hospital* (1881), 17 Ch. D. 378.

SUB-SECT. 3.—COSTS INCIDENTAL TO PURC

1785. Costs of purchase—Which purchaser has voluntarily agreed to pay—Promoters not liable.]—Re NORTH STAFFORDSHIRE RY. Co., Ex p. ALSAGER (INCUMBENT) (1854), 22 L. T. O. S. 344; 2 W. R. 324.

1786. ———— Ordinarily borne by vendor—Though purchaser agrees to pay them—Promoters not liable.]—*Ex p. CHRIST'S HOSPITAL (GOVERNORS)* (1875), L. R. 20 Eq. 550.

Annotation:—*Consd.* *Re Temple Church Lands* (1877), 47 L. J. Ch. 160.

1787. ————.]—*Re TEMPLE CHURCH LANDS* (1877), 47 L. J. Ch. 160; 26 W. R. 259.

1788. Reference to master—To report on title—Promoters liable.]—Re EASTERN COUNTIES RAILWAY ACT, Ex p. MARSH (1841), 5 Jur. 502.

1789. ———— As to purchase of two separate pieces of land—Account taken of amount due on mortgage—Promoters liable.]—*Re BRISTOL & EXETER RY. Co., Ex p. CRESSWELL* (1846), 7 L. T. O. S. 2; 10 Jur. 86.

1790. ———— Purchase completed previous to reference to master—Lands Act, 1845, s. 69—Promoters not liable.]—*Ex p. BOUVERIE* (1848), 5 Ry. & Can. Cas. 431.

1791. Second petition—Investment in land subject of another suit—Promoters liable.]—CARPMAEL v. PROFFITT (1854), 23 L. J. Ch. 165; 22 L. T. O. S. 64; 17 Jur. 875.

Annotation:—*Refd.* *Haynes v. Barton* (1861), 1 Drew. & Sm. 483.

1792. ———— Death of vendor pending examination of title—Bill rendered necessary against heir—Promoters liable.]—*ARMITAGE v. ASKHAM, Re LONDON & NORTH WESTERN RY. Co.* (1855), 1 Jur. N. S. 227.

Annotation:—*Consd.* *Barker v. Venables* (1865), 31 L. J. Ch. 420.

1793. Obtaining reconveyances—Of existing incumbrances—Reconveyances taken by vendors—Promoters liable only by consent.]—JONES v. LEWIS (1847), 1 De G. & Sm. 245; 9 L. T. O. S. 168; 11 Jur. 511; 63 E. R. 1052.

Annotations:—*Consd.* *Ex p. Fishmongers' Co.* (1862), 1 New Rep. 85. *Refd.* *Re Olive, Olive v. Westernman* (1886), 34 Ch. D. 70.

1794. Investigation of title—Counsel's fees—Promoters partially liable.]—Re JONES'S SETTLED ESTATES (1858), 27 L. J. Ch. 706; 4 Jur. N. S. 887; 6 W. R. 762, L. J. J.

1795. Solicitor's costs—Solicitors Remuneration Act, 1881 (c. 44)—Solicitor for purchaser—Promoters liable.]—Re MERCHANT TAYLORS' Co. (1885), 30 Ch. D. 28; 54 L. J. Ch. 867; 52 L. T. 775; 33 W. R. 693, C. A.

Annotation:—*Consd.* *Re Morgan*, [1915] 1 Ch. 182.

1796. ———— Election to be paid under old system—Promoters liable.]—*Re BRIDEWELL HOSPITAL & METROPOLITAN BOARD OF WORKS* (1887), 57 L. T. 155.

PART XII. SECT. 7, SUB-SECT. 3.

p. Costs of purchase—Ordinarily borne by vendor—When thrown on purchaser.]—Where money paid into ct. under Public Works Act, 1900, is re-invested in land upon a contract which

throws upon the purchaser costs of the purchase which in an open contract would be borne by the vendor, the costs directed to be paid by the promoters will not be necessarily limited to those which in an open contract would be purchaser's costs.

The promoters must not be burdened with any costs which the purchaser has been forced to incur by unreasonable conditions of a special nature, or by his own act unreasonably incurred. —Re WALLIS (1903), 3 S. R. N. S. W. 615.—AUS.

1797. — — — **Purchase of easement—Scale fee not applicable—Promoters liable.]—***Re SANDERS' SETTLEMENT*, [1896] 1 Ch. 480; 65 L. J. Ch. 426; 74 L. T. 261; 44 W. R. 385; 40 Sol. Jo. 318, C. A.

See, also, Nos. 1251, 1262, *ante*.

See, further, SOLICITORS.

1798. Surveyor's charge—Ryde's Scale—Promoters liable.]—*A.-G. v. DRAPERS' CO.* (1869), L. R. 9 Eq. 69; 21 L. T. 651.

1799. Charity lands—Costs of enrolment of conveyance—Promoters liable.]—*Ex p. CHRIST'S HOSPITAL (GOVERNORS)* (1864), 4 New Rep. 14; 10 L. T. 262; 12 W. R. 669.

1800. — — — **Costs of scheme for application of purchase-money cy-près—Promoters not liable.]—***Re ST. PAUL'S SCHOOLS, FINSBURY* (1883), 52 L. J. Ch. 454; 48 L. T. 412; 31 W. R. 421.

*Annotation:—***Consd.** *Re Wood Green Gospel Hall Charity, Ex p. Middlesex County Council*, [1909] 1 Ch. 263.

1801. — — — **Costs of lease granted by trustees to vendor as part of purchase agreement—Promoters not liable.]—***Ex p. THAVIE'S CHARITY TRUSTEES*, [1905] 1 Ch. 403; 74 L. J. Ch. 326; 92 L. T. 287; 53 W. R. 316; 49 Sol. Jo. 282.

1802. Death of sole petitioner—After order obtained—Promoters liable to pay costs to executors.]—*Re YOUNG* (1873), L. R. 16 Eq. 107; 42 L. J. Ch. 900.

SUB-SECT. 4.—PARTIES.

A. Reinvestment generally.

1803. Vendor of land proposed to be acquired—Served with & appearing on petition—Not entitled to costs against promoters.]—*Re YORKSHIRE, DONCASTER & GOOLE RY. CO., Re DYLLAR'S ESTATE* (1855), 1 Jur. N. S. 975.

1804. Remainderman & trustees—Served with & appearing on petition by tenant for life—Under private Act—Not entitled to costs against promoters.]—*Re BOWES' ESTATE* (1861), 4 New Rep. 315; 33 L. J. Ch. 711; 10 L. T. 598; 10 Jur. N. S. 817; 12 W. R. 929.

*Annotation:—***Refd.** *Re Gore Langton's Estates* (1874), 10 Ch. App. 330, n.

1805. Incumbrancers—General rule.]—Parts of certain settled estates were taken by two cos. & the purchase-money paid into ct. under Lands Act, 1845. Two separate petitions for reinvestment in land were presented by the tenant for life of the estates, & served on certain portion trustees & persons having charges on the estates. At the hearing of the petitions the counsel for petitioner & resps. held separate briefs on each petition:—*Held*: the cos. must pay the costs of one petition only.

Whenever there is a simple petition for the reinvestment of purchase-money in land the proper course is to serve such persons as mtgees. & annuitants with a copy of the petition, & to pay 40s. for costs with an intimation that if they appear at the hearing they will probably not get their costs. Unless this is done such persons will be entitled to their costs.—*Re GORE LANGTON'S ESTATES* (1875), 10 Ch. App. 328; 44 L. J. Ch. 405; 32 L. T. 785; 23 W. R. 842, L. J.J.

*Annotations:—***Consd.** *Re Halstead United Charities* (1875), L. R. 20 Eq. 48; *Re Pattison's Devised Estates, Re Pattison's S. E.* (1876), 4 Ch. D. 207. **Refd.** *Re Artizans' & Labourers' Dwellings Improvement Act, 1875, Ex p. Jones* (1880), 14 Ch. D. 621; *Re Ruck's Trusts* (1895), 39 Sol. Jo. 601.

1806. — — — **Costs of service on—Borne by promoters.]—***Re EASTERN COUNTIES RY. CO., Re LANDS CLAUSES CONSOLIDATION ACT, 1815, Ex p.*

PEYTON'S SETTLEMENT (1856), 2 Jur. N. S. 1013; 4 W. R. 380.

1807. Ecclesiastical land—Bishop attending in master's office to consent—& appearing upon petition in court—Entitled to costs against promoters.]—*Ex p. CREECH ST. MICHAEL (VICAR)* (1852), 21 L. J. Ch. 677.

1808. — — — **Ecclesiastical Commissioners appearing to consent—On being improperly served with petition—Not entitled to costs against promoters.]—***Ex p. LONDON (BR.)* (1860), 2 De G. F. & J. 14; 29 L. J. Ch. 575; 2 L. T. 365; 3 L. T. 224; 24 J. P. 611; 6 Jur. N. S. 610; 8 W. R. 465, 714; 45 E. R. 526, L. J.J.

*Annotations:—***Folld.** *Re Byron's Estate* (1863), 1 De G. J. & Sm. 358; *Re Carlisle & Silloth RY.* (1863), 33 Beav. 253; *Re Maryport & C. RY. Act* (1863), 32 Beav. 397; *Re Merton College* (1864), 1 De G. J. & Sm. 361; *Ex p. London Corpn.* (1868), L. R. 5 Eq. 418; *Ex p. Trinity College, Cambridge* (1868), 18 L. T. 849; *Re Leigh's Estate* (1871), 6 Ch. App. 887; *Re Gore Langton's Estates* (1875), 32 L. T. 785. **Distd.** *Ex p. St. Bartholomew's Hospital* (1875), L. R. 20 Eq. 369. **Folld.** *Ex p. Bilston* (1889), 37 W. R. 460; *Re St. Alban's, Wood St.* (1891), 66 L. T. 51. **Expld.** *Re Bishopsgate Foundation*, [1894] 1 Ch. 185. **Consd.** *Re Met. Ry. & Gonville & Caius College, Cambridge*, [1906] 1 Ch. 619, n. **Refd.** *Ex p. Echl. Comrs. for England* (1865), 13 W. R. 575; *Ex p. Manchester Dean & Canons* (1873), 28 L. T. 184; *Re Manchester & Leeds RY., Ex p. Gaskell* (1876), 2 Ch. D. 360; *Re Clark*, [1906] 1 Ch. 615.

1809. Land subject of administration suit—Remaindermen & trustees—Served with & appearing upon petition—Not entitled to costs against promoters.]—*Re LANCASHIRE & YORKSHIRE RY. CO., WILSON v. FOSTER* (1859), 26 Beav. 398; 28 L. J. Ch. 410; 32 L. T. O. S. 250; 5 Jur. N. S. 113; 7 W. R. 172; 53 E. R. 951.

*Annotations:—***Consd.** *Haynes v. Barton* (1861), 1 Drew. & Sm. 483. **Folld.** *Henniker v. Chafy* (1865), 11 Jur. N. S. 919.

1810. — — — **Remaindermen & tenant for life—Served with petition as parties to suit—Entitled to costs against promoters.]—***HAYNES v. BARTON* (1861), 1 Drew. & Sm. 483; 30 L. J. Ch. 804; 4 L. T. 764; 7 Jur. N. S. 699; 9 W. R. 777; 62 E. R. 463.

*Annotations:—***Distd.** *Re L. & S. W. RY., Ex p. Phillips* (1862), 7 L. T. 452. **Apld.** *Re Braye* (1863), 9 Jur. N. S. 454; *Paterson v. Paterson* (1864), 3 New Rep. 657. **Folld.** *Haynes v. Barton* (1866), L. R. 1 Eq. 422.

1811. — — — **Fund standing to credit of cause as well as in matter of Act—Petition by tenant for life served on all parties interested—Promoters liable for parties so served.]—***BRADSHAW v. FANE, Re LONDON & NORTH WESTERN RY. CO.* (1862), 1 New Rep. 159; 9 Jur. N. S. 166.

1812. Settled land—Promoters liable only for costs of petitioner—Costs of other persons properly served out of funds.]—*Re LEECHE'S ESTATE, Re PORTSMOUTH RAILWAY ACT, 1853* (1860), 8 W. R. 559.

Costs of reinvestment in other lands, *see* Sect. 7, sub-sect. 1, *ante*.

B. Reinvestment in Discharge of Incumbrances.

1813. Incumbrancers—Appearing on being served with petition—Not entitled to costs against promoters.]—*Re LANCASTER & CARLISLE RY. CO., Ex p. YEATES* (1847), 5 Ry. & Can. Cas. 370; 12 Jur. 279.

1814. — — — — —.] — *Re HATFIELD'S ESTATE (No. 2)* (1863), 32 Beav. 252; 55 E. R. 99.

*Annotations:—***Consd.** *Re Artizans' & Labourers' Dwellings Improvement Act, 1875, Ex p. Jones* (1880), 14 Ch. D. 621. **Refd.** *Re Ruck's Trusts* (1895), 13 R. 637.

1815. — — — — —. **Mortgagee of tenant for life—Entitled to costs against promoters.]—***Re BROOKE* (1864), 10 L. T. 860; 12 W. R. 1128.

Not entitled to costs against

Sect. 7.—Costs of reinvestment in other land: See sect. 4, B.; sub-sect. 5. Sect. 8: Sub-sect. 1, A. & B. (a), (b), (c) & (d), C.]

promoters.]—*Re JONES'S TRUST ESTATE*, No. 1703, *ante*.

1817. — Promoters' liability limited to costs tendered on service.]—*Re HALSTEAD UNITED CHARITIES* (1875), L. R. 20 Eq. 48.

*Annotations:—***Consd.** *Re Pattison's Devised Estates, Re Pattison's S. E.* (1876), 4 Ch. D. 207. **Folld.** *Re Artizans' & Labourers' Dwellings Improvement Act, 1875, Ex p. Jones* (1880), 14 Ch. D. 624. **Refd.** *Re Ruck's Trusts* (1895), 39 Sol. Jo. 601.

1818. Remainderman—Appearing on petition by tenant for life—Entitled to costs against promoters.]—*Re FURNESS RY. CO., Re ROMNEY* (1863), 3 New Rep. 287.

SUB-SECT. 5.—APPORTIONMENT BETWEEN SEVERAL PROMOTERS.

See Sect. 11,

SECT. 8.—COSTS OF PAYMENT OUT.

See Lands Act, 1845, s. 80.

SUB-SECT. 1.—TO PERSONS ABSOLUTELY ENTITLED.

A. In General.

1819. Who entitled to costs—Not parties to suit to establish rights of claimants to fund.]—*Re HORE'S ESTATE & SOUTH DEVON RY. CO.* (1849), 5 Ry. & Can. Cas. 592; *sub nom. HORE v. SMITH, Re SOUTH DEVON RAILWAY CO.'S ACT*, 13 L. T. O. S. 399; 14 Jur. 55.

*Annotations:—***Apld.** *Re L. & Y. Ry., Wilson v. Foster* (1859), 26 Beav. 398. **Consd.** *Haynes v. Barton* (1861),

PART XII. SECT. 8, SUB-SECT. 1. A.

q. Who entitled to costs—Not parties who are each in default.]—A tenant at will, having agreed to give possession of lands, subsequently refused possession unless his sister, who had an equal interest, was also satisfied. The money was offered to be paid on his giving possession, but was not formally tendered. The co. lodged the sum agreed on in ct. to the separate credit of the tenant, alleging in the warrant his refusal to accept it as the reason for the lodgment: *Held*: the tenant was entitled to draw the entire money out of ct. Costs refused, each party having been in default. *Re SOUTH EASTERN RY. CO.* (1849), 12 L. Eq. R. —IR.

r. — Not promoters for motion when continuing order to pay out would avoid.]—An application to draw out of ct. a sum lodged there by a ry. co. could have been avoided had the co., on bringing in the money, obtained a continuing order to pay it out: *Held*: the co. were liable for the costs of the motion. *Ex p. CREMEN v. GREAT SOUTHERN & WESTERN RY. CO.* (1852), 4 Ir. Jur. 182.—IR.

s. — Not owner who wilfully neglects to make title.]—Upon compulsory purchase of land, under an Act incorporating Lands Act, 1845, & Railway (Ir.) Act, 1851, the purchasers lodged in ct. the compensation award, as the owner had failed to deliver a statement of title within the time prescribed by notices published under the Act: *Held*: owner should bear his own costs of drawing the money out. *Re DUBLIN CORPN., Ex p. DOWLING* (1881), 7 L. R. Ir. 173.—IR.

t. — — —.]—The owner of lands taken declined to accept the

compensation awarded or to make title, & the money was lodged in ct.: *Held*: the owner's costs of application to draw the money out must be borne by him, he being guilty of "wilful default" within Lands Act, 1845, s. 80. *Re ROSCREA GUARDIANS & WALLACE* (1906), 40 I. L. T. 211.—IR.

1820 i. What costs included—Costs of application.]—Notwithstanding previous orders for payment to a tenant for life of dividends on purchase-money of lands compulsorily taken, costs of which have been borne by the co., the ct. will order the co. to pay the cost of an application by the tenant for payment out of ct. of the corpus to trustees under Settled Land Act, 1882. *Secus* where applt. was absolutely entitled to the fund at the time when the application for payment of dividends only was made. *Re BELFAST CORPN., Re GREAT NORTHERN RY. CO., Re BALLYCASTLE RY. CO., Ex p. HARBERTON (VISCOUNTESS)* (1893), 51 L. R. Ir. 258.—IR.

1820 ii. — — —.]—An arbiter ordained a ry. co. to deposit in bank the sum he found due by them for an estate acquired by them; & he also ordained the proprietor to grant a disposition of the land; which he failed to do. The ry. co. consigned the money & completed their title under Lands (Scot.) Act, 1845, s. 76: *Held*: the expense of an application for warrant to uplift the consigned money formed a valid charge against the ry. co.—*MONCRIEFF v. EDINBURGH & GLASGOW RY. CO.* (1857), 19 Dunl. (Cl. of Sess.) 283; 29 Sc. Jur. 139.—SCOT.

1820 iii. — — — Costs of application—*Under Prison's Act, 1826.]—**Re BAL-LINASLOE UNION WORKHOUSE* (1867),

1 Drew. & Sm. 483. **Refd.** *Melling v. Bird* (1853), 22 L. J. Ch. 599; *Honniker v. Chafy* (1865), 11 Jur. N. S. 919.

1820. What costs included—Costs of application.]—*TOFT'S ESTATE* (1856), 26 L. T. O. S. 290; 2 Jur. N. S. 131.

1821. — Not of absolute transfer of stock—Where compensation money invested in stock—Under special Act.]—*Re LAND'S TRUST* (1858), 4 K. & J. 81; 32 L. T. O. S. 35; 70 E. R. 34.

*Annotations:—***Consd.** *Re Metford* (1860), 6 Jur. N. S. 796; *Re Cherry's S. E.* (1861), 31 L. J. Ch. 38; *Re Harrison's Estate* (1870), L. R. 10 Eq. 532. **Folld.** *Re Williams' Estate* (1871), L. R. 12 Eq. 488.

1822. — — —.]—*Re MOUSLEY'S TRUST* (1858), 4 K. & J. 86, n.; 70 E. R. 37.

*Annotations:—***Consd.** *Re Harrison's Estate* (1870), 40 L. J. Ch. 77. **Refd.** *Re Wood's Estate, Ex p. Works & Buildings Comrs.* (1886), 31 Ch. D. 607.

1823. Costs of part owners—Employing separate solicitors—Promoters liable.]—*Re NICHOLLS' TRUST ESTATES* (1866), 35 L. J. Ch. 516; 14 W. R. 475.

1824. Part payment out—Another part re-invested—Promoters liable.]—*Re JONES'S TRUST ESTATE*, No. 1703, *ante*.

1825. — Whole fund not to be paid out—Promoters liable.]—*Re LOWRY* (1873), 29 L. T. 233, L. J.

1826. — Application for whole fund to be paid out—Costs of summons in so far as it failed disallowed.]—*Re JACOBS, BALDWIN v. PESCOTT*, [1908] 2 Ch. 691; 78 L. J. Ch. 24; 99 L. T. 726.

1827. Costs of infant devisee—Sale to promoters after devise—Death of testator before completion—Promoters liable.]—*Re MANCHESTER & SOUTH-PORT RY. CO.* (1851), 19 Beav. 365; 52 E. R. 391. *Annotation:—***Mentd.** *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

1828. Where doubtful title—No wilful default or delay on part of owner—Promoters liable.]—*Re WOODBURN'S TRUST* (1865), 13 L. T. 237.

1829. No provision for costs of payment out in

I. R. 1 Eq. 331.—IR.

1820 iv. — — — Under special Act.]—Purchase-money had been paid under a special Act, providing that the ct. might order expenses of all purchases made with the funds in pursuance of the Act, together with necessary costs & charges of obtaining such order "to be paid by the co. lodging it": *Held*: ct. had no power to order the costs of drawing out to be paid by the co.—*Re ULSTER CANAL CO. & LORD PRIMATE* (1872), L. R. 6 Eq. 208.—IR.

u. — — Costs of verifying execution of power of attorney to draw out—Promoters liable.]—*Re GODLEY* (1817), 10 L. Eq. R. 222.—IR.

1828 i. Where doubtful title—No wilful default or delay on part of mortgagers—Promoters liable.]—A corp. acquired compulsorily under Lands Acts, 1845, land included with other lands in a mortgage to a building society, & served notice on the society offering compensation for their interest. The society intimated that they made no claim for compensation provided no reduction was made in their tenants' rents. The corp. published statutory notices requiring persons interested to deliver a statement of their claim & an abstract of title on which it was founded. The owner furnished an abstract showing mortgage to the society, but failing to make title & the corp. lodged amount of award in ct. On the application of society for payment out to them as mortgagees & costs of application: *Held*: they were entitled to the sum in ct., had been guilty of no wilful neglect, & were entitled to costs.—*Re DUBLIN CORPN. v. CARROLL* (1915), 49 I. L. T. 60.—IR.

special Act passed in 1840—Second special Act passed in 1855 with no special provision—**Lands Act, 1845, incorporated—Promoters liable.**—*Re* WOOD'S ESTATE, *Ex p.* WORKS & BUILDINGS COMRS. (1886), 31 Ch. D. 607; 55 L. J. Ch. 488; 54 L. T. 145; 34 W. R. 375; 2 T. L. R. 347, C. A. *Annotations*:—*Re* Mills' Estate, *Ex p.* Works & Public Buildings Comrs. (1886), 34 Ch. D. 24. *Mentd.* Graham v. Public Works Comrs., [1901] 2 K. B. 781; (Liquor Traffic) v. Cannon Brewery

Brokerage.]—*See* Sub-sect. 4, *post*.

B. Costs of Petition.

(a) In General.

1830. Lands purchased from tenant in tail—Entail barred on attaining majority—**Promoters liable.**—*Re* GREAT WESTERN RY., *Ex p.* MARSHALL (1845), 1 Ph. 560; 4 Ry. & Can. Cas. 58; 41 E. R. 715, L. C.

Annotations:—*Re* Birmingham Ry., *Ex p.* Worcester College, Oxford (1848), 5 Ry. & Can. Cas. 147. *Mentd.* *Re* G. W. Ry. *Ex p.* Madon (1845), 4 Ry. & Can. Cas. 19.

1831. ——— **Promoters not liable.**—*Re* MIDLAND COUNTIES RY. CO., *Ex p.* THOROTON (1818), 17 L. J. Ch. 167; 10 L. T. O. S. 362; 12 Jur. 130.

Annotation:—*Consd.* & *Apld.* *Re* Land's Trust (1858), 4 K. & J. 81.

1832. Lands belonging partly to infants—Petition on attainment of majority—**Promoters liable.**—*Re* NORTH MIDLAND RAILWAY ACT, *Ex p.* SLATERS, DEVISEES (1819), 5 Ry. & Can. Cas. 700; 18 L. J. Ch. 431.

Annotation:—*Distd.* *Re* Doncaster's Estate (1855), 25 L. J. Ch. 381, n.

1833. Land of devisee for life with reversion to testator's heirs—Two petitions by two co-heirs—**Claiming funds on death of tenant for life.**—*Re* SPOONER'S ESTATE, No. 1213, *ante*.

(b) Jurisdiction of Court.

See, now, Judicature Act, 1890 (c. 41), s. 5; *see, also*, Sect. 1, *ante*.

1834. Where no express enactment—Land taken from owner under disability—**No jurisdiction.**

Ex p. ECCLESIASTICAL COMRS. FOR (1865), 5 New Rep. 483; 12 L. T. 294; 11 Jur. N. S. 461; 13 W. R. 575.

Annotation:—*Consd.* & *Folld.* *Re* Harrison's Estate (1870), L. R. 10 Eq. 532.

1835. Court of Chancery Money paid into Court of Exchequer—Costs beyond those authorised by special Act allowed.]—*Re* ROBERTSON (1857), 23 Beav. 133; 26 L. J. Ch. 349; 28 L. T. O. S. 352; 3 Jur. N. S. 784; 53 E. R. 171.

Annotations:—*Folld.* *Re* Tiverton Market Act (No. 2) (1858), 26 Beav. 239. *Distd.* *Re* Metford (1860), 6 Jur. N. S. 796. *N.F.* *Re* Harrison's Estate (1870), L. R. 10 Eq. 532.

1836. ——— **Practice of Court of Exchequer not applied.**—*Re* METFORD (1860), 6 Jur. N. S. 796; 8 W. R. 634.

Annotations:—*Consd.* *Re* Harrison's Estate (1870), L. R. 10 Eq. 532. *Re* Wood's Estate, *Ex p.* Works & Buildings Comrs. (1886), 31 Ch. D. 607.

1837. ——— **No jurisdiction.**—*Re* WILLIAMS' ESTATE (1871), L. R. 12 Eq. 488.

(c) Where Express Provision in Act.

1838. Provision for "reasonable expenses" of petition—**Promoters liable.**—*Re* MAKINNON (1814), 2 L. T. O. S. 305, L. C.

1839. Provision for "expenses of all pur-

chases"—**Promoters liable.**—*Re* SPITALFIELDS SCHOOLS, & WOODS & FORESTS COMRS. (1870), L. R. 10 Eq. 671; *sub nom.* *Re* CHRIST CHURCH, SPITALFIELDS, PAROCHIAL CHARITY SCHOOLS, 22 L. T. 569; 18 W. R. 799.

Annotations:—*Folld.* *Re* Truppo's Estate, Clark v. Johnson (1870), 22 L. T. 570. *N.F.* *Re* St. Dunstan-in-the-West Charity Schools (1871), L. R. 12 Eq. 537.

1840. ——— **Promoters not liable.**—*Re* TRUPPO'S ESTATE, CLARK v. JOHNSON (1870), 22 L. T. 570; 18 W. R. 800.

1841. ——— **Promoters not liable.**—*Re* ST. DUNSTAN-IN-THE-WEST CHARITY SCHOOLS (1871), L. R. 12 Eq. 537; 24 L. T. 613; 19 W. R. 887.

Annotation:—*Consd.* *Re* Stanley of Alderley's Estates (1872), 26 L. T. 822.

1842. Under Metropolitan Paving Act (Michael Angelo Taylor's Act), 1817, s. 89—**Costs allowed.**—*Re* SAUNDERS' ESTATE (1869), L. R. 8 Eq. 681.

Annotations:—*Consd.* *Re* Mercer (1877), 7 Ch. D. 184; *Ex p.* Mercers' Co. (1879), 10 Ch. D. 481.

(d) Where no Express Provision in Act.

1843. Costs of conveyance directed by first Act—**Second Act directing payment into Court—Promoters not liable.**—*Re* OAKHAM CANAL (1813), 1 L. T. O. S. 12.

1844. Act providing only for costs of reinvestment in other lands—**Whether provision applicable to payment out—Promoters not liable.**—*Re* LIVERPOOL & MANCHESTER RAILWAY ACT, *Ex p.* MOLYNEUX (1845), 2 Coll. 273; 5 L. T. O. S. 474; 63 E. R. 732.

Annotations:—*Consd.* *Re* Midland Counties Ry., *Ex p.* Thoroton (1818), 17 L. J. Ch. 167; *Re* Doncaster's Estate (1855), 25 L. J. Ch. 381, n.; *Re* Harrison's Estate (1870), L. R. 10 Eq. 532. *Re* Strachan's Estate (1851), 9 Hare, 185; *Melling v. Bird* (1853), 22 L. J. Ch. 599; *Re* Land's Trust (1858), 4 K. & J. 81; *Re* Mousley's Trust (1858), 4 K. & J. 86, n. *Mentd.* Toft's Estate (1856), 26 L. T. O. S. 290.

1845. ——— **Promoters liable.**—*Re* TIVERTON MARKET ACT (No. 2) (1858), 26 Beav. 239; 53 E. R. 889.

Annotations:—*Consd.* *Re* Metford (1860), 6 Jur. N. S. 796. *N.F.* *Re* Harrison's Estate (1870), L. R. 10 Eq. 532.

1846. ——— **Promoters not liable.**—*Re* EDMENADE'S ESTATE (1860), 3 L. T. 73; 6 Jur. N. S. 986; 8 W. R. 327.

Annotation:—*Re* Cherry's S. E. (1861), 31 L. J. Ch. 38.

1847. ——— **Promoters not liable.**—*Re* MUSGRAVE (1860), 6 Jur. N. S. 797.

Annotation:—*Mentd.* *Re* Harrison's Estate (1870), L. R. 10 Eq. 532.

1848. ——— **Promoters not liable.**—*Re* ACKERS' TRUSTS, *Re* MACCLESFIELD CANAL ACT, MANCHESTER & SHEFFIELD RAILWAY CO. ACT, MANCHESTER, SHEFFIELD & LINCOLNSHIRE RAILWAY CO. ACT (1862), 7 L. T. 525; 9 Jur. N. S. 224; 11 W. R. 182.

1849. ——— **Money originally paid into Court of Exchequer Promoters not liable.**—*Re* HARRISON'S ESTATE (1870), L. R. 10 Eq. 532; 40 L. J. Ch. 77; 18 W. R. 1065.

Annotations:—*Re* Stanley of Aldersley's Estate (1872), L. R. 14 Eq. 227. *Mentd.* *Re* Mercer (1877), 7 Ch. D. 184.

Application of Judicature Acts.—*See* Sect. 1, sub-sect. 2, *ante*.

C. Investigating and Perfecting Title.

1850. Cost of disentailing assurance—Sale by tenant for life—Payment to tenant in tail—**Promoters not liable.**—*Ex p.* LANGTON (1847), 10 L. T. O. S. 50.

PART XII. SECT. 8, SUB-SECT. 1.—C.

1850 i. Costs of disentailing assurance—Entailed lands were com-

deposited: a disentailing deed was executed & the tenant in tail in possession petitioned for a transfer of the funds to him. The ct. refused to direct that the costs of the deed

were payable by the promoters.—*Re* MERCHANT SHIPPING ACT, 1854, *Ex p.* ALLEN (1881), 7 L. R. Ir. 124.—**IR.**

Sect. 8.—Costs of payment out: Sub-sect. 1, C.; sub-sects. 2, 3, 4 & 5, A. & B.; sub-sect. 6.]

1851. ——— Promoters liable.]—*Re BROOKING'S DEVISEES v. SOUTH DEVON RY. CO.* (1859), 2 Giff. 31; 29 L. J. Ch. 151; 2 L. T. 204; 6 Jur. N. S. 441; 66 E. R. 14.

1852. Costs of investigating title—Persons claiming to be heirs.]—*Re SPOONER'S ESTATE*, No. 1243, *ante*.

1853. ——— Claims by lessees under leases granted after notice to treat—Promoters not liable.]—*Re MARYLEBONE IMPROVEMENT ACT*, 1868, *Ex p. TOPPLE* (1871), 25 L. T. 407; 19 W. R. 1058.

1854. Costs of obtaining letters of administration—To estates of deceased beneficiaries—Not to estate of testator—Promoters liable.]—*Re LLOYD & NORTH LONDON RY. (CITY BRANCH) ACT*, 1861, [1896] 2 Ch. 397; 65 L. J. Ch. 626; 74 L. T. 548; 44 W. R. 522; 12 T. L. R. 432.

Annotations:—Appld. Re London United Tramways Act, 1900, [1906] 1 Ch. 534. *Foll'd. Re Griggs, Ex p. London School Board*, [1914] 2 Ch. 547. *Refd. Re Thames Tunnel (Rotherhithe & Ratcliff) Act*, 1900, [1908] 1 Ch.

1855. ——— Two administrations—Promoters liable.]—*Re GRIGGS, Ex p. LONDON SCHOOL BOARD*, [1914] 2 Ch. 547; 83 L. J. Ch. 835; 111 L. T. 931; 80 J. P. 35; 58 Sol. Jo. 796; 13 L. G. R. 27, C. A.

SUB-SECT. 2.—TO OTHER ACCOUNTS.

See, now, Judicature Act, 1890 (c. 41), s. 5.

1856. Transfer to credit of suit—Administration suit Sale by devisees in trust—Promoters liable.]—*DINNING v. HENDERSON, Re YORK, NEWCASTLE & BERWICK RAILWAY ACT*, 1847 (1848), 2 De G. & Sm. 485; 64 E. R. 216.

Annotation:—Consd. Haynes v. Barton (1861), 1 Drew. & Sm. 483.

1857. ——— Petition by remainderman dismissed—Promoters liable for ordinary costs of common petition for investment.]—*NASH v.* (1868), 37 L. J. Ch. 927; 19 L. T. 256; 16 W. R. 1105.

1858. ——— Suit by tenant for life—Promoters liable for costs of petition only.]—*Re PICTON'S ESTATE* (1855), 25 L. T. O. S. 22; 3 W. R. 327.

Annotation:—Consd. Haynes v. Barton (1861), 1 Drew. & Sm. 483.

1859. ——— Account not entitled in matter of special Act—Promoters not liable for subsequent costs.]—*FISHER v. FISHER* (1874), L. R. 17 340; 43 L. J. Ch. 262; 29 L. T. 720; 22 W. R. 638.

1851i. Costs of disentailing deed—Promoters liable.]—Costs of a disentailing deed, necessary for payment of a fund in ct. lodged by a ry. co., are payable by the co., & a special order will be made as to such costs.—*Re NAVAN & KINGSCOURT RY. CO. & FINGALL (EARL)*, [1906] 1 I. R. 557.—*IR.*

1854i. Costs of obtaining letters of administration—To estates of deceased beneficiaries—Promoters liable.]—Money was paid into ct. by a ry. co., under the Lands Act, 1845, for leaseholds. Persons claiming under their deceased father applied for payment, but the ct. decided that other children, then dead, & having no personal representatives, had taken vested interests, & declined to pay out until administration taken out to their estates. One of the applicants took out administration to the deceased children, & obtained payment of the fund:—*Held: co.* should pay the costs of obtaining these

administrations.—*Re CITY OF DUBLIN JUNCTION RYS., Ex p. KELLY* (1893), 31 L. R. Ir. 137.—*IR.*

1854ii. ——— ———.]—*Re MIDLAND GREAT WESTERN (IRELAND) RY. CO., Ex p. RORKE*, [1891] 1 I. R. 146.—*IR.*

w. Costs of order appointing trustee for purpose of Settled Land Act, 1882—Promoters not liable.]—By deed of resettlement, 1881, estates were limited, subject to charges created by a deed of settlement, to the use of H. for life, with remainders over. Both deeds contained powers of sale, but the trustees were not the same persons. Portions of one of the estates were taken by a ry. co., under compulsory powers, incorporating Lands Act, 1845, & the purchase money was paid into ct. H. applied in the matter of that estate to have trustees of the deed of 1881, appointed trustees for the purpose of Settled Land Act, 1882, of the compound settlement consisting of the

1860. ——— ———.]—*NOCK v. NOCK*, [1879] W. N. 125.

1861. To Official Trustees of Charitable Funds—Treated as petition for payment out—Promoters liable.]—*Re BRISTOL FREE GRAMMAR SCHOOL ESTATES* (1878), 47 L. J. Ch. 317.

SECT. 3.—ON AMALGAMATION OF PROMOTERS AND TRANSFER OF POWERS.

1862. Original Act providing for costs—Repealed on amalgamation—Third amalgamation repealing two previous Acts—Costs payable by third company.]—*Re CHESTER & CREWE RY. CO., Ex p. CHETWODE* (1849), 18 L. J. Ch. 418.

Promoters not liable under original Act prior to Lands Act, 1845—Subsequent amalgamation Act—Incorporating Lands Act, 1845.]—*See Sect. 1, sub-sect. 1, B., ante.*

1863. Transfer of powers—From justices to municipal corporation—Corporation liable.]—*Re COVENTRY J.J.* (1854), 19 Beav. 158; 24 L. J. Ch. 586; 3 W. R. 141; 52 E. R. 309.

Apportionment of costs.]—*See Sect. 11, post.*

SUB-SECT. 4.—BROKERAGE.

1864. Brokerage on sale—Costs of investment not taxed—Promoters liable.]—*Re LAEGH'S SETTLED ESTATE* (1853), 2 W. R. 109.

1865. ——— Petition by persons absolutely entitled—Promoters liable.]—*Re MAGDALEN COLLEGE, OXFORD*, [1901] 2 Ch. 786; 70 L. J. Ch. 821; 85 L. T. 179; 66 J. P. 23; 50 W. R. 90.

Apportionment of.]—*See Sect. 11, sub-sect. 4, post.*

SUB-SECT. 5.—PARTIES.

A. Payment out generally.

1866. Legatees—Petition by devisee in fee—Not entitled to costs against promoters.]—*Re TURNER'S ESTATE, Ex p. OXFORD & RUGBY RY. CO.* (1854), 2 W. R. 441.

1867. Incumbrancers Not entitled to costs against promoters.]—*Re HATFIELD'S ESTATE* (1861), 29 Beav. 370; 54 E. R. 670; *sub nom. Re HADFIELD*, 30 L. J. Ch. 278; 7 Jur. N. S. 383; 9 W. R. 263; *subsequent proceedings, sub nom. Re HATFIELD'S ESTATE (No. 2)* (1863), 32 Beav. 252. *Annotations:—Consd. Re Artizans' & Labourers' Dwellings Improvement Act*, 1875, *Ex p. Jones* (1880), 14 Ch. D. 624. *Refd. Re Ruck's Trusts* (1895), 13 R. 637.

two deeds, & an order was made accordingly. On appln. by H. for payment out of purchase money to the trustees: *Held: the ry. co.* should not pay costs of obtaining order appointing the trustees for the purpose of Settled Land Act.—*Re WATERFORD & LIMERICK RY. CO., Ex p. HARLECH (BARON)*, [1896] 1 I. R. 507.—*IR.*

PART XII. SECT. 8, SUB-SECT. 5.—A.

y. Incumbrancers—Whether entitled to costs against promoters—For appearance to consent to payment out of purchase-money.]—Costs of mtgees. appearing & consenting to accept payment out of ct. of their security from purchase-money of lands taken by a ry. co. subject to their mortgage, ordered to be paid by the co.—*Re WATERFORD, DUNGARVAN & LISMORE RY. CO.* (1877), 1 I. R. 11 Eq. 321.—*IR.*

z. ——— Application for payment out resisted.]—A ry. co., having

1868. Promoters' liability limited to costs tendered on service—& to costs of affidavit of service.]—*Re HALSTEAD UNITED CHARITIES* (1875), L. R. 20 Eq. 48.

*Annotations:—*Consd. *Re Pattison's Devised Estates, Re Pattison's S. E.* (1876), 4 Ch. D. 207; *Re Artizans' & Labourers' Dwellings Improvement Act, 1875, Ex p. Jones* (1880), 14 Ch. D. 624. *Re Ruck's Trusts* (1895), 39 Sol. Jo. 601.

1869. —.]—*Re ARTIZANS' & LABOURERS' DWELLINGS IMPROVEMENT ACT, 1875, Ex p. JONES* (1880), 14 Ch. D. 624; 43 L. T. 84.

*Annotation:—*Re Ruck's Trusts (1895), 39 Sol. Jo. 601.

1870. —.]—*Re RUCK'S TRUSTS* (1895), 39 Sol. Jo. 601; 13 R. 637.

1871. —.]—Though incumbrance created after payment into court.]—*Re OLIVE'S ESTATE* (1890), 44 Ch. D. 316; 59 L. J. Ch. 360; 62 L. T. 626; 38 W. R. 459.

*Annotation:—*Re Ruck's Trusts (1895), 39 Sol. Jo. 601.

1872. Lessor—Appearing on petition by lessee—Though not served or made formal respondent—Notice to promoters of claim—Promoters liable.]—*Re LONDON-STREET, GREENWICH, & LONDON, CHATHAM & DOVER RAILWAY (FURTHER POWERS) ACT, 1881* (1887), 57 L. T. 673.

1873. Tenants in common—Appearing separately on petition for payment to incumbrancers—Entitled to costs against promoters.]—*Re LONDON & NORTH WESTERN RAILWAY CO.'S ACT, 1846, & RUGBY & STAMFORD RAILWAY ACT, 1846, Re BRAYE'S (BARONESS) SETTLED ESTATES* (1863), 32 L. J. Ch. 432; 9 Jur. N. S. 454; 11 W. R. 333.

1874. Trustees—Served with & appearing on petition by cestui que trust—Entitled to costs against promoters.]—*Re BURNELL'S ESTATE* (1864), 10 L. T. 127; 10 Jur. N. S. 289; 12 W. R. 568.

*Annotation:—*Re English's Trusts (1888), 57 L. J. Ch. 1048.

1875. —.]—*Ex p. METROPOLITAN RY. CO.* (1868), 16 W. R. 996.

*Annotation:—*Re English's Trusts (1888), 57 L. J. Ch. 1048.

1876. Cestuis que trust—Respondents to petition by sole trustee & other cestuis que trust—Promoters liable for costs of all parties—Except of one respondent formerly petitioner.]—*Re LONG'S TRUST* (1864), 33 L. J. Ch. 620; 10 L. T. 21; 10 Jur. N. S. 417; 12 W. R. 460.

1877. Executors—Of guardian of infant—Appearing on petition by infant on attaining majority—Part payment to estate of guardian—Promoters not liable.]—*Re SINCLAIR, LONDON GASLIGHT ACT, 1852* (1867), 16 L. T. 474.

1878. Promoters—Served where purchase-money paid in to credit of suit—Entitled to costs.]—*PRES-COTT v. WOOD* (1868), 37 L. J. Ch. 691.

1879. Parties served ceasing to have interest in fund—Appearing by counsel—Promoters liable.]—*Ex p. LONDON & SOUTH WESTERN RY. CO.* (1869), 38 L. J. Ch. 527.

1880. Vendors—Appearing as respondents to consent—To petition by promoters under Lands Act, 1845, s. 85—Allowed costs in special cases.]—*Re TOTTENHAM & HAMPSHIRE JUNCTION RY. CO.* (1866), 14 W. R. 669.

1881. —.]—Refusal to be added as co-petitioners—Promoters not liable.]—*Re HOLMAN'S SETTLEMENT*, [1877] W. N. 272.

1882. Official solicitor—Appearing on account of neglect of tenant for life—Fund exceeding £500 not dealt with for fifteen years—Costs not payable

by promoters.]—*Re CLARKE'S ESTATE* (1882), 21 Ch. D. 776; 52 L. J. Ch. 88.

1883. Tenant for life—Made respondent to petition by trustees of will—Entitled to be separately represented—& to costs against promoters.]—*Re PIGGIN, Ex p. MANSFIELD RY. CO.*, [1913] 2 Ch. 326; 82 L. J. Ch. 431; 108 L. T. 1014.

B. Transfer to Other Accounts.

1884. To credit of suit—All parties to suit served—Costs not separable—Promoters liable.]—*PATTEN v. GATTY* (1852), 1 W. R. 219, n.

*Annotation:—*Consd. *Haynes v. Barton* (1861), 1 Drew. & Sm. 483.

1885. —.]—Promoters not parties to applications & proceedings—Promoters liable.]—*HENNIKER v. CHAFY, Re MANCHESTER & LEEDS RY.* (1860), 28 Beav. 421; 7 Jur. N. S. 87; 54 E. R. 505; subsequent proceedings, sub nom. *HENNIKER v. CHAFY* (1865), 35 Beav. 124.

*Annotations:—*Folld. *Sidney v. Wilmer* (1862), 31 Beav. 338; *Paterson v. Paterson* (1864), 3 New Rep. 657.

1886. —.]—Promoters liable for costs of petitioner & serving respondents—Not costs of appearance.]—*SIDNEY v. WILMER* (No. 2), *Re CLAY CROSS WATERWORKS ACT, 1856* (1862), 31 Beav. 338; 54 E. R. 1169.

*Annotations:—*Folld. *Henniker v. Chafy* (1865), 11 Jur. N. S. 919. *Re English's Settlement* (1888), 39 Ch. D. 556.

1887. —.]—No adverse claims—Promoters liable.]—*EDEN v. THOMPSON* (1864), 2 Hem. & M. 6; 10 L. T. 522; 12 W. R. 789; 71 E. R. 359.

*Annotations:—*Consd. *Re Barcham* (1881), 17 Ch. D. 329. *Apld. Re Olive's Estate* (1890), 44 Ch. D. 316. *Mentd. Re Brooshooft's Settlement* (1889), 42 Ch. D. 250.

1888. —.]—Costs of all parties beneficially interested—Not payable if not joining in petition.]—*MELLING v. BIRD* (1853), 22 L. J. Ch. 599; 20 L. T. O. S. 303; 17 Jur. 155; 1 W. R. 219.

*Annotations:—*Consd. *Re Hinks's Estate* (1853), 2 W. R. 108; *Haynes v. Barton* (1861), 1 Drew. & Sm. 483. *Distd. Re Braye's S. E.* (1863), 32 L. J. Ch. 432. *Re Picton's Estate* (1855), 25 L. T. O. S. 22; *Re Manchester & Leeds Ry., Henniker v. Chafy* (1860), 28 Beav. 621.

1889. —.]—Instituted for raising legacies & charges upon estate—Defendants to suit served & appearing—Not entitled to costs against promoters.]—*Re PICTON'S ESTATE* (1855), 25 L. T. O. S. 22; 3 W. R. 327.

*Annotation:—*Consd. *Haynes v. Barton* (1861), 1 Drew. & Sm. 483.

1890. —.]—Land subject to settlement—Trustees appearing by counsel on being served—Allowed costs against promoters.]—*Re ENGLISH'S SETTLEMENT* (1888), 39 Ch. D. 556; 57 L. J. Ch. 1048; 60 L. T. 44; 37 W. R. 191.

1891. To Ecclesiastical Commissioners—Prebendary formerly co-petitioner appearing as respondent—Not entitled to costs against promoters.]—*Re ST. MARGARET, LEICESTER (PREBEND)* (1864), 10 L. T. 221.

*Annotation:—*Apld. *Re St. Alban's, Wood Street* (1891), 66 L. T. 51.

1892. To Official Trustees of Charitable Funds—Scheme binding on interested parties—Costs of service on disallowed.]—*Re ST. ALBAN'S, WOOD STREET (RECTOR & CHURCHWARDENS)* (1891), 66 L. T. 51.

*Annotation:—*Distd. *A.-G. v. St. John's Hospital, Bath*, [1893] 3 Ch. 151.

B-SECT. 6. —APPORTIONMENT BETWEEN SEVERAL PROMOTERS.

See Sect. 11, post.

taken lands compulsorily, lodged the amount found by the arbitrator in ct., under Railways (Ir.) Act, 1860, s. 2, & went into possession. The co. neither applied to have the money

invested or transferred to the credit of the final award made in 1871:—*Held*: money could not be paid out to owner without the consent of annuity holder charged thereon, & the costs of an

annuitant appearing to resist an application for payment should be borne by the co.—*Re DUBLIN, WICKLOW & RY. CO., Ex p. JORDAN* (1891), 27 L. R. Ir. 79.—IR.

Sect. 8.—Costs of payment out: Sub-sect. 7. Sects. 9 & 10: Sub-sects. 1, 2, 3, 4, 5 & 6.]

SUB-SECT. 7.—OTHER CASES.

1893. Land taken subject to lease—Costs of half-yearly sale of stock—For purposes of distribution—Promoters liable.]—*Re LONG'S ESTATE* (1853), 1 W. R. 226.

1894. ——— Order for to follow words of Lands Act, 1845.]—*Re EDMUNDS* (1866), 35 L. J. Ch. 538; 14 L. T. 243; *sub nom. Re LONDON, CHATHAM & DOVER RY. CO., Ex p. EDMUNDS*, 14 W. R. 507, L. J. J.

1895. Inclusion of another fund in petition—Promoters not liable for increased costs.]—*Re LYNN & FAKENHAM RAILWAY (EXTENSION) ACT*, 1880 (1909), 100 L. T. 432; 73 J. P. 163.

1896. Fees for attendance—With consent brief—On behalf of lunatic—Promoters liable.]—*Re CRAVEN'S SETTLEMENT* (1889), 6 T. L. R. 105.

1897. ——— Before Accountant-General—Allowance of two fees.]—*Re BUTLER'S WILL, Ex p. METROPOLITAN BOARD OF WORKS* (1912), 106 L. T. 673; 56 Sol. Jo. 326; 76 J. P. Jo. 88.

SECT. 9.—COSTS OF PAYMENT OF DIVIDENDS.

1898. Construction of special Act—Costs of obtaining order for payment—Not costs of payment.]—*Re HULL & SELBY RAILWAY ACT, Ex p. ALTHORPE* (1839), 3 Y. & C. Ex. 396; 160 E. R. 756.

1899. ——— Promoters not liable for costs of payment.]—*MITCHELL v. NEWELL, Re MANCHESTER & LEEDS RAILWAY ACT* (1844), 3 Ry. & Can. Cas. 515.

1900. No provision in Act as to costs—Subsequent Act incorporating Lands Act, 1845—Costs payable by promoters under latter Act.]—*Re BRISTOL DOCK ACT & COLSTON ALMSHOUSES, Ex p. SOCIETY OF MERCHANTS* (1853), 21 L. T. O. S. 17.

1901. Costs of & incidental to petition—Payment to owner of land—Before conveyance made—Promoters liable.]—*Ex p. COFIELD* (1847), 9 L. T. O. S. 410; 11 Jur. 1071.

1902. ——— Change occasioned by death—Death of vestry clerk—Payment to churchwardens & overseers—Promoters liable.]—*Re ROYAL EXCHANGE ACT* (1850), 14 Jur. 28.

1903. ——— Death of testator—Payment to tenant for life—Promoters liable.]—*Re LYE'S ESTATE, Re BERKS & HANTS EXTENSION RAILWAY ACT*, 1859 (1866), 13 L. T. 664.

Annotation:—Refd. Re Brooshooff's Settlement. (1889), 42 Ch. D. 250.

1904. ——— Death of tenant for life—Payment to settlor on resettlement—Promoters not liable.]—*Re PICK'S SETTLEMENT* (1862), 31 L. J. Ch. 495; 10 W. R. 365.

Annotations:—Refd. Re Shakespeare Walk School (1879), 12 Ch. D. 178; *Re Brooshooff's Settlement.* (1889), 42 Ch. D. 250.

1905. ——— Death of one of two joint committees of lunatic—Payment to surviving committee—Promoters liable.]—*Re RYDER (A PERSON OF UNSOUND MIND)* (1887), 37 Ch. D. 595; 57 L. J. Ch. 459; 58 L. T. 783, C. A.

1906. ——— Change of trustees—Payment to newly appointed trustees—Promoters not liable.]—*Re ANDENSHAW SCHOOL* (1863), 1 New Rep. 255.

Annotation:—Refd. Re Shakespeare Walk School (1879), 12 Ch. D. 178.

1907. ——— Reconstitution of charity

—Promoters liable.]—*Re SHAKESPEARE WALK SCHOOL* (1879), 12 Ch. D. 178; 48 L. J. Ch. 677; 28 W. R. 148.

Annotation:—Refd. Re Brooshooff's Settlement. (1889), 42 Ch. D. 250.

1908. ——— Life interests—Costs of altering orders for payment—Promoters liable.]—*Re BAZETT'S TRUSTEES* (1850), 16 L. T. O. S. 279.

1909. ——— Payment of dividends on moiety of principal to tenant for life—Promoters liable.]—*Re HAWKER'S TRUST, Re BRISTOL & EXETER RY. CO.* (1852), 18 L. T. O. S. 300.

1910. ——— Payment to purchaser of life interest—During life of tenant for life—Promoters not liable.]—*Re BYROM* (1859), 5 Jur. N. S. 261; 7 W. R. 367.

Annotation:—Refd. Re Shakespeare Walk School (1879), 12 Ch. D. 178.

1911. ——— Costs of petition in Court of Exchequer paid by promoters—Promoters not liable for costs of petition in Court of Chancery.]—*Re WILLIAMS' ESTATE* (1871), L. R. 12 Eq. 488.

1912. Costs of persons entitled in succession—Promoters liable.]—*Re BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RAILWAY ACTS, Ex p. GILDEN SUTTON (INCUMBENT)* (1856), 8 De G. M. & G. 380; 27 L. T. O. S. 163; 2 Jur. N. S. 793; 4 W. R. 582; 44 E. R. 436, L. J. J.

Annotation:—Refd. Re Shakespeare Walk School (1879), 12 Ch. D. 178.

1913. Costs of parties—Petition necessary on marriage of beneficiary—Promoters not necessary parties & entitled to costs served.]—*Re GRAND JUNCTION RAILWAY ACTS, Ex p. HORDEIN* (1848), 2 De G. & Sm. 263; 11 L. T. O. S. 372; 64 E. R. 118.

Annotations:—Folld. Re Andenshaw School (1863), 1 New Rep. 255. *Refd. Re Dryland's Estate* (1853), 1 W. R. 139; *Re Shakespeare Walk School* (1879), 12 Ch. D. 178.

1914. ——— Trustees of settled estate—Petition by tenant for life—Fund subject of administration suit—Promoters liable.]—*HENNIKER v. CHAFY* (1865), 35 Beav. 124; 11 Jur. N. S. 919; 55 E. R. 812.

Annotation:—Consd. Re English's Settlement. (1888), 39 Ch. D. 556.

SECT. 10.—COSTS OF UNNECESSARY PROCEEDINGS.

SUB-SECT. 1.—APPLICATION BY PETITION OR SUMMONS.

Procedure on application generally, *see* Part XI., Sect. 7, *ante*.

1915. Applicant adopting proper procedure—Petition by person absolutely entitled to part of fund under £300—Promoters liable.]—*Re CLARKE'S DEVISEES* (1858), 6 W. R. 812.

1916. ——— Petition for payment out of sum exceeding £1000—Accrued interest not credited to account—Promoters liable.]—*Ex p. FINSBURY & CITY OF LONDON SAVINGS BANK (TRUSTEES)*, [1886] W. N. 150.

1917. Applicant proceeding by petition instead of summons—Money paid in under Defence Act, 1842 (c. 94) & 1860 (c. 112)—Costs allowed—Future applications to be made in chambers.]—*Re DEFENCE ACT, 1842, & ORDNANCE BOARD TRANSFER ACT, 1855, & MAYNARD'S TRUSTS* (1861), 30 L. J. Ch. 344; 3 L. T. 773; 7 Jur. N. S. 232; 9 W. R. 330.

Acquisition of land for defence of realm generally, *see* CONSTITUTIONAL LAW.

PART XII. SECT. 9.

a. Costs of persons entitled in succession—Promoters liable—But not for costs consequent on order.]—Under

Lands Act, 1845, s. 80, ry. cos. are liable for cost of orders obtained by successive tenants for life for payment to them of dividends accruing on stock purchased with the price of land taken

by them, & by them paid into ct.; but not to any costs incurred consequent on the order.—*Ex p. GORDON v. BELFAST & COUNTY DOWN RY. CO.* (1865), 18 Ir. Jur. 1.—IR.

Sect. 10.—Costs of unnecessary proceedings: Sub-sect. 6. Sect. 11: Sub-sects. 1, 2, 3 & 4. Sect. 12: Sub-sect. 1.]

On petition for payment out.]—See Sect. 8, sub-sect. 5, A., ante.

On petition for transfer of fund from one account to another.]—See Sect. 8, sub-sect. 5, B., ante.

On petition for payment of dividends.]—See Sect. 9, ante.

SECT. 11.—APPORTIONMENT OF COSTS BETWEEN SEVERAL PROMOTERS.

SUB-SECT. 1.—GENERAL COSTS.

1942. General rule—Equally apportioned—Joint proceedings.]—LONDON & BRIGHTON RY. CO. v. SHROPSHIRE UNION RY., ETC. CO. (1856), 23 Beav. 605; 53 E. R. 238.

1943. — — — Not ratably according to amounts paid in.]—Ex p. LONDON (BP.) (1860), 2 De G. F. & J. 14; 29 L. J. Ch. 575; 2 L. T. 365; 3 L. T. 224; 24 J. P. 611; 6 Jur. N. S. 640; 8 W. R. 465, 714; 45 E. R. 526, L. J.J.

Annotations:—Apprvd. & Apld. Re Byron's Estate (1863), 8 L. T. 562. Apld. Re Carlisle & Silloth Ry. (1863), 33 Beav. 253. Consd. Re Maryport, etc. Ry. Act (1863), 32 Beav. 397. Foll'd. Re Merton College (1864), 1 De G. J. & Sm. 361. N.F. Ex p. Eccl. Comrs. for England (1865), 13 W. R. 575. Foll'd. Ex p. London Corp'n. (1868), L. R. 5 Eq. 418; Ex p. Trinity College, Cambridge (1868), 18 L. T. 849; Re Leigh's Estate (1871), 6 Ch. App. 887. Consd. Ex p. Manchester (1873), 28 L. T. 184. Foll'd. Re Goro Langton's Estates (1875), 32 L. T. 785. N.F. Ex p. St. Bartholomew's Hospital (1875), L. R. 20 Eq. 369. Foll'd. Re Manchester & Leeds Ry., Ex p. Gaskell (1876), 2 Ch. D. 360; Ex p. Bilston (1889), 37 W. R. 460. Consd. Re Bishopsgate Foundation, [1894] 1 Ch. 185; Re Met. Ry. & Gonville & Caius College, Cambridge, [1906] 1 Ch. 619, n. Reifd. Re St. Alban's, Wood Street (1891), 66 L. T. 51; Re Clark, [1906] 1 Ch. 615.

1944. — — —.]—(1) The costs of a joint reinvestment of purchase-moneys for lands taken by different cos. must be borne by the cos. equally, without reference to the amounts of the purchase-moneys but the ct. will apportion the *ad valorem* duty on the conveyance according to the amounts contributed by each co. to the consideration money.

(2) Where three cos. took lands & two of them subsequently became amalgamated with another co. the costs of a joint re-investment were ordered to be borne, as to two-thirds, by the co. which represented the two amalgamated cos.—Re MARYPORT, ETC. RAILWAY ACT, Ex p. LONSDALE (EARL) (1863), 32 Beav. 397; 1 New Rep. 506, 545; 32 L. J. Ch. 811; 9 Jur. N. S. 1217; 11 W. R. 410, 507; 55 E. R. 155.

Annotations:—As to (2) Dbtd. & N.F. Ex p. Corpus Christi College, Oxford (1871), L. R. 13 Eq. 334. N.F. Re Manchester & Leeds Ry., Ex p. Gaskell (1876), 45 L. J. Ch. 368.

1945. — — — In absence of severe hardship.]—Re BYRON'S ESTATE (1863), 1 De G. J. & Sm. 358; 2 New Rep. 294; 32 L. J. Ch. 584; 8 L. T. 562; 9 Jur. N. S. 838; 11 W. R. 790; 46 E. R. 143, L. J.J.

Annotation:—Apld. Re Merton College (1864), 1 De G. J. & Sm. 361.

1946. — — —.]—Lands were taken by three separate cos. from the same owner. Afterwards one of the cos. leased its line for 999 years:—*Held*: each co. must bear one-third of the costs of the reinvestment, with a proportionate part of the *ad valorem* stamp.—Re CARLISLE & SILLOTH RY. CO. (1863), 33 Beav. 253; 55 E. R. 365.

1947. — — — Reinvestment of three funds & balance of fourth.]—Re MERTON COLLEGE (1864), 1 De G. J. & Sm. 361; 3 New Rep. 598; 10 Jur. N. S. 222; 12 W. R. 503; 46 E. R. 145, L. J.J.; sub nom. Re MERTON COLLEGE, OXFORD, Ex p. LONDON, CHATHAM & DOVER RY. CO., 10 L. T. 8.

1948. — — — Mere inequality no ground for departing from rule—Or because part of particular fund only to be invested.]—Ex p. CHRIST'S HOSPITAL (GOVERNORS) (1864), 2 Hem. & M. 166; 71 E. R. 425.

Annotation:—Consd. Re Bishopsgate Foundation, [1894] 1 Ch. 185.

1949. — — — Payment in by Crown & two companies—Costs borne equally by two companies.]—A.-G. v. ROCHESTER CORPN. (1867), 16 L. T. 408; sub nom. A.-G. v. ROCHESTER CORPN., Re WATT'S CHARITY TRUSTEES, 15 W. R. 765.

Annotation:—Consd. Re Met. Ry. & Gonville & Caius College, Cambridge, [1906] 1 Ch. 619, n.

1950. — — — Investment in leaseholds.]—Ex p. TRINITY COLLEGE, CAMBRIDGE (MASTER, FELLOWS, ETC.) (1868), 18 L. T. 849.

1951. — — —.]—Ex p. CHRIST'S HOSPITAL (GOVERNORS) (1879), 27 W. R. 458.

1952. — — — Only when costs not readily apportionable.]—On a petition by B. Foundation, which by arrangement between petitioners & resps., certain public bodies who had purchased different portions of the charity lands, was treated as one for reinvestment in land as far as the costs were concerned, the question arose whether these should be borne ratably or equally as between resps.:—*Held*: as the general rule laid down in Ex p. London (Bishop), No. 1808, ante, that these costs should be borne in equal shares, only applied to such costs as were not readily apportionable & not to the *ad valorem* stamp duty & the surveyor's fee, which should be paid ratably, the fact that the scale fee had been adopted on the purchase of the land for reinvestment in the present case readily furnished a means of apportionment & there being a great inequality in the amounts of purchase-money, these costs should be apportioned to the extent of the scale fee.—Re BISHOPSGATE FOUNDATION, [1894] 1 Ch. 185; 63 L. J. Ch. 167; 70 L. T. 231; 42 W. R. 199; 38 Sol. Jo. 80; 8 R. 50.

Annotation:—Reifd. Re Clark, [1906] 1 Ch. 615.

1953. Exceptions to general rule—Ratably apportioned—Great inequality in amounts paid in.]—Ex p. CHRISTCHURCH (1861), 9 W. R. 474.

Annotations:—Expld. Ex p. St. Bartholomew's Hospital (1875), L. R. 20 Eq. 369. In consideration of the hardship & injustice which would arise in cases of great inequality in the amounts contributed from the different sources, STUART, V.C., in Ex p. Christchurch directed that the costs should be borne in proportion to the amount contributed (MALINS, V.C.).—Reifd. Ex p. Gaskell (1876), 24 W. R. 752.

1954. — — —.]—Ex p. ST. BARTHOLOMEW'S HOSPITAL (GOVERNORS) (1875), L. R. 20 Eq. 369; 32 L. T. 652.

Annotations:—Reifd. Ex p. Gaskell (1876), 24 W. R. 752; Re Bishopsgate Foundation, [1894] 1 Ch. 185.

1955. — — —.]—Re BISHOPSGATE FOUNDATION, No. 1952, ante.

1956. On amalgamation of companies—Of two of three companies—Amalgamated company liable for two-thirds.]—Re MARYPORT, ETC. RAILWAY ACT, Ex p. LONSDALE (EARL), No. 1944, ante.

1957. — — — Of three of four companies—Equal apportionment between subsisting companies.]—Ex p. CORPUS CHRISTI COLLEGE, OXFORD (1871), L. R. 13 Eq. 334; 41 L. J. Ch. 170.

1958. — — —.]—Re MANCHESTER & LEEDS RY. CO., Ex p. GASKELL (1876), 2 Ch. D. 360; 45 L. J. Ch. 368; 24 W. R. 752.

Annotation:—Reifd. Re Bishopsgate Foundation, [1894] 1 Ch. 185.

1959. On assignment of undertaking—Sums paid in by assignor & assignee—Assignee liable for reinvestment of both funds.]—Ex p. SHEFFIELD (VICAR) (1904), 68 J. P. 313.

1960. Apportionment according to amount of respective purchase-moneys.]—Re GREAT WESTERN

RAILWAY ACTS, *Re* LONDON & BRIGHTON RAILWAY ACTS, *Re* LONDON & BLACKWALL RAILWAY ACTS, *Ex p.* ST. THOMAS'S HOSPITAL (GOVERNORS) (1859), 7 W. R. 425.

1961. Some promoters not liable to pay or receive costs—Liability of remaining promoters limited—To apportionment as among whole of promoters.]—*Ex p.* ECCLESIASTICAL COMRS. FOR ENGLAND (1865), 5 New Rep. 483; 12 L. T. 294; 11 Jur. N. S. 461; 13 W. R. 575.
Annotation:—*Consd.* *Re* Harrison's Estate (1870), L. R. 10 Eq. 532.

SUB-SECT. 2.—SCALE AND SURVEYOR'S FEES.

1962. Surveyor's fees—Apportioned ratably.]—*Ex p.* LONDON CORPN. (1868), L. R. 5 Eq. 418; 37 L. J. Ch. 375; 17 L. T. 489; 16 W. R. 355.
Annotation:—*Refd.* *Re* Clark, [1906] 1 Ch. 615.

1963. ———.]—*Re* BISHOPSGATE FOUNDATION, No. 1952, *ante*.

1964. Scale fees—Apportioned ratably.]—*Re* BISHOPSGATE FOUNDATION, No. 1952, *ante*.

SUB-SECT. 3.—STAMP DUTIES.

1965. Apportioned ratably.]—*Re* MARYPORT, ETC. RAILWAY ACT, *Ex p.* LONSDALE (EARL), No. 1944, *ante*.

1966. ———.]—*Re* CARLISLE & SILLOTH RY. CO., No. 1916, *ante*.

1967. ———.]—*Re* BISHOPSGATE FOUNDATION, No. 1952, *ante*.

SUB-SECT. 4.—BROKERAGE.

1968. Equally apportioned—Though funds of unequal value.]—*Re* BARTHOLOMEW'S HOSPITAL (1901–7), cited in 24 T. L. R. 262.

Annotation:—*Refd.* *Ex p.* Emmanuel Hospital (1908), 24 T. L. R. 26

1969. ———.]—*Ex p.* EMMAUEL HOSPITAL (1908), 24 T. L. R. 261.

See, also, Part XII., Sect. 5, sub-sect. 5, & Sect. 8, sub-sect. 4, *ante*.

SECT. 12.—COSTS OF LITIGATION BETWEEN ADVERSE CLAIMANTS.

SUB-SECT. 1.—DOUBTFUL OR DISPUTED TITLE.

See Lands Act, 1845, s. 80.

1970. Title dependent on construction of will—Promoters liable.]—*Re* TOOKEY'S TRUST, *Re* BUCKS RY. CO. (1852), 21 L. J. Ch. 402; 16 Jur. 708.

Annotation:—*Refd.* *Re* Longworth's Estate (1853), 1 K. & J. 1.

1971. ———.]—*Re* LAVERICK'S ESTATE, *Re* WHITBY IMPROVEMENT ACT (1853), 22 L. T. O. S. 168; 18 Jur. 304; 2 W. R. 113.

PART XII. SECT. 12, SUB-SECT. 1.

c. Title dependent on construction of will—Payment into court under Public Works Act, 1900—Promoters not liable to unsuccessful claimant—Nor to successful claimant for costs caused by enquiry into claims.]—Where money is paid into ct. under above Act because of adverse claims on construction of a settlement or will, & these claims are subsequently litigated, the promoters will not be required to pay costs of unsuccessful claimants nor such costs of successful claimants as have been caused by the enquiry as to such claims.—*Re* GOODWIN (1904), 4 S. R. N. S. W.

682.—AUS.

1982 i. Lands taken with knowledge that title disputed—One claimant subsequently abandoning claim—Petition by other for payment—Promoters liable.]—Where compensation money is paid into ct. because the promoters are not satisfied with the title of adverse claimants, & after payment in, one claimant abandons his claim, the promoters will not be relieved of costs of an unopposed petition for payment out merely because the payment in was made after requests by both claimants to adopt that course in order to settle their claims.—*Re*

1972. Costs of appearance of parties entitled—Promoters liable—Counterpetition—Promoters not liable.]—*Re* HINKS'S ESTATE (1853), 2 W. R. 108.

1973. ——— Promoters liable for only one set of costs.]—*Re* MID KENT RAILWAY ACT, 1856, *Ex p.* STYAN (1859), John. 387; 70 E. R. 472.

Annotation:—*Refd.* *Re* Mid-Kent Ry., *Ex p.* Bate (1863), 11 W. R. 417.

1974. ———.]—*Ex p.* YATES (1869), 5 Ch. App. 1; 17 W. R. 872, L. C.

Annotations:—*Refd.* *Ex p.* Mancaux (1870), 5 Ch. App. 518. *Mentd.* *Saxby v. Hennett* (1873), 28 L. T. 639.

1975. ———.]—*Re* CATLING'S ESTATE (1890), 6 T. L. R. 417, C. A.

1976. ——— Form of order—Following words of Lands Act, 1845, s. 80.]—*Re* CANT'S ESTATE (1859), 1 De G. F. & J. 153; 29 L. J. Ch. 119; 1 L. T. 254; 6 Jur. N. S. 183; 8 W. R. 105; 45 E. R. 317, L. J.J.

Annotations:—*Foldd.* *Re* Hayward & *Re* 23 & 24 Vict. c. 193, London & City Improvement Act, 1847, *Ex p.* St. James, Gorlickhithe (1863), 9 L. T. 320; *Re* Courts of Justice Comrs., [1868] W. N. 124. *Consd.* *Re* Kerry, Bocoock v. Kerry, Arnall v. Kerry, [1889] W. N. 3; *Hood v. West Ham Corpn.*, *Re* West Ham Corporation Act, 1902 (1910), 74 J. P. 179. *Refd.* *Re* M'Donald's Will Trusts & *Re* London & Blackwall Ry. (1860), 2 L. T. 168.

1977. ——— Doubtful devise—Costs of determining construction of—Promoters liable.]—*Re* GREGSON'S TRUSTS (1864), 2 Hem. & M. 504; 4 New Rep. 222; 33 L. J. Ch. 531; 10 L. T. 642; 10 Jur. N. S. 696; 12 W. R. 935; 71 E. R. 559; *revid.* on other grounds, 2 De G. J. & Sm. 428, L. J.J.

1978. ——— Settlement of trust fund—Promoters liable.]—*Re* NOAKE'S WILL (1880), 28 W. R. 762.

1979. Land taken with knowledge that title disputed—Dividends ordered to be paid on former application—Second application for payment out of purchase-money—Disputant appearing to consent—Promoters liable.]—*Ex p.* PALMER, COX & BELLINGHAM (1849), 13 Jur. 781.

1980. ——— Conveyances taken from two disputants—Costs of two petitions for investment—Costs of disputant appearing as respondent—Promoters liable.]—*Re* BUTTERFIELD (1861), 9 W. R. 805.

1981. ——— One claimant subsequently abandoning claim—Petition by other for payment—Promoters not liable.]—*Re* ENGLISH (A LUNATIC) (1865), 12 F. T. 561; 11 Jur. N. S. 434; 13 W. R. 932, L. J.J.

1982. ——— Promoters liable.]—NORFOLK'S (DUKE) SETTLED ESTATES (1874), 31 L. T. 79.

1983. ——— Invalid leases—Promoters liable for general costs on petition for payment—Not costs of lessors' appearance.]—*Re* NORTH LONDON RY. CO., *Ex p.* COOPER, No. 2044, *post*.

1984. ——— Dispute settled without litigation—Costs of negotiation for settlement—Promoters not liable.]—HOOD v. WEST HAM CORPN., *Re* WEST HAM CORPORATION ACT, 1902 (1910), 74 J. P. 179.

CLISSOLD (1907), 7 S. R. N. S. W. 638.—AUS.

d. Title dependent on result of litigation—Payment into court under Public Works Act, 1900—Promoters not liable to unsuccessful litigant.]—When money has been paid into ct. under above Act, the ct. has jurisdiction to order costs occasioned by adverse litigation, including so much of the costs of the promoters as have been so occasioned, to be paid by unsuccessful litigant.—*Re* ASSETS REALISATION & GENERAL FINANCE CO., LTD. (1904), 4 S. R. N. S. W. 555; 21 N. S. W. W. N. 167.—AUS.

Sect. 12.—Costs of litigation between adverse claimants: Sub-sects. 1, 2 & 3. Sect. 13. Part XIII. Sect. 1: Sub-sects. 1 & 2.]

1985. Charity lands—Claim of Charity Commissioners that money not payable without their consent—Promoters liable.]—*Re CLERGY ORPHAN CORPN.*, [1894] 3 Ch. 145; 64 L. J. Ch. 66; 71 L. T. 450; 43 W. R. 150; 10 T. L. R. 672; 38 Sol. Jo. 695; 7 R. 549, C. A.

Annotations:—Consd. Re Gilchrist Educational Trust, [1895] 1 Ch. 367; *Re Harding & Welsh Calvinistic Methodist Connexion* (1905), 92 L. T. 641; *Re Church Army, A.-G. v. Church Army* (1906), 75 L. J. Ch. 467; *A.-G. v. Mathieson*, [1907] 2 Ch. 383; *Re Soc. for Training Teachers of the Deaf & Whittle's Contract*, [1907] 2 Ch. 486. **Folld.** *Wesleyan Methodist Chapel, South Street, Wandsworth*, [1909] 1 Ch. 454. **Consd.** *Re Orphan Working School & Alexandra Orphanage Contract*, [1912] 2 Ch. 167. **Refd.** *Re Mason's Orphanage & L. & N. W. Ry.*, [1896] 1 Ch. 54; *Re Stockport Ragged, Industrial & Reformatory Schools*, [1898] 2 Ch. 687; *Re Dod's Charity*, [1905] 1 Ch. 442; *Re Howard Street Congregational Chapel (Sheffield)* (1913), 83 L. J. Ch. 99; *Re Murray's Charity* (1914), 111 L. T. 710; *Re Richard Murray Hospital*, [1914] 2 Ch. 713.

1986. Suit pending—Part of money remaining in court to await decision—Petition by person rightly entitled for payment out—Promoters liable.]—*Re EASTERN COUNTIES RY. CO., Ex p. GARDINER* (1843), 3 Ry. & Can. Cas. 117.

1987. — Petition in matter of special Act & in the cause—Promoters liable only for costs of petition in matter of Act.]—*Re HORE'S ESTATE & SOUTH DEVON RY. CO.* (1849), 5 Ry. & Can. Cas. 592; *sub nom. HORE v. SMITH, Re SOUTH DEVON RAILWAY CO.'S ACT*, 13 L. T. O. S. 399; 14 Jur. 55.

Annotations:—Consd. Melling v. Bird (1853), 22 L. J. Ch. 599; *Wilson v. Foster* (1859), 26 Beav. 398. **Folld.** *Haynes v. Barton* (1861), 1 Drew. & Sm. 483; *Henniker v. Chafy* (1865), 11 Jur. N. S. 919.

SUB-SECT. 2.—DIFFERENT INTERESTS.

1988. Doubt as to parties entitled—Reference to master—Promoters liable for all costs except those of reference—& of opposing affidavits by adverse claimants.]—*Ex p. COLLINS* (1850), 19 L. J. Ch. 244; 15 L. T. O. S. 362.

1989. — Costs of ascertaining rights & shares of parties—Promoters liable.]—*Re SINGLETON'S ESTATE, Ex p. FLEETWOOD RY. CO.* (1863), 8 L. T. 630; 9 Jur. N. S. 941; 11 W. R. 871.

1990. — Costs of ascertaining rights & shares of parties—Promoters liable.]—Lands were taken by a railway co., & the purchase-money paid into ct. under Lands Act, 1845, s. 80. Certain expenses were incurred in ascertaining the parties entitled to the purchase-money:—*Held*: the expenses must be borne by the co.—*Re SINGLETON'S ESTATE, Ex p. FLEETWOOD RY. CO.* (1863), 8 L. T. 630; 9 Jur. N. S. 941; 11 W. R. 871.

1991. Death of vendor pending negotiations for reinvestment—Costs of suit for declaring infant

PART XII. SECT. 12, SUB-SECT. 2.

1990 i. Doubt as to parties entitled—Costs of ascertaining rights of parties—Promoters liable—Except for litigation between adverse claimants.]—A petition was presented for transfer to petitioner of money lodged in ct. by a ry. co.

under Lands Act, 1845, & several claimants appeared. The ct. decided petitioner entitled to the whole sum, & ordered the ry. co. to pay costs of the petition & of the proceedings thereunder, except costs occasioned by the litigation between the adverse

heir trustee for purchasers—**Promoters not liable.]—***Re FENTON'S WILL* (1855), 3 W. R. 331.

1992. Contest between tenant for life & remainderman—As to proportion of fund belonging to each—Promoters not liable.]—*ASKEW v. WOODHEAD* (1880), 14 Ch. D. 27; 49 L. J. Ch. 320; 42 L. T. 567; 44 J. P. 570; 28 W. R. 874, C. A.

Annotations:—Folld. Re Hunt's Estate, [1884] W. N. 181; *Re Lingard, Lingard v. Squirrel*, [1908] W. N. 107. **Consd.** *Re Simpson, Clarke v. Simpson*, [1913] 1 Ch. 277. **Refd.** *Worman v. Worman* (1889), 43 Ch. D. 296.

1993. Purchase of land in possession of mortgagee—Inquiry to ascertain amount due on mortgage—Promoters liable.]—*Re BAREHAM* (1881), 17 Ch. D. 329; 29 W. R. 525, C. A.

Annotation:—Consd. Re Olive's Estate (1890), 44 Ch. D. 316.

1994. Summons by various claimants for proportionate part of purchase-money—Form of order—Following words of Lands Act, 1845, s. 80.]—*Re COURTS OF JUSTICE COMRS.*, [1868] W. N. 124.

SUB-SECT. 3.—APPORTIONMENT OF DIVIDENDS.

1995. Claims by representatives of tenant for life—Promoters not liable.]—*Re LONGWORTH'S (DECEASED) ESTATE* (1853), 1 K. & J. 1; 2 Eq. Rep. 776; 23 L. J. Ch. 104; 22 L. T. O. S. 197; 2 W. R. 124; 69 E. R. 343.

Annotations:—Folld. Jodrell v. Jodrell (1869), 20 L. T. 349. **Refd.** *Ex p. London* (1863), 3 New Rep. 246.

1996. Former order not obtained on account of disputes—Costs of additional application—Promoters not liable.]—*Re JOLIFFE* (1857), 3 Jur. N. S. 633.

See, generally, Sect. 9, ante.

SECT. 13.—COSTS OF SUBSEQUENT DEALINGS WITH PROPERTY OR FUND.

1997. Devolution of title—From charity trustees to school board governors—Petition for payment of part of corpus & dividends—Promoters liable.]—*Re SHAKESPEARE WALK SCHOOL* (1879), 12 Ch. D. 178; 48 L. J. Ch. 677; 28 W. R. 148.

Annotation:—Refd. Re Brooshooft's Settlement (1889), 42 Ch. D. 250.

1998. Mortgage of interest in fund—Costs of mortgagees in proving title—Promoters not liable.]—*Re GOUGH'S TRUSTS, Ex p. GREAT WESTERN RY. CO.* (1883), 24 Ch. D. 569; 53 L. J. Ch. 200; 49 L. T. 494; 32 W. R. 147.

Annotations:—Dbtd. Re Olive's Estate (1890), 44 Ch. D. 316. **Refd.** *Re Ruck's Estate* (1895), 13 R. 637.

1999. Land subject to settlement—Exercise of power of appointment—Form of order—Following words of Lands Act, 1845, s. 80.]—*Re BROOSHOOFT'S SETTLEMENT* (1889), 42 Ch. D. 250; 58 L. J. Ch. 654; 61 L. T. 320; 37 W. R. 741.

Annotation:—Refd. Re Olive's Estate (1890), 44 Ch. D. 316.

claimants; & ordered unsuccessful claimants to pay to petitioner such costs as the taxing master should find occasioned by their adverse claims.—*Re WILLIAMS, Ex p. GREAT SOUTHERN & WESTERN RY. CO.* (1877), 1 R. 11 Eq. 497.—IR.

Part XIII.—Purchase of Particular Interests in Land.

SECT. 1.—COPYHOLDS.

SUB-SECT. 1.—IN GENERAL.

See Lands Act, 1845, ss. 95–98.

2000. Lands Act, 1845, ss. 95–98—Not varied by Copyhold Acts, 1852–1858—Special Act incorporating Lands Act, 1845 after Copyhold Act, 1852 (c. 51) & before Copyhold Act, 1858 (c. 94)—Conveyance to promoters after Copyhold Act, 1858.]—(1) The tenant for life of a manor is entitled to such part of the moneys paid into ct., in respect of the lord's rights in copyhold lands taken by a railway co., as is properly apportionable in respect of actual damage already done to the life estate by taking of soil, etc.; but he is not entitled to the corpus of any sum which may be speculatively apportioned in respect of fines, that would probably, but for the purchase by the co., have become payable to him, as tenant for life.

(2) The Copyhold E. Acts above mentioned do not vary the construction of the copyhold clauses of Lands Act, 1845, though the special Act incorporating it bears date since that of the earlier Copyhold E. Act, & the conveyance to the co. since the later.—*Re WILSON'S ESTATE* (1863), 3 De G. J. & Sm. 410; 1 New Rep. 301; 32 L. J. Ch. 191; 7 L. T. 772; 9 Jur. N. S. 1043; 11 W. R. 295; 46 E. R. 693, L. J.J.

Annotation:—As to (1) Consd. Leconfield v. L. & N. W. Ry., [1907] 1 Ch. 38.

2001. Right of promoters to purchase—Private Act authorising purchase of "lands, tenements or hereditaments"—Objection to purchase not maintainable by owner acting as owner of fee simple.]—*R. v. SOUTH HOLLAND DRAINAGE COMMITTEE MEN* (1838), 8 Ad. & El. 429; 1 Per. & Dav. 79; 1 Will. Woll. & H. 617; 8 L. J. Q. B. 64; 112 E. R. 901.

*Annotations:—Mentd. R. v. Manchester & Leeds Ry. (1838), 1 Per. & Dav. 164; R. v. Swansea Harbour Trustees (1838), 8 Ad. & El. 439; Taylor v. Clemson (1844), 11 Cl. & Fin. 610; R. v. Stainforth (1845), 11 Q. B. 63; R. v. Salop J.J. (1859), 29 L. J. M. C. 39; R. v. Surrey J.J. (1870), L. R. 5 Q. B. 466; R. v. Sheward (1880), 5 Q. B. D. 179; R. v. Williams, *Ex p.* Phillips, [1914] 1 K. B. 608.*

SUB-SECT. 2.—TENANT'S INTEREST.

See Lands Act, 1845, ss. 95, 96.

2002. Fees payable to steward—For surrender only—Not admittance.]—*COOPER v. NORFOLK RY. CO.* (1849), 3 Exch. 546; 6 Ry. & Can. Cas. 94; 18 L. J. Ex. 176; 13 L. T. O. S. 7; 13 J. P. 380; 13 Jur. 195; 154 E. R. 962.

2003. Lord entitled by custom to fine on surrender & admittance—Not entitled to fine on sale by copyholder—Or on enrolment.]—*ECCLESIASTICAL COMRS. FOR ENGLAND v. LONDON & SOUTH WESTERN RY. CO.* (1854), 14 C. B. 743; 23 L. J. C. P. 177; 18 Jur. 911; 2 W. R. 560; 2 C. L. R. 1796; 139 E. R. 305.

Annotations:—Consd. Lowther v. Calc. Ry., [1891] 3 Ch. 443. Refd. Re Wilson's Estates (1863), 32 L. J. Ch. 191.

2004. Statutory conveyance by copyholder—Incomplete without admittance.]—(1) Infants Property Act, 1830 (c. 65), enacting that no infant shall forfeit copyhold land for his neglect or refusal to be admitted, does not prevent the lord from seizing *quousque*.

(2) A canal co. was authorised by statute to purchase land, on voluntary or compulsory sale

by the persons interested at prices to be agreed upon, or ascertained by comrs. or a jury, & a form of conveyance was prescribed, purporting that the party granted all his right, title, & interest, to & in the same, & every part thereof, to hold to the said co. for ever. The co. were authorised to enter upon payment of price, or tender, etc., & were made liable to render compensation for damage done by their works, etc., if claimed within six months. A copyholder in fee executed a conveyance in the statutory form to the co., who paid him the price, & entered:—*Held*: this conveyance passed only such interest as the copyholder could convey without the lord, & on the copyholder's death, no other person having been admitted, the lord might seize *quousque* for want of a tenant, & maintain ejectment, & an action for mesne profits, against the co.—*DIMES v. GRAND JUNCTION CANAL CO.* (1846), 9 Q. B. 469; 5 Ry. & Can. Cas. 34; 16 L. J. Q. B. 107; 11 Jur. 429; 115 E. R. 1353, Ex. Ch.; *subsequent proceedings, sub nom. DIMES v. GRAND JUNCTION CANAL (PROPRIETORS)* (1852), 3 H. L. Cas. 794, H. L.
Annotation:—Generally, Mentd. Doo d. Patrick v. Beaufort (1851), 6 Exch. 498.

2005. — Confers equitable estate only—Customary heir ordered to be admitted—As trustee for promoters.]—An Act of Parliament incorporated certain persons as a co. for the purpose of making a canal, & gave them powers to purchase & hold lands for the purposes of the Act; it authorised persons to contract for, sell, & convey their lands, gave a form of conveyance of all the estate, right, title, & interest of the person conveying, & enacted that all such contracts, agreements, sales, conveyances, & assurances should be valid to all intents, etc. S. was a tenant of copyhold land, a portion of which was wanted for the purposes of the canal; he sold it to the co., & executed a conveyance according to the form given by the Act. The land was then applied to the purposes of the canal. On the death of S. the lord made a proclamation for the heir of S. to come in & be admitted as a tenant on the rolls of the manor. No one appeared to claim admittance, & the lord seized the land *quousque*. He afterwards brought ejectment against the canal proprietors, & obtained judgment against them on the ground that the conveyance under the Act had only vested in them an equitable estate in the copyhold land. He then interfered to stop the course of the navigation. The canal proprietors filed a bill against him, praying that the customary heir of S., or such other person as plffs. might appoint, might be admitted to the copyhold premises, plffs. undertaking to pay the fine & fees upon such admission; & further praying for a perpetual injunction & general relief:—*Held*: the customary heir of S., who had been made a party to the suit, should be admitted tenant to the copyhold premises in question, & when admitted should hold the same as trustee for plffs. in the suit, & the amount of the fine was referred to the master, & an injunction should be granted.—*DIMES v. GRAND JUNCTION CANAL (PROPRIETORS)* (1852), 3 H. L. Cas. 794; 19 L. T. O. S. 317; 17 Jur. 73; 10 E. R. 315, H. L.

Annotations:—Refd. Lowther v. Calc. Ry., [1891] 3 Ch. 443. Mentd. Bright v. Hutton, Hutton v. Bright (1852), 3 H. L. Cas. 341.

Cost of conveyance of copyhold estate.]—See Nos. 1257, 1258, *ante*.

Sect. 1.—Copyholds: Sub-sects. 2, 3 & 4. Sects. 2,

Compulsory enfranchisement—Rights of promoters to acknowledgment of right to production of deeds.]—See COPYHOLDS.

SUB-SECT. 3.—RIGHTS OF LORD OF THE MANOR.

2006. To fines—Not on sale by copyholder to promoters — Or on enrolment.]—ECCLESIASTICAL COMRS. FOR ENGLAND v. LONDON & SOUTH WESTERN RY. CO. (1854), 14 C. B. 743; 23 L. J. C. P. 177; 18 Jur. 911; 2 W. R. 560; 2 C. L. R. 1796; 139 E. R. 305.

Annotations:—Consd. Re Wilson's Estates (1863), 32 L. J. Ch. 191. Refd. Lowther v. Cale. Ry., [1891] 3 Ch. 443.

2007. — Not on compulsory enfranchisement.]—Re WILSON'S ESTATE, No. 2000, ante.

2008. — Payable on death of vendors or successors—Pending enfranchisement.]—LECONFIELD (LORD) v. LONDON & NORTH WESTERN RY CO., [1907] 1 Ch. 38; 76 L. J. Ch. 33; 95 L. T. 672; 23 T. L. R. 31; 51 Sol. Jo. 27.

2009. Entitled to such part of in moneys paid—As properly apportionable for actual damage to life estate—By taking of soil, etc.]—Re WILSON'S ESTATE, No. 2000, ante.

2010. Assessment of compensation—Loss of fines not included.]—ECCLESIASTICAL COMRS. FOR ENGLAND v. LONDON & SOUTH WESTERN RY. CO. (1854), 14 C. B. 743; 23 L. J. C. P. 177; 18 Jur. 911; 2 W. R. 560; 2 C. L. R. 1796; 139 E. R. 305.

Annotations:—Consd. Lowther v. Cale. Ry., [1891] 3 Ch. 443. Refd. Re Wilson's Estates (1863), 32 L. J. Ch. 191.

See, also, No. 2008, ante.

2011. — Loss of quitances included.]—Re NORTHUMBERLAND (DUKE) & TYNEMOUTH CORPN., [1909] 2 K. B. 374; 78 L. J. K. B. 767; 100 L. T. 930; 73 J. P. 326.

2012. — On value of lands one month after entry.]—Re SALISBURY (MARQUIS) & LONDON & NORTH WESTERN RY. CO. (1879), [1892] 1 Ch. 75, n.; 66 L. T. 63, n.

Annotations:—Consd. Lowther v. Cale. Ry., [1892] 1 Ch. 73. Apld. Leconfield v. L. & N. W. Ry., [1907] 1 Ch. 38. Consd. Re Northumberland & Tynemouth Corpn., [1909] 2 K. B. 374.

2013. — On value of lands at date of entry—Or enrolment.]—A railway which had taken copyholds in 1873 was required by the lord to enfranchise in 1887:—Held: in view of the obligation imposed by the Lands Act, 1845, ss. 96, 97, on the co. to enfranchise within one month of taking copyholds or three months from the enrolment of the conveyance, the compensation for enfranchisement must be assessed on the value of the lands at the time when they were taken or the conveyance enrolled but fines payable on other occasions, e.g., on the death of a lord, were to be assessed on the value of the land when the fines became due after the taking & prior to the enrolment of the conveyance.—LOWTHER v.

CALEDONIAN RY. CO., [1892] 1 Ch. 73; 61 L. J. Ch. 108; 66 L. T. 62; 40 W. R. 225; 8 T. L. R. 149; 36 Sol. Jo. 152, C. A.

Annotations:—Consd. Re Northumberland & Tynemouth Corpn., [1909] 2 K. B. 374. Refd. Leconfield v. L. & N. W. Ry., [1907] 1 Ch. 38.

2014. Interest on compensation money—Payable at 4 per cent. from date of obligation to enfranchise—To date of payment—After deducting rents received meanwhile.]—Re NORTHUMBERLAND (DUKE) & TYNEMOUTH CORPN., [1909] 2 K. B. 374; 78 L. J. K. B. 767; 100 L. T. 930; 73 J. P. 326. —.]—See, also, Part X., Sect. 1, sub-sect. 4, ante.

SUB-SECT. 4.—APPORTIONMENT OF RENTS WHEN LAND SEVERED.

See Lands Act, 1845, s. 98.

2015. Non-apportionment by promoters—Not a ground for refusal of conveyance—Duty of vendor to apply.]—PARKER v. SOUTH EASTERN RY. CO. (1853), 1 W. R. 316.

2016. Promoters not bound to exonerate lands not taken—From apportioned heriot—Construction of contract.]—PARKER v. SOUTH EASTERN RY. CO. (1853), 1 W. R. 316.

SECT. 2.—COMMONS OR WASTE LAND.

See COMMONS & RIGHTS OF COMMON, Part VIII., pp. 38 et seq., ante.

SECT. 3.—LAND SUBJECT TO MORTGAGE.

2017. Money paid into court to credit of mortgagor—Company restrained until mortgagee's interests secured.]—RANKEN v. EAST & WEST INDIA DOCKS, ETC. RY. CO. (1849), 12 Beav. 298; 19 L. J. Ch. 153; 15 L. T. O. S. 81; 14 Jur. 7; 50 E. R. 1075.

2018. Agreement with tenant for life as though owner in fee—Under mistake—Company restrained from retaining possession—At instance of mortgagees & remaindermen—Though railway built.]—PERKS v. WYCOMBE RY. CO., No. 147, ante.

2019. Equitable mortgagees—Not entitled to lien on money in court—Compensation assessed at less than mortgage debt—Entitled to assignment of property in default.]—A railway co. requiring land paid a sum of money into ct., & gave the usual bonds to the landowner & to his mtgees. by deposit, & took possession of the land. The co. proceeded with the inquiry into the amount of compensation as against the landowner, the mtgees. being aware, though without formal notice, of the inquiry, but taking no part in it. The compensation awarded was less than the amount in ct., & was not sufficient to pay the debt due to the mtgees., & a suit being instituted by them, the sum in ct. was transferred to that suit, & ordered to stand as a security under Lands Act, 1845:—Held: (1) the mtgees. had no lien on the sum in ct.;

PART XIII. SECT. 3.

e. Mortgage for a term — Payment by promoters before expiry—Mortgagee entitled to compensation therefor—To interest from date of taking.]—SPARKE v. WORKS MINISTER, PALING v. WORKS MINISTER (1891), 12 N. S. W. L. R. 276; 8 N. S. W. W. N. 72.—AUS.

f. Mortgagee—Entitled to have compensation separately ascertained.]—A mtgor. does not represent his mtgee. for purposes of Railway Act, & can

only deal with his own equity of redemption, leaving the mtgee. entitled to have his compensation separately ascertained.—Re TORONTO BELT LINE RY. CO. (1895), 26 O. R. 413.—CAN.

g. — Dispossessed after entry — Entitled to compensation—Mortgagor entitled to redem.]—Where a mtgee. has entered & is subsequently dispossessed, & the lands taken by a ry. co.:—Held: mtgee. entitled to recover value of land as damages, to

be held as security for his mortgage money, & mtgor. entitled to redem in respect of the damages as he would have been in respect of the land.—DELANEY v. CANADIAN PACIFIC RY. CO. (1890), 21 O. R. 11.—CAN.

h. — With no notice of arbitration—Entitled to amount awarded.]—A ry. co. took possession of land & proceeded with an arbn. with the owners. The lands were subject to a mortgage to plffs., who received no notice of, &

(2) they were not bound by the inquiry, & were as equitable mtgees. entitled in default of payment to an assignment by the co. & the landowner of the land comprised in their security; (3) they were not entitled to have the mtge. discharged out of the money paid into the bank; (4) s. 124 did not apply.—**MARTIN v. LONDON, CHATHAM & DOVER RY. CO.** (1866), 1 Ch. App. 501; 35 L. J. Ch. 795; 14 L. T. 814; 12 Jur. N. S. 775; 14 W. R. 880, L. C. *Annotations*:—As to (1) (2) & (3) *Distd. Ex p. Mid. Ry.* (1903), 89 L. T. 545. *Refd. Law Guarantee & Trust Soc. v. Mitoham & Cheam Brewery Co.*, [1906] 2 Ch. 98.

2020. — Equally entitled as legal mortgagees. — **LONDON & INDIA DOCK CO. v. NORTH LONDON RY. CO.** (1903), *Times*, Feb. 6.

2021. Mortgage debt greater than agreed compensation—Mortgagee entitled to whole. — **KING v. MIDLAND RY. CO.** (1868), 17 W. R. 113.

2022. Interest—Six years only recoverable—Purchase-money paid into court. — *Re STEAD'S MORTGAGED ESTATES* (1876), 2 Ch. D. 713; 45 L. J. Ch. 634; 35 L. T. 465; 24 W. R. 698.

Annotations:—*Consd. Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Distd. Re Thomson's Mortgage Trusts, Thomson v. Bruty*, [1920] 1 Ch. 508. *Refd. Re Marshfield, Marshfield v. Hutchings* (1887), 34 Ch. D. 721.

2023. — Payable by vendor—In lieu of notice. — In a compulsory purchase under Lands Act, 1845, interest is payable to the vendor by the purchaser from the time when possession might have been taken, it appearing that a good title could be shown, & the land being subject to mtge. by the vendor to the mtgee. in lieu of notice.—**SPENCER-BELL TO LONDON & SOUTH WESTERN RY. CO. & METROPOLITAN DISTRICT RY. CO.** (1855), 33 W. R. 771; 1 T. L. R. 435.

2024. Mortgagor not entitled to proportion of purchase-money—For loss of trade profits—Graving dock. — The owner of business premises mortgaged them with the machinery & fixtures. A railway co. gave notice to take part of the premises for their railway, but before the price was fixed the mtgor. died & the mtgees. entered into possession of the property. A suit was instituted for the administration of the mtgor.'s estate, which proved to be insolvent, & a receiver was appointed, who, with the consent of the mtgees., carried on the business. Arbitrators & an umpire were appointed to fix the compensation money payable by the co. The umpire awarded a sum of £11,950, of which he certified that he had awarded £2,800 in respect of the loss of profits in carrying on the business. The exors. claimed the £2,800 as belonging to the mtgor.'s estate, to be divided among his general creditors:—*Held*: the £2,800 was in the nature of compensation for the value of the goodwill of the business, which passed with the premises; & the whole of the sum of £11,950 belonged to the mtgees.—**PILE v. PILE, Ex p. LAMBTON** (1876), 3 Ch. D. 36; 45 L. J. Ch. 841; 35 L. T. 18; 24 W. R. 1003, C. A.

2025. Mortgagor entitled to proportion of purchase-money—For trade damage & personal expenses—Where goodwill dependant on personal skill. — **COOPER v. METROPOLITAN BOARD OF WORKS**, No. 177, *ante*.

took no part in, the arbn., & gave no consent to taking possession. An award was made, but was not taken up by either the co. or the owners. Pltfs. brought action against co. & owners for foreclosure, offering to take compensation awarded, & release the lands:—*Held*: co. were proper parties to action, & pltfs. were entitled to judgment against all defts. with a provision for release of lands on payment of amount of award.—**SCOTTISH AMERICAN INVESTMENT CO. v. PRITIE** (1893), 20 A. R. 398.—CAN.

j. Portion of land subject to mort taken—Rights of mortgagee. — A portion of land subject to a mtge. was taken under Labourers (Ir.) Act, 1906:—*Held*: the rights of the parties were regulated by Lands Act, 1845, s. 112, & that the value of the part taken was to be assessed, & sum awarded to be paid over to the mtgees. in satisfaction of his mtge. debt so far as the same would extend.—*Ex p. STRAHANE RURAL COUNCIL*, [1910] 1 L. R. 135.—IR.

k. Mortgagor not entitled to notice

2026. Mortgagee in possession with power of sale—Entitled to compensation for value—& for injurious affection. — **R. v. MIDDLESEX (CLERK OF THE PEACE)**, [1914] 3 K. B. 259; 83 L. J. K. B. 1773; *sub nom. R. v. MIDDLESEX (CLERK OF THE PEACE), Ex p. LONDON ELECTRIC RY. CO.*, 111 L. T. 579; 79 J. P. 7.

Mortgagee in possession—Payment of dividends of fund in Court. — See No. 1385, *ante*.

Application of fund in Court—In discharge of mortgage. — See No. 1289, *ante*.

Application for payment of dividends—To tenant for life—Whether mortgagees must be served. — See No. 1559, *ante*.

2027. Reinvestment of purchase-money—Lands purchased made subject to same mortgages as lands taken. — *Re EASTERN COUNTIES RY. CO., Re LANDS CLAUSES CONSOLIDATION ACT, 1845, Ex p. PEYTON'S SETTLEMENT* (1856), 2 Jur. N. S. 1013; 4 W. R. 380.

SECT. 4.—LAND SUBJECT TO CHARGES OTHER THAN MORTGAGE.

2028. Tithe—Land rendered incapable of producing—Not damage to lands or persons interested therein—To entitle vicar to compensation. — **R. v. NENE OUTFALL COMRS.** (1829), 9 B. & C. 875; 4 Man. & Ry. 646; 8 L. J. O. S. K. B. 1; 109 E. R. 325.

Annotations:—*Refd. R. v. Thames & Isis Navigation Comrs.* (1836), 5 Ad. & El. 804; *Bird v. G. E. Ry.* (1865), 19 C. B. N. S. 268.

2029. — Basis of compensation—Actual value of tithe before lands taken. — By 37 Hen. 8, c. 12 the inhabitants of certain parishes in the city of London were to pay tithes at the rate of 2s. 9d. in the pound on their rent. By Blackwall Railway Act, 1839, where houses in any of these parishes should be taken for the purposes of the railway after the occupiers should have quitted their houses, & until new houses or other buildings should be erected, & occupied, of such annual rent or value, that the tithes of such new houses should be equal to the tithes payable for the houses quitted, the tithes, or payments in lieu of tithes, payable in respect of the houses quitted, according to the last assessments to March 25, 1839, or annual sums of money equal to the loss in tithes which the rectors might sustain by the taking down of such houses, should be paid & payable to the rectors, etc. The co. removed a great many houses, & built two others, which were at once occupied:—*Held*: (1) the object of the Act was only indemnity to the clergy; therefore the clergy were entitled to receive only what they would have received if the railway co. had never interfered with the premises; (2) the co. was liable to pay in respect of houses removed, where no others had been built in their places, such sums as were actually paid to the rector, whether by agreement or otherwise, up to March 25, 1839; (3) the amount before then

of expropriation proceedings—When equity of redemption conveyed to promoters. — A mtgor. who has conveyed his equity of redemption subject to the payment of the mtge. is not entitled to notice of expropriation proceedings taken by a co. with regard to the mortgaged lands; & the absence of such notice does not constitute any defence to an action brought against him by the mtgee. on a covenant to pay the mortgage money.—**FARR v. HOWELL** (1900), 31 O. R. 693.—CAN.

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agreed upon between the rector & the occupant, & paid by the occupant, constituted the assessment within the Act, & the amount of compensation must be measured thereby; (4) where new houses had been built & occupied, the co. was entitled to be credited in reduction of its general liability to make compensation under the Act with the sums which had become payable in respect of such new houses, & not merely with those which had been actually received therefrom.—*LONDON & BLACKWALL RY. CO. v. LETTS* (1851), 3 H. L. Cas. 470; 18 L. T. O. S. 1; 15 Jur. 995; 10 E. R. 185; *sub nom. LETTS v. LONDON & BLACKWALL RY. CO.*, 6 Ry. & Can. Cas. 687; 7 Ry. & Can. Cas. 987, H. L.; *reversg. S. C. sub nom. LETTS v. LONDON & BLACKWALL RY. CO.* (1847), 5 Hare, 605.

Annotation:—As to (1) (2) & (3) Consd. Esdaile v. Met. & Dist. Rys. Joint Committee (1881), 46 J. P. 103.

2030. — Not last annual assessment.]—Where a railway co. were given compulsory powers under their special Act to take property subject to tithes on condition that they indemnified the owner of the tithes, either by continuing to pay them to him according to the last annual assessment, or by purchasing them under Lands Act, 1845 upon payment of compensation, & the co. elected to purchase the tithes:—*Held*: the last annual assessment was not to be taken as the basis for estimating the compensation to be so paid.—*ESDAILE v. METROPOLITAN & DISTRICT RAILWAYS JOINT COMMITTEE* (1881), 46 J. P. 103, D. C.

2031. Rent-charge—Small proportion of land charged taken—Compensation reduced by amount similarly proportioned to value of rent-charge—Promoters indemnified from rent-charge by vendor.]—*POWELL v. SOUTH WALES RY. CO.* (1855), 1 Jur. N. S. 773.

2032. — Lunatic beneficiary—Release by committee—On purchase of life annuity of equal value.]—*Re BREWER*, No. 423, *ante*.

2033. Annuities—Purchase from first annuitant under power of sale—Second annuitant not entitled to charge—Nor specific performance of contract on notice to treat.]—*HILL v. GREAT NORTHERN RY. CO.* (1854), 3 Eq. Rep. 324; 24 L. J. Ch. 212; 24 L. T. O. S. 332; 1 Jur. N. S. 102; 3 W. R. 39. *Annotation:—Consd. Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

2034. — Uncertainty whether promoters taking whole or part—Promoters restrained until annuities secured.]—*UNIVERSITY LIFE ASSURANCE SOCIETY v. METROPOLITAN RY. CO.*, [1866] W. N. 167.

SECT. 5.—LAND SUBJECT TO LEASES.

SUB-SECT. 1.—WHO ENTITLED TO COMPENSATION.

2035. Lessee—Lease granted after special Act—Not entitled.]—*LONDON'S (BP. OF) CASE* (1818), 1 Sim. & St. 268; 57 E. R. 108.

2036. Lease granted after notice to treat—Tenant without notice of proposed works—Entitled

to notice to treat.]—*CARTER v. GREAT EASTERN RY. CO.* (1863), 8 L. T. 197; 9 Jur. N. S. 618.

2037. — Weekly tenant granted term for years—Not entitled.]—*Re MARYLEBONE (STINGO LANE) IMPROVEMENT ACT, Ex p. EDWARDS* (1871), L. R. 12 Eq. 389; 40 L. J. Ch. 697; 25 L. T. 149; 19 W. R. 1047.

Annotations:—Reid. Mercer v. Liverpool, St. Helens & South Lancashire Ry., [1903] 1 K. B. 652. *Mentd. Zick v. London United Tramways*, [1908] 1 K. B. 611.

2038. — Not entitled.]—The owner of land received from a railway co. notice under their statutory powers which incorporated Lands Act, 1845, to treat for part of his land, & the purchase-money was settled by agreement to include compensation for all injurious affection. Between the notice to treat & the agreement the owner leased to applt. part of the land held with the land purchased. The railway co. exercised their powers & injuriously affected applt.'s land:—*Held*: the sum paid to the owner must be taken to have included compensation for the injury to the lessee's land, & the lessee was not entitled to compensation under Lands Act, 1845.—*MERCER v. LIVERPOOL, ST. HELENS & SOUTH LANCASHIRE RY. CO.*, [1904] A. C. 461; 73 L. J. K. B. 960; 91 L. T. 605; 68 J. P. 533; 53 W. R. 241; 20 T. L. R. 673, H. L.

Annotations:—Consd. Dawson v. Great Northern & City Ry., [1905] 1 K. B. 260. *Mentd. Zick v. London United Tramways*, [1908] 1 K. B. 611; *Wild v. Woolwich B. C.*, [1909] 2 Ch. 287.

2039. — For existing lease not surrendered—Though new tenancy granted after notice to treat.]—By an agreement dated Mar. 15, 1905, F., as agent for the mtgees. in possession of certain premises, let the premises to S. for three years from Mar. 14, 1905. On May 15, 1905, notice to treat under Lands Act, 1845, in respect of the premises was served by defts., a tramway co., on the lessors. By an agreement dated Jan. 23, 1906, S. agreed to stand possessed of the lease of the premises in trust for pltf., & in Feb. pltf. entered upon the premises. Subsequently S. informed F., the lessors' agent, that he wished to transfer his interest to pltf., & it was arranged between S., pltf., & F. that the old tenancy should be surrendered, & a new tenancy should be granted to pltf. for a term of three years, being about a year longer than the residue of the former term. Accordingly on Feb. 14, 1906 an agreement was entered into by which F., as the lessors' agent, let the premises to pltf. for three years from that date:—*Held*: either pltf. or S. as trustee for him was entitled to compensation in respect of the tenancy under the original agreement of Mar. 15, 1905, which still subsisted, in the absence of a valid surrender of it.—*ZICK v. LONDON UNITED TRAMWAYS, LTD.*, [1908] 2 K. B. 126; 77 L. J. K. B. 942; 98 L. T. 841; 72 J. P. 257; 24 T. L. R. 577; 52 Sol. Jo. 456, C. A.

Annotation:—Mentd. Canterbury Corpn. v. Cooper (1908), 99 L. T. 612.

, *also*, No. 2075,

2040. — For chance of renewal of lease & goodwill—Not for fixtures & improvements belonging to landlord under lease.]—*R. v. HUNGERFORD*

PART XIII. SECT. 5, SUB-SECT. 1.

2038 i. Lessee—Lease granted after notice to treat—Tenant not entitled.]—A tenant is not entitled to compensation in respect of his compulsory removal from subjects of which he was in possession, he not having obtained a written lease until after co. had given the landowner notice to take, & the tenant had been duly warned to remove.—*CITY OF GLASGOW UNION RY. CO. v. M'EWEN & CO.* (1870), 8 Macph. (Ct. of Sess.) 747; 42 Sc. Jur.

385.—SCOT.

2040.i. — For chance of renewal of lease.]—The Crown resumed land under Public Works Act, 1900, subject to a lease. At date of resumption 2 years had still to run.

Held: in valuing pltf.'s interest in the land the jury were not entitled to consider the probability of a renewal arising from the fact that the owner held nearly all the shares in pltf. co., the balance being held by members of his family.—*NEW SOUTH WALES*

AERATED WATER & CONFECTIONARY CO. v. THE MINISTER (1916), 33 N. S. W. W. N. 34, 119.—AUS.

2040 ii. ——A tenant of licensed premises under a lease for a term of years is not entitled to have the chance of renewal of lease at its expiration taken into account in the valuation.—*LYNCH v. GLASGOW CORPN.* (1903), 5 F. (Ct. of Sess.) 1174.—SCOT.

1. — Landlord's power of resumption not exercised—Entitled against promoters.]—A tenant held under a lease

MARKET CO., *Ex p.* GOSLING (1833), 4 B. & Ad. 596; 1 Nev. & M. K. B. 518; 110 E. R. 580.

Annotations.—**Distd.** *R. v. Manchester & Liverpool Ry.* (1836), 1 Har. & W. 689. **Consd.** *Re Palmer & Hungerford Market Co.* (1839), 9 Ad. & El. 463. **Refd.** *Allen v. Flood*, [1898] A. C. 1.

See, also, Nos. 2044, 2076, 2077, *post*.

2041. ——— **Not entitled.**—*R. v. LIVERPOOL & MANCHESTER RY. CO.* (1836), 4 Ad. & El. 650; 6 Nev. & M. K. B. 186; 111 E. R. 931; *sub nom.* *R. v. MANCHESTER & LIVERPOOL RY. CO.*, *Ex p.* BATHE, 1 Har. & W. 689; 5 L. J. K. B. 106.

Annotation.—**Consd.** *R. v. London & Southampton Ry.* (1839), 10 Ad. & El. 3.

2042. ——— **Trustees of underlease authorised to obtain clause for compensation.**—*JONES v. POWELL* (1841), 4 Beav. 96; 49 E. R. 274.

See, also, Nos. 2062, 2075, *post*.

2043. ——— **Under Act authorising compensation to owners or proprietors.**—*LISTER v. LOBLEY* (1837), 7 Ad. & El. 124; 2 Har. & W. 12; 6 Nev. & M. K. B. 340; 6 L. J. K. B. 200; 1 J. P. 309; 1 Jur. 526; 112 E. R. 417.

Annotations.—**Consd.** *Hutton v. L. & S. W. Ry.* (1849), 7 Hare, 259; *Kennet & Avon Navigation Co. v. Witherington* (1852), 18 Q. B. 531. **Refd.** *Paddock v. Forrester* (1842), 3 Man. & G. 903; *Derby v. Bury Improvement Comrs.* (1869), L. R. 4 Exch. 222; *A.-G. v. Parish*, [1913] 2 Ch. 444. **Mentd.** *Peters v. Clarson* (1844), 7 Man. & G. 548; *Ramsden v. Manchester, South Junction & Altrincham Ry.* (1848), 1 Exch. 723; *A.-G. v. Thames River Conservators* (1862), 1 Hem. & M. 1; *Macey v. Metropolitan Board of Works* (1864), 33 L. J. Ch. 377.

2044. ——— **Under invalid lease—For improvements executed on faith of validity of lease—Not for loss of trade.**—(1) As regards leasehold interests the function of a compensation jury summoned under Lands Act, 1815, extends only to ascertaining the value of the leasehold interest claimed by the landowner, & if too large an interest be claimed, the ct. itself will, after the compensation money has been paid in by the co., direct a proper apportionment, & order the excess in the amount paid into ct. to be returned to the co.

(2) A railway co. requiring certain premises in the occupation of A. gave him notice to treat. A. claimed compensation in respect of two leases, one for 21 years & the other for 80 years, & for loss of trade. A jury awarded £1500 for the leases & £700 for loss of trade, which sums were paid into ct. by the co. to the credit of *ex p.* the co., the account of A. The leases were in fact invalid, in consequence of their having been granted by the exors. instead of the heir of a last surviving trustee:—*Held*: A. was entitled to so much of the £1500 as represented the value of certain improve-

ments effected by him on the faith of the leases being valid, the amount to be ascertained by an inquiry in chambers, & the residue of the money paid in must be returned to the railway co.; A. having served the persons who were interested in contending under the will that the leases were invalid, the co. would not be ordered to pay the costs of their appearance; a jury or arbitrator could not determine the title of the party but only the value of the interest.—*Re NORTH LONDON RY. CO. (CITY BRANCH)*, *Ex p.* COOPER (1865), 2 Drew. & Sm. 312; 5 New Rep. 233; 34 L. J. Ch. 373; 11 L. T. 661; 11 Jur. N. S. 103; 13 W. R. 364; 62 E. R. 640.

Annotations.—*As to* (1) **Refd.** *Bogg v. Mid. Ry.* (1867), L. R. 4 Eq. 310. *As to* (2) **Folld.** *Ex p. Luntley* (1865), 13 L. T. 490; *Re North London Ry.*, *Ex p. Hayne* (1865), 12 L. T. 200.

See, also, No. 2076, *post*.

2045. ——— **Under lease for any term at tenant's option—With covenant by landlord not to give notice to quit so long as rent paid.**—*Re KING'S LEASEHOLD ESTATES*, *Ex p.* EAST LONDON RY. CO. (1873), L. R. 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.

Annotations.—**Distd.** *Wood v. Beard* (1876), 2 Ex. D. 30. **Refd.** *Kusel v. Watson* (1879), 11 Ch. D. 129; *Cheshire Lines Committee v. Lewis* (1880), 50 L. J. Q. B. 121.

2046. ——— **Under building agreement—Though forfeited by non-completion of buildings within specified time—Building suspended with consent of landlord.**—*BIRMINGHAM & DISTRICT LAND CO. v. LONDON & NORTH WESTERN RY. CO.*, No. 990, *ante*.

2047. ——— **Landlord cannot destroy right—By exercising power of resuming possession—For "purpose of building, planting, accommodation or otherwise."**—*JOHNSON v. EDGWARE, ETC. RY. CO.* (1866), 35 Beav. 480; 35 L. J. Ch. 322; 14 L. T. 45; 14 W. R. 416; 55 E. R. 982.

— **From year to year.**—*See* Sect. 6, *post*.

2048. **Lessor—Not for lease granted after special Act.**—*LONDON'S (BP. OF) CASE* (1818), 1 Sim. & St. 268; 57 E. R. 108.

See, also, No. 2075, *post*.

Application of purchase-money of leaseholds—Paid into court—As between tenant for life & remainderman.—*See* Part XI., Sect. 4, sub-sect. 1, *ante*.

— **In purchase of other lands.**—*See* Nos. 1295, 1302, *ante*.

2049. **Compensation for interests of lessor & lessee in lump sum—Lessor entitled to principal—Lessee entitled to interest.**—*Re AYLESBURY RY. CO.* (1843), 1 L. T. O. S. 456.

which provided that the proprietor was entitled to resume at pleasure. A co. acquired part of the lands from the proprietor who had never exercised his power of resumption. The tenant claimed compensation under Lands (Scot.) Act, 1845. In suspension brought by the co. of the statutory arbitration.

Held: the co. were not entitled to found on the clause of resumption.—*SOLWAY JUNCTION RY. CO. v. JACKSON* (1874), 1 R. (Cl. of Sess.) 831.—**SCOT.**

m. ——— **—**—**—**—**—**—**FLEMING v. NEWPORT RY. CO.** (1883), 8 App. Cas. 265.—**SCOT.**

2043 i. ——— **Under Act authorising compensation to owners or occupiers.**—*JOHNSON v. ONTARIO, SIMCOE, & HURON RY. CO.* (1854), 11 U. C. R. 1.—**CAN.**

n. ——— **Where land expropriated for public purposes—Entitled to indemnity against promoter.**—The lessee of land expropriated for public purposes has a recourse for indemnity against the expropriating party, independently of the proprietor. Such

recourse may be exercised by a common law action independently of the expropriation proceedings.—*Re VERDUN CORPN. & GRAND TRUNK BOATING CLUB* (1898), Q. R. 7 Q. B. 185.—**CAN.**

o. ——— **Under 37 Vict. c. 13, s. 7.**—*Re WELLAND CANAL ENLARGEMENT*, *FITCH v. McRAE* (1881), 29 Gr. 139.—**CAN.**

p. ——— **—**—**—**—**—**—**The clay in certain lands was leased to a tenant who claimed compensation from a ry. co. for the clay sublying that portion of the lands traversed by their line.**—*Held*: the tenant had a sufficient interest to form the subject of a statutory submission under the Lands Clauses Consolidation Act.—*SOLWAY JUNCTION RY. CO. v. JACKSON* (1874), 1 R. (Cl. of Sess.) 831; 11 Sc. L. R. 344.—**SCOT.**

q. ——— **For interference with business.**—*R. v. MONTGOMERY-CAMPBELL & NORTHFIELD COAL CO., LTD.* (1917), 17 Exch. C. R. 32.—**CAN.**

r. ——— **In possession after lessors option to renew lease not exercised—Not entitled.**—Lessees, under renewable

lease, when the lessors have option to renew or to pay for improvements, who remain in possession after expiration of the term, but to whom no renewal lease is granted, although demanded, are tenants at will merely, & not "persons interested" in the land within the meaning of Railway Act, 1906, s. 155, & are not entitled to compensation.—*CANADIAN PACIFIC RY. CO. v. BROWN (ALEXANDER) MILLING & ELEVATOR CO.* (1909), 18 O. L. R. 85; 13 O. W. R. 301; 9 Can. Ry. Cas. 56.—**CAN.**

s. ——— **For hotel right of way.**—*Pltf.* was lessee of hotel. *Defts.* acquired the property from the owner, but took no proceedings to acquire *pltf.*'s lease or right of way:—*Held*: *pltf.* was entitled to compensation.—*McDONALD v. VANCOUVER, VICTORIA & EASTERN RY. & NAVIGATION CO.* (1909), 11 W. L. R. 121.—**CAN.**

t. **Compensation for interests of lessor & lessee—Must be in separate amounts.**—*PACIFIC GREAT EASTERN RY. CO. v. LARSEN & LINTON & CO.* (1915), 8 W. W. R. 1, 630.—**CAN.**

Sect. 5.—Land subject to leases: Sub-sects. 1, 2, 3, 4, 5 & 6. Sect. 6: Sub-sect. 1, A.]

2050. — Application by lessee for apportionment—Refused—Promoter not entitled to costs & expenses on petition.]—*Ex p. WARD* (1848), 2 De G. & Sm. 4; 5 Ry. & Can. Cas. 398; 17 L. J. Ch. 249; 10 L. T. O. S. 479; 12 Jur. 322; 64 E. R. 2.

2051. — Application by lessor for apportionment—Previous valuation to which lessor not party—Not binding on lessor.]—*Ex p. LUNTLEY* (1865), 13 L. T. 490; 14 W. R. 93.

.]—See, also, No. 2038, ante.

SUB-SECT. 2.—WHERE PART OF LAND TAKEN.

2052. Apportionment of rents—Not within jurisdiction of arbitrator appointed to assess compensation.]—*Re WARE & REGENT'S CANAL CO.*, No. 667, *ante*.

2053. — Lessors consent unnecessary—Lease containing covenant against assignment—Without licence of lessor.]—*SLIPPER v. TOTTENHAM & HAMPSTEAD JUNCTION RY. CO.* (1867), L. R. 4 Eq. 112; 36 L. J. Ch. 841; 16 L. T. 446; 15 W. R. 861.

Annotation:—Distd. Metropolitan Water Board v. Solomon, [1908] 2 Ch. 214.

2054. — Agreement for—Lessor refusing consent—Specific performance ordered—Order to serve lessor with notice to treat refused.]—*WILLIAMS v. EAST LONDON RY. CO.* (1869), 21 L. T. 524; 18 W. R. 159.

2055. Several plots of land comprised in building agreement—Agreement not put an end to.]—*Re FURNESS & WILLESDEN URBAN DISTRICT COUNCIL* (1905), 70 J. P. 25; 22 T. L. R. 52.

Effect of notice to treat generally.]—*See Part VI., Sect. 2, sub-sect. 5, ante.*

Costs of apportionment of rent.]—*See Part Sect. 4, sub-sect. 3, ante.*

PART XIII. SECT. 5, SUB-SECT. 2.

u. Apportionment of rents—Only apportioned rent payable to landlord from final award—Although no conveyance made or premises taken till after subsequent rent accrued.]—*BALL v. GRAVES* (1886), 18 L. R. Ir. 224.—**IR.**

w. — Agreement for—Only apportioned rent payable from date of agreement—Although no entry.]—Portion of lands in occupation of a statutory tenant was required for Defence Acts. Notice to treat was given, & rent apportioned by agreement, under Lands Act, 1845, s. 119:—*Held*: apportioned rent only was payable from date of agreement, although no entry had taken place.—*Re WAR SECRETARY & HURLEY'S CONTRACT*, [1904] 1 L. R. 354.—**IR.**

PART XIII. SECT. 5, SUB-SECT. 3.

2060 i. Rent as basis of value.]—The owner of land let out a large part of compound to tenants whom he allowed to acquire occupancy rights therein:—*Held*: under Land Acquisition Act, 1894, that so far as owner's interest was concerned compensation should be calculated at so many years purchase of the annual profits actually received by owner at time of the sale.—*ORDRE v. SECRETARY OF STATE FOR INDIA* (1918), 1 L. R. 40 All. 367.—**IND.**

x. —.]—P. demised lands in 1887 to Govt. for 21 years, at a rent, with clause of surrender at the end of 7 or 14 years. In 1898 Govt. served notice to treat:—*Held*: compensation payable to P. in respect of

the rent should be assessed on the basis of a purchase immediately before notice to treat, & be valued at the rent reserved upon a lease for the residue unexpired of a term of 21 years, taking into account the power of surrender, & all the circumstances of the case & the holding should be taken into consideration.—*Re ATHLONE RIFLE RANGE*, [1902] 1 L. R. 433.—**IR.**

y. — Lessee's compensation based on full period—Subject to deduction on contingent powers to terminate earlier.]—A tenant under a lease to Whitsunday, 1911, with power to the landlord or tenant to terminate at Whitsunday, 1898, being deprived of land by a Local Authority under compulsory powers, claimed, in an arbn. under Lands (Scot.) Act, 1845, compensation for loss of profits on the basis of the lease extending to Whitsunday, 1911.

Held: tenant was entitled to compensation on the footing that lease endured to Whitsunday, 1911, subject to such deduction as arbitrator might consider due to the contingency of its being brought to an end at an earlier date.—*FLEMING v. DISTRICT COMMITTEE OF MIDDLE WARD OF LANARKSHIRE* (1895), 23 R. (Ct. of Sess.) 98; 33 Sc. L. R. 83; 3 S. L. T. 157.—**SCOT.**

z. Lessee with option to purchase the fee simple—Lessee's compensation includes lease & option—Lessor's fee simple subject to exercise of option—Public Works Act, 1894.]—*COMPTON v. HAWTHORN & CRUMP* (1902), 22 N. Z. L. R. 709.—**N.Z.**

a. Lands (Scot.) Act, 1845, ss. 17

SUB-SECT. 3.—ASSESSMENT OF COMPENSATION.

2056. Conditional lease at reduced rent—Lessor's compensation based on value at time premises taken—Not value acquired by promoters.]—*PENNY v. PENNY* (1868), L. R. 5 Eq. 227; 37 L. J. Ch. 340; 18 L. T. 13; 16 W. R. 671.

2057. — Lessee's compensation based on full value of premises—Subject to deduction for possibility—Of forfeiture.]—*PENNY v. PENNY* (1868), L. R. 5 Eq. 227; 37 L. J. Ch. 340; 18 L. T. 13; 16 W. R. 671.

2058. Lessee with power to pull down & rebuild—Plans approved in contravention of local bye-laws—Cannot be considered by arbitrator.]—*Re MCINTOSH & PONTYPRIDD IMPROVEMENT CO.* (1892), 8 T. L. R. 203, C. A.

Annotations:—Mentd. Yabbeicom v. King, [1899] 1 Q. B. 444; *Dover Picture Palace & Pessers v. Dover Corpn. & Crundall, Wraith, Gurr & Knight* (1913), 11 L. G. R. 971.

2059. Land let for public park—Power of re-entry if land taken compulsorily—Compensation for commercial value—Not capitalised value of rent.]—*Re MORGAN & LONDON & NORTH WESTERN RY. CO.*, [1896] 2 Q. B. 469; 75 L. T. 226; 45 W. R. 176; 12 T. L. R. 632; 40 Sol. Jo. 753, D. C.

2060. Lease held by promoters—Rent as basis of value.]—*ELDON (EARL) v. NORTH EASTERN RY. CO.* (1899), 80 L. T. 723.

2061. — Severance of reversion—Involuntary act of lessor—Lands Act, 1845, s. 68 not applicable.]—*PIGGOTT v. MIDDLESEX COUNTY COUNCIL*, [1909] 1 Ch. 134; 77 L. J. Ch. 813; 99 L. T. 662; 72 J. P. 461; 52 Sol. Jo. 698; 6 L. G. R. 1177.

Annotations:—Mentd. Wild v. Woolwich B. C. (1909), 78 L. J. Ch. 633; *Jolly v. Brown*, [1914] 2 K. B. 109.

Compensation for goodwill.]—*See No. 2040, ante, Nos. 2076, 2077, post.*

Compensation for improvements.]—*See Nos. 2040, 2044, ante, No. 2078, post.*

2062. Land taken subject to dispute—As to lessee's right of renewal—Court has jurisdiction to settle dispute.]—*BOGG v. MIDLAND RY. CO.* (1867), L. R. 4 Eq. 310; 36 L. J. Ch. 440; 16 L. T. 113.

& 115—Promoters cannot combine sections & thereby penalise tenants.]—A ry. co. in their notice under above sects. required a tenant claiming compensation in respect of an unexpired term to produce his lease with his claim within 21 days, under penalty:—

Held: the co. were not entitled to combine the provisions of the two sects., & shorten the time for tenants producing their leases, so as to involve them, if they failed to comply with such notice, in the penalties contemplated by s. 115.—*FORFAR & BRECHIN RY. CO. v. BEIL* (1892), 19 R. (Ct. of Sess.) 786; 29 Sc. L. R. 648.—**SCOT.**

b. Lease subject to compensation for improvements—Option of lessor to renew—Compensation includes value of improvements & lease.]—The suppliant was tenant of lands where he carried on his business as assignee of two leases. The leases had expired at time of expropriation; but contained a proviso that buildings should be valued, & lessor should have option of resuming possession upon payment of the appraisement, or renewing leases on same terms for a further term. No appraisement had been made, & suppliant continued in possession of property as tenant from year to year. The lessor had no present intention of paying for improvements & resuming possession:—*Held*: in addition to the value of improvements, suppliant was entitled to compensation for the value of his possession under the leases at date of expropriation.—*McGOLDRICK v. R.* (1902), 8 Exch. C. R. 169; 23 C. L. T. 99.—**CAN.**

2063. Lessor claiming possession at expiry of lease—Entitled to compensation only—Based on value at expiry of lease—Assessment by court.]—BEAUFORT (DUKE) v. PATRICK (1853), 17 Beav. 60; 1 Eq. Rep. 41; 7 Ry. & Can. Cas. 906; 22 L. J. Ch. 489; 21 L. T. O. S. 296; 17 Jur. 682; 1 W. R. 280; 51 E. R. 954.

*Annotations:—*Consd. Plimmer v. Wellington Corpn. (1884), 9 App. Cas. 699. Refd. Somersetshire Coal Canal Co. v. Harcourt (1858), 2 De G. & J. 596; Mold v. Wheatecroft (1859), 27 Beav. 510. Mentd. Martin v. L. C. & D. Ry. (1866), 1 Ch. App. 501; Eardley v. Granville (1876), 24 W. R. 528.

SUB-SECT. 4.—EFFECT OF EXERCISE OF COMPULSORY POWERS ON LESSOR'S COVENANTS.

See, generally, LANDLORD & TENANT.

2064. General rule—Promoters bound to accept assignment containing usual covenants indemnifying lessee—On payment of purchase-money after notice to treat—& taking possession with consent of lessee.]—HARDING v. METROPOLITAN RY. CO., No. 762, *ante*.

2065. Covenant to pay rent—Rent payable half-yearly—Notice to quit expiring between two days of payment—Tenant liable for full six months rent.]—WAINWRIGHT v. RAMSDEN (1839), 5 M. & W. 602; 1 Ry. & Can. Cas. 714; 9 L. J. Ex. 120; 151 E. R. 255.

*Annotations:—*Refd. Tasker v. Bullman (1849), 3 Exch. 351. Mentd. Albony v. Ratemeyer (1841), 3 Moo. P. C. C. 452.

2066. Proviso against assignment without licence—Licence not necessary.]—SLIPPER v. TOTTENHAM & HAMPSTEAD JUNCTION RY. CO. (1867), L. R. 4 Eq. 112; 36 L. J. Ch. 841; 16 L. T. 446; 15 W. R. 861. *Annotation:—*Mentd. Metropolitan Water Board v. Solomon, [1908] 2 Ch. 214.

2067. Covenant not to build—On behalf of lessee & assigns—Building by purchasers—Lessee not liable.]—BAILY v. DE CRESPIGNY (1869), L. R. 4 Q. B. 180; 10 B. & S. 1; 38 L. J. Q. B. 98; 19 L. T. 681; 33 J. P. 164; 17 W. R. 494.

*Annotations:—*Refd. Mills v. East London Grdus. (1872), L. R. 8 Q. B. 79; Kirby v. Harrogate School Board, [1896] 1 Ch. 437; Long Eaton Recreation Grounds Co. v. Mid. Ry., [1902] 2 K. B. 574. Mentd. Newington L. B. v. Cottingham L. B. (1879), 12 Ch. D. 725; Re Arthur, Arthur v. Wynne (1880), 14 Ch. D. 603; M. S. & L. Ry. v. Anderson, [1898] 2 Ch. 394; Nickoll v. Ashton, [1901] 2 K. B. 126; Budd-Scott v. Daniell (1902), 87 L. T. 392; Krell v. Henry, [1903] 2 K. B. 740; Re Bradford Tram. & Omnibus Co., Courtenay's Case (1904), 68 J. P. 362; Metropolitan Water Board v. Solomon, [1908] 2 Ch. 214; Grimsdick v. Sweetman, [1909] 2 K. B. 740; Re Shipton, Anderson & Harrison, [1915] 3 K. B. 676; Enlayde v. Roberts (1916), 86 L. J. Ch. 149; Horlock v. Beal, [1916] 1 A. C. 486; Leiston Gas Co. v. Leiston-cum-Sizewell U. D. C., [1916] 2 K. B. 428; Blackburn Robbin Co. v. Allen, [1918] 2 K. B. 467; Metropolitan Water Board v. Dick, Kerr, [1918] A. C. 119; Naylor, Benyon v. Krainsche Industrie Gesellschaft (1918), 87 L. J. K. B. 1066; Bank Line v. Capel, [1919] A. C. 435; Hulton v. Chadwick, Taylor (1919), 122 L. T. 66; Denholme v. Shipping Controller (1920), 124 L. T. 378; Curling v. Matthey (1921), 37 T. L. R. 717.

PART XIII. SECT. 5, SUB-SECT. 4.

c. Covenant to pay rent—Suspension of lease by government under Mining Act, 1874, s. 13—Effect as if lease not granted—Lessee entitled to return or remission of rent.]—The effect of suspension under above Act is that all rights of the lessee derived from the lessor are in abeyance & the lessor is in the same position as if the lease had never been granted, & accordingly, can resume possession.—(OOK v. RICKETSON, [1901] A. C. 588; 16 N. S. W. W. N. 111.—AUS.

d. — Tenant liable for rent between date of award & payment into court.]—Lands, held by A. as tenant to B. under lease, were acquired under

a local Act, incorporating Railways (Ir.) Act, 1851 & the arbitrator awarded *inter alia* that the rent should be wholly abated, but the compensation moneys payable thereunder were only lodged in ct. a considerable time after the award:—*Held*: B. was entitled to recover rent under the lease from A. for the period between the date of award & lodgment of the compensation in respect of B.'s interest in ct.—CALLOW v. FLYNN (1890), 26 L. R. Ir. 179.—IR.

e. Covenant to build—Release from covenant & rent considered.]—Where lessee is under covenant to build upon premises, & part thereof is expropriated, the fact that lessee is relieved from his covenant & his rent is reduced by

2068. Covenant to repair—Lessee liable up to date of giving up possession—Measure of damages diminution of value of reversion.]—MILLS v. EAST LONDON UNION (1872), L. R. 8 Q. B. 79; 42 L. J. C. P. 46; 27 L. T. 557; 37 J. P. 6; 21 W. R. 142.

*Annotation:—*Mentd. Joyner v. Weeks, [1891] 2 Q. B. 31.

— With condition for re-entry on non-performance.]—*See* No. 2070, *post*.

Covenant to cultivate—With condition for re-entry on non-performance.]—*See* No. 2070, *post*.

2069. Restrictive covenant as to user—Promoters not liable under—When compensation paid to lessor—Though no conveyance taken.]—EAST & WEST INDIA DOCKS & BIRMINGHAM RY. CO. v. DAWES (1853), 11 Hare, 363; 68 E. R. 1315.

2070. Purchasers acquiring whole tenement—After notice requiring possession of third—Liable as to two thirds—For breach of covenants to repair house & cultivate garden.]—PIGGOTT v. MIDDLESEX COUNTY COUNCIL, [1909] 1 Ch. 134; 77 L. J. Ch. 813; 99 L. T. 662; 72 J. P. 461; 52 Sol. Jo. 698; 6 L. G. R. 1177.

*Annotations:—*Mentd. Wild v. Woolwich B. C. (1909), 78 L. J. Ch. 633; Jolly v. Brown, [1914] 2 K. B. 109.

Right of lessee to compensation for breach of covenants.]—*See* Part III., Sect. 3, sub-sect. 4, C. (b), *ante*.

SUB-SECT. 5.—APPORTIONMENT OF PURCHASE-MONEY BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

See Part XI., Sects. 4, 5, *ante*.

SUB-SECT. 6.—REINVESTMENT OF PURCHASE-MONEY OF LEASEHOLDS.

See Nos. 1295, 1302, *ante*.

SECT. 6.—TENANCIES "FOR A YEAR OR FROM YEAR TO YEAR" AND LESSER INTERESTS.

SUB-SECT. 1.—WHO ENTITLED TO COMPENSATION.

A. Subsisting Tenancies.

See Lands Act, 1845, s. 121.

2071. Schoolmaster occupying school house—Employment terminable by three months' notice—To take effect on one of two specified dates in each year.]—R. v. MANCHESTER, ETC. RY. CO. (1854), 4 E. & B. 88; 23 L. T. O. S. 287; 1 Jur. N. S. 419; 2 W. R. 591; 119 E. R. 35.

*Annotations:—*Consd. R. v. Middlesex, Re Somers v. Met. Ry. (1862), 31 L. J. Q. B. 261; Cameron v. Charing Cross Ry. (1864), 12 W. R. 803. Refd. Knapp v. L. C. & D. Ry. (1863), 2 H. & C. 212. Mentd. Re Allyn's College, Dulwich (1875), 1 App. Cas. 68.

reason of the taking, will be taken into consideration by the ct. in fixing compensation.—R. v. YOUNG (1901), 7 Exch. C. R. 282; 22 C. L. T. 84.—CAN.

PART XIII. SECT. 6, SUB-SECT. 1.—A.

f. Tenant at will—Not entitled to compensation for plant.]—Pltf.'s factory was built on land part of which was the property of pltf., & part the property of the Crown which pltf. occupied as tenants at will. Pltf.'s land was resumed, but their permission to occupy the other land was not revoked. *Held*: pltf. not entitled to compensation in respect of the portion of their machinery which was erected on the Crown land, although it was an

6.—*Tenancies "for a year or from year to year" and lesser interests: Sub-sect. 1, A., B. & C.; sub-sect. 2. Sect. 7.]*

2072. Tenant for term exceeding three years—Though under agreement not under seal.]—SWEETMAN v. METROPOLITAN RY. CO. (1864), 1 Hem. & M. 543; 10 L. T. 156; 28 J. P. 295; 12 W. R. 304; 71 E. R. 238.

2073. Tenant for residue of term of two years—Unexpired residue less than a year.]—R. v. GREAT NORTHERN RY. CO. (1876), 2 Q. B. D. 151; 46 L. J. Q. B. 4; 35 L. T. 551; 41 J. P. 197; 25 W. R. 41, D. C.

*Annotations:—*Refd. *Shepherd v. Norwich Corpn.* (1885), 30 Ch. D. 553; *R. v. Kennedy* (1893), 41 W. R. 380.

Tenant for term of thirty years—Determinable by three months' notice by landlord.]—See No. 2093, post.

2074. Tenancy for less than year—Quarterly rent—No legal or equitable interest.]—SYERS v. METROPOLITAN BOARD OF WORKS, No. 502, ante.

2075. — No right to compensation for chance of renewal.]—WILKINS v. BIRMINGHAM CORPN. (1883), 25 Ch. D. 78; 53 L. J. Ch. 93; 49 L. T. 468; 48 J. P. 231; 32 W. R. 118.

*Annotations:—*Consd. *L. C. C. v. Wilson's Executors*, [1916] 1 K. B. 837. Refd. *Morcer v. Liverpool, St. Helen's & South Lancashire Ry.*, [1903] 1 K. B. 652; *Zick v. London United Tramways*, [1908] 1 K. B. 611.

See, also, Nos. 2040–2042, ante.

B. Tenancies in respect of which Notice has been given.

See Lands Act, 1845, s. 121.

2076. Tenant from year to year—Tenancy determined by notice to quit—Compensation for goodwill—Marketable interest in premises—Entitled.]—Re HUNGERFORD MARKET CO., Ex p. FARLOW (1831), 2 B. & Ad. 341; 109 E. R. 1169; sub nom. *R. v. HUNGERFORD MARKET CO.*, 9 L. J. O. S. K. B. 255.

*Annotations:—*Consd. *R. v. Hungerford Market Co.* (1833), 4 B. & Ad. 592; *R. v. Hungerford Market Co.* (1833), 4 B. & Ad. 596; *R. v. Manchester & Liverpool Ry.* (1836), 1 Har. & W. 689; *Re Palmer & Hungerford Market Co.* (1839), 9 Ad. & El. 463. Mentd. *Allen v. Flood*, [1898] A. C. 1.

2077. — Under-tenants to tenant holding over—Entitled.]—R. v. HUNGERFORD MARKET CO. (1833), 4 B. & Ad. 592; 1 Nev. & M. K. B. 404; 110 E. R. 578.

*Annotations:—*Consd. *R. v. Hungerford Market Co.* (1833), 4 B. & Ad. 596; *Re Palmer & Hungerford Market Co.* (1839), 9 Ad. & El. 463. Mentd. *Allen v. Flood*, [1898] A. C. 1.

2078. — Compensation for improvements—Tenancy created pending negotiations for purchase—Improvements belonging to landlord under terms of lease—Not entitled.]—Re PALMER & HUNGERFORD MARKET CO. (1839), 9 Ad. & El. 463; 8 L. J. Q. B. 114; 112 E. R. 1287; sub nom. *Re HUNGERFORD MARKET CO.*, Ex p. PALMER, 1 Per. & Dav. 492.

2079. — Lessees with right to remove buildings—Entitled.]—ROGERS v. KINGSTON-UPON-HULL DOCK CO., No. 970, ante.

2080. — Tenant holding over—Without consent of vendor or purchaser—Not entitled.]—The owner of a freehold estate which was in the occupation of a yearly tenant, contracted to sell it to a corporate body for a sum of money, which was paid into ct. The tenant received due notice from the owner to quit at the end of six months,

integral part of the whole plant, which, owing to the resumption, had to be removed to another site.—*NEW SOUTH WALES AERATED WATER & CONFECTIONERY CO. v. THE MINISTER* (1916), 16 S. R. N. S. W. 38; 33 N. S. W. N. 119.—AUS.

g. Tenant from year to year—Lands (Scot.) Act, 1845, s. 114.]—Where a co. under above Act takes part of land of a person who has no greater interest than as tenant for a year, or from year to year, the latter is entitled,

but he remained in possession without the consent either of the vendor or of the purchaser:—*Held: he was not entitled to any portion of the purchase-money as compensation for his interest in the estate.—Ex p. NADIN* (1848), 17 L. J. Ch. 421; 11 L. T. O. S. 429.

2081. — Land not required till after expiration of notice—Not entitled.]—R. v. LONDON & SOUTHAMPTON RY. CO. (1839), 10 Ad. & El. 3; 1 Ry. & Can. Cas. 717; 2 Per. & Dav. 243; 8 L. J. Q. B. 220; 113 E. R. 1.

*Annotations:—*Appld. *Great Northern & City Ry. v. Tillett*, [1902] 1 K. B. 874. Consd. *Cranwell v. London Corpn.* (1870), L. R. 5 Exch. 284.

2082. — Re PORTSMOUTH RY. CO., Ex p. MERRETT (1860), 2 L. T. 471; 24 J. P. 437.

2083. — Not entitled to compensation for loss of trade as publican—Through pulling down of neighbouring houses after expiration of notice.]—R. v. VAUGHAN (1868), L. R. 4 Q. B. 190; 9 B. & S. 892; 38 L. J. M. C. 49; 33 J. P. 358; 17 W. R. 115.

2084. — No landlord's notice to determine given—Notice requiring possession given—Land not taken till after expiration of notice—Entitled.]—By Lands Act, 1845, s. 121, if lands in the possession of a tenant from year to year were taken compulsorily, & such person was required to give up possession before the expiration of his term or interest therein, he should be entitled to compensation for the value of his unexpired term or interest in such lands, & for any just allowance which ought to be made to him by an incoming tenant, & for any loss or injury he might sustain. Under a local Act incorporating the above sect. defts., in Nov., 1865, served upon pltf., who held certain premises as yearly tenant, a notice stating their intention to take the premises, & requiring possession in six months. In fact possession was not taken by defts. until 1867, & pltf. meanwhile remained in possession, & continued to carry on his business upon the premises. In Jan., 1867, defts. took an assignment of the interest of pltf.'s landlord, the lessee for a term of the premises, but no landlord's notice to quit was ever given to pltf. In Feb., 1867, defts. demanded immediate possession of the pltf.'s premises, declining to pay any compensation, & upon refusal, obtained possession under a provision of their local Act, which, however, required that no such possession should be taken until payment or deposit of purchase or compensation money should have been made. Pltf. having sued them in trespass:—*Held: defts. had not complied with their local Act, & were liable, & pltf. was entitled to compensation.—CRANWELL v. LONDON CORPN.* (1870), L. R. 5 Exch. 284; 39 L. J. Ex. 193; 22 L. T. 760.

*Annotation:—*Consd. *Great Northern & City Ry. v. Tillett*, [1902] 1 K. B. 874.

2085. — Withdrawal of notice requiring possession—Entitled to compensation for expenses.]—By Lands Act, 1845, s. 121, a tenant from year to year is entitled to compensation for the value of his unexpired term or interest, & for any just allowance which ought to be made to him by an incoming tenant, & for any loss or injury he may sustain, or, if part only of the lands occupied by him be required, compensation for the damage done to him in his tenancy by severance. On

under above sect., to full compensation for loss of the land, & has no ground for refusing to pay the full year's rent to his landlord.—*FERGUSON v. HOOD* (1881), 9 R. (Ct. of Sess.) 168; 19 Sc. L. R. 145.—SCOT.

Oct. 22 a tenant from year to year, whose holding began on May 1, received notice from the promoters of an undertaking, requiring him to give up possession at the expiration of six months. Before the expiration of six months he was informed by the promoters that they did not intend to take possession at the end of the six months:—*Held*: he was entitled to compensation for any expenses which he had been put to by the notice.—*R. v. ROCHDALE IMPROVEMENT ACT COMRS.* (1856), 2 Jur. N. S. 861; *sub nom. Re ROCHDALE IMPROVEMENT COMRS. & LANCASHIRE JJ.*, 20 J. P. Jo. 404.

C. Time of Ascertainment of Interest.

2086. Time of giving notice of intention to take—Not at expiry of notice.]—*TYSON v. LONDON CORPN.* (1871), L. R. 7 C. P. 18; 41 L. J. C. P. 6; 25 L. T. 640; 20 W. R. 112.

Annotation:—*Consd. R. v. Kennedy* (1893), 68 L. T. 454.

2087. Time when possession taken—Not at date of abortive notice to treat.]—*R. v. KENNEDY*, [1893] 1 Q. B. 533; 62 L. J. M. C. 168; 68 L. T. 454; 57 J. P. 346; 41 W. R. 380; 5 R. 270, D. C.

Annotation:—*Consd. Bexley Heath Ry. v. North* (1894), 70 L. T. 903.

See, also, No. 2223, post.

Time of ascertainment of right to compensation.]—*See Part III., Sect. 1, sub-sect. 3, I., ante.*

SUB-SECT. 2.—ASSESSMENT OF COMPENSATION.

2088. By justices under Lands Act, 1845, s. 121—Not by jury under s. 68.]—*KNAPP v. LONDON, CHATHAM & DOVER RY. CO.*, No. 1017, *ante*.

2089. Lands Act, 1845 incorporated in local Act.]—*R. v. LONDON CORPN.*, No. 209, *ante*.

2090. Conditions precedent to jurisdiction of justices—Land must have been taken—Injurious affection insufficient.]—*R. v. MIDDLESEX (SHERIFF), Re SOMERS v. METROPOLITAN RY. CO.* (1862), 31 L. J. Q. B. 261; 10 W. R. 717.

Annotation:—*Refd. Cameron v. Charing Cross Ry.* (1864), 16 C. B. N. S. 430.

2091. — Possession must have been required Notice to treat insufficient.]—*R. v. STONE*, No. 539, *ante*.

2092. — — — — —.]—*GREAT NORTHERN & CITY RY. CO. v. TILLET*, [1902] 1 K. B. 871; 71 L. J. K. B. 525; 86 L. T. 723; 66 J. P. 712; 50 W. R. 652; 46 Sol. Jo. 500.

2093. Extent of jurisdiction of justices—Not to assess damage to residue of term—Where part only of lands taken.]—*N. held land on lease for thirty years from 1889 determinable as to the whole or part by the lessor by three months' notice. A railway with compulsory powers for the purchase of land gave N. notice to treat as to part of the land. N.'s lessor then gave him three months' notice as to that part of the land. During the currency of the notice the railway took possession. The compensation was assessed by a metropolitan magistrate:—Held*: assuming that N. was entitled to compensation for damage to the residue of the term in respect of the adjoining lands, the magistrate had no jurisdiction under s. 121 to assess it, & he had only jurisdiction to assess

compensation for the value of N.'s interest in the land taken & for damage to the adjoining lands during the currency of the notice.—*BEXLEY HEATH RY. CO. v. NORTH*, [1894] 2 Q. B. 579; 64 L. J. M. C. 17; 71 L. T. 533; 58 J. P. 832; 10 T. L. R. 528; 9 R. 751, C. A.

2094. Not to inquire into claimant's title.]—*GREAT NORTHERN & CITY RY. CO. v. TILLET*, [1902] 1 K. B. 874; 71 L. J. K. B. 525; 86 L. T. 723; 66 J. P. 742; 50 W. R. 652; 46 Sol. Jo. 500.

2095. Assessment need not be in writing.]—*R. v. BOYCE COMBE* (1863), 32 L. J. M. C. 67; *sub nom. Re BOYCE COMBE*, 11 W. R. 441.

Annotation:—*Refd. R. v. Edwards* (1884), 13 Q. B. D. 586.

SECT. 7.—LAND AND INTERESTS OMITTED TO BE PURCHASED.

See Lands Act, 1845, s. 124.

2096. To what lands or interests procedure applies—Lands omitted from plan in book of reference.]—*HYDE v. MANCHESTER CORPN.* (1852), 5 De G. & Sm. 249; 19 L. T. O. S. 6; 16 Jur. 189; 64 E. R. 1103.

Annotation:—*Consd. Jolly v. Wimbledon & Dorking Ry.* (1861), 1 B. & S. 815.

2097. — — — — —.]—*DOE d. HYDE v. MANCHESTER CORPN.* (1852), 12 C. B. 474; 138 E. R. 992.

Annotations:—*Consd. Tamworth Election Petn., Penrhyn & Falmouth Election Petn., Southampton Election Petn.* (1870), 39 L. J. C. P. 89. *Refd. Salisbury v. G. N. Ry.* (1858), 5 C. B. N. S. 174. *Mentd. Jamieson v. Trevelyan* (1855), 10 Exch. 748; *Hill v. Peel* (1870), L. R. 5 C. P. 172; *Avery v. Wood* (1891), 39 W. R. 577.

2098. — Name of lessee omitted from book of reference.]—*KEMP v. WEST END OF LONDON & CRYSTAL PALACE RY. CO.* (1855), 1 K. & J. 681; 3 Eq. Rep. 940; 26 L. T. O. S. 70; 1 Jur. N. S. 1012; 3 W. R. 607; 69 E. R. 633.

See, also, Part II., Sect. 3, sub-sect. 1.

2099. — Not land entered on with knowledge of omission—Land subject to equitable mortgage.]—*MARTIN v. LONDON, CHATHAM & DOVER RY. CO.*, No. 2019, *ante*.

2100. — — — — — Difficulty of ascertaining boundaries.]—*STRETTON v. GREAT WESTERN & BRENTFORD RY. CO.*, No. 1002, *ante*.

2101. — — — — — Though omitted from original notice to treat.]—On Sept. 23, 1903, deft. co. gave notice to treat in respect of certain leasehold lands belonging to pltf. This notice did not include 628 square yards, which turned out to be part of the property originally included in the lease under which pltf. held. On Oct. 28, 1903, the co. entered upon the land, including the 528 yards, & on the same day pltf.'s solrs. wrote & complained of what was being done; but prior to Nov. 3, 1903, no complaint was specifically made by pltf. that land had been entered upon by the railway co. which was not included in the notice to treat. On Nov. 2 a proper bond was given for the £2,470 claimed with interest, under s. 85. On Nov. 25, 1903, the writ was issued, & it was not until Nov. 27, that notice to treat for the land not included in the earlier notice was given:—*Held*: at the time the co. did take possession they had full knowledge of pltf.'s title,

PART XIII. SECT. 7.

h. To what lands or interest procedure applies—Lands entered on with no knowledge of omission.]—Pltfs. were authorised by provisional order of 30th April, 1901, confirmed by Act, to take compulsorily G.'s lands, held in fee-simple. Deft., who held adjoin-

ing lands from G. under lease, encroached upon G.'s lands, & prior to the date of order, acquired title under Statute of Limitations to portion of lands, for the residue of his lease. This portion was included in advertisements & plans, but the name of deft., of whose claim pltfs. were ignorant, did not appear in the schedule, or to

arbitrator's award, nor was notice of award given to deft. No claim was made by deft. in respect of any interest in the premises:—*Held*: pltfs. were not entitled to recover possession.—*OMAGH URBAN COUNCIL v. HENDERSON*, [1907] 2 I. R. 310, 317; 41 I. L. T. 65.—*IR.*

Sect. 7.—Land and interests omitted to be purchased.
Part XIV. Sects. 1 & 2: Sub-sects. 1

could not avail themselves of s. 124 of the Act.—**CARDWELL v. MIDLAND RY. CO.** (1904), 21 T. L. R. 22, C. A.

2102. — Not land on which promoters trespassers.]—THOMAS v. BARRY DOCK & RYS. CO. (1889), 5 T. L. R. 360.

2103. How period of six months for assessment of compensation calculated—From time disputed title finally established at law—Refusal of new trial in action of ejectment.]—HYDE v. MANCHESTER CORPN. (1852), 5 De G. & Sm. 249; 19 L. T. O. S. 6; 16 Jur. 189; 64 E. R. 1103.

Annotation:—Consd. Jolly v. Wimbledon & Dorking Ry. (1861), 1 B. & S. 815.

2104. — From award in arbitration—Not from judgment referring matter to arbitration.]—By Lands (Scotland) Act, 1845, s. 117, in the case of omitted interests in lands which an undertaking is authorised to purchase the promoters were to remain in the undisturbed possession of such lands for a period not exceeding six months after the right thereto should have been finally established by law in favour of the party claiming same, & then the undertakers were to pay compensation for such interest:—Held: the six months do not run from a judgment referring the matter to arbn., but from the award in the arbn. itself.—CALEDONIAN RY. CO. v. DAVIDSON, [1903] A. C. 22; 72 L. J. P. C. 25; 87 L. T. 602, H. L.

2105. Remedy of owner—Ejectment.]—SALISBURY (MARQUIS) v. GREAT NORTHERN RY. CO. (1858), 5 C. B. N. S. 174; 28 L. J. C. P. 40; 32 L. T. O. S. 175; 23 J. P. 22; 5 Jur. N. S. 70; 7 W. R. 75; 141 E. R. 69.

Annotations:—Consd. Landrock v. Met. Dist. Ry. (1886), 3 T. L. R. 162. **Folld. Melksham U. D. C. v. Gay** (1902), 18 T. L. R. 358. **Refd. Jolly v. Wimbledon & Dorking Ry.** (1860), 1 B. & S. 815; **Berridge v. Ward** (1861), 10 C. B. N. S. 400; **Micklethwaite v. Newlay Bridge** (1866), 33 Ch. D. 133; **R. v. Wycombe Ry.** (1867), L. R. 2 Q. B. 310; **Plumstead Board of Works v. British Land Co.** (1874), L. R. 10 Q. B. 16; **Pryor v. Petre**, [1894] 2 Ch. 11. **Mentd. Tidswell v. Whitworth** (1867), L. R. 2 C. P. 326; **R. v. Platts** (1880), 28 W. R. 915; **Devonshire v. Patkinson** (1887), 20 Q. B. D. 263.

2106. — Not within six months of notice of claim.]—By Lands Act, 1845, s. 124, if, after the promoters of the undertaking have entered

upon lands which they are authorised to purchase, & which are permanently required, any party shall appear to be entitled to any interest in or charge thereon which through mistake was not purchased, then the promoters shall remain in undisturbed possession; provided within six months after notice of the interest or charge, in case the same is not disputed, or, in case the same shall be disputed, then, within six months after the right thereto shall have been established by law, they pay the compensation therein mentioned. Defts., a railway co., under their Act, which incorporated Lands Act, 1845, in July, 1858, entered upon lands of which the mtgor. had been in possession; & although the purchase-money was not paid to him, the parties were treating for arrangement, & the entry was with the knowledge & consent of the mtgor. Pltf. was mtgee. in fee of these lands, but the mtge. was not known by defts. to exist until pltf.'s attorney, having discovered the entry by defts., sent a letter in Aug., 1859, to defts.' attorney, asserting pltf.'s rights. A correspondence ensued, in which pltf. gave no information of his title & defts. did not dispute his title, but asked for a short delay while their legal advisers were absent from London. In the following Oct. pltf. brought ejectment:—**Held: ejectment could not be maintained, inasmuch as, the title not being in dispute, the above enactment gave the defts. a right of possession for six months after notice of the pltf.'s claim.—JOLLY v. WIMBLEDON & DORKING RY. CO.** (1861), 1 B. & S. 815; 31 L. J. Q. B. 95; 5 L. T. 614; 26 J. P. 340; 8 Jur. N. S. 1037; 10 W. R. 253; 121 E. R. 917, Ex. Ch.

2107. — Right to injunction lost by entry on land & interference with works.]—LIND v. ISLE OF WIGHT FERRY CO. (1862), 1 New Rep. 13; 7 L. T. 416.

Annotations:—Refd. Tiverton & North Devon Ry. v. Loosemoore (1884), 9 App. Cas. 480. **Mentd. Nesbitt v. Mablethorpe U. D. C.**, [1918] 2 K. B. 1.

2108. — Injunction—Refused where question of value only outstanding.]—WOOD v. CHARING CROSS RY. CO. (1863), 33 Beav. 290; 55 E. R. 379.

Annotations:—Mentd. Dowling v. Pontypool Caerleon & Newport Ry. (1874), L. R. 18 Eq. 714; **Parkdale Corpn. v. West** (1887), 12 App. Cas. 602.

Part XIV.—Superfluous Lands.

See Lands Act, 1845, ss. 127–132.

SECT. 1.—WHAT LAND MAY BECOME SUPERFLUOUS.

2109. Reversion of land acquired subject to term.]—By provisions in a railway Act, similar to Lands Act, 1845, s. 127, lands acquired by the co. under the Act, but not required for the purposes of the Act, were to be sold within ten years of the passing of the Act; & superfluous lands, remaining unsold at the expiration of the time limited, were thereupon to vest in & become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining same:—Held: (1) this extended to lands the reversion of which had been acquired by the co. subject to a term; (2) where there were several adjoining properties in contact with the superfluous land, it was to be divided among the

owners of the adjoining properties in proportion to the frontage of each, frontage meaning, what would be the length of the line of contact of each property if the line were made straight from the point of intersection of the boundaries on one side to the point of intersection of the boundaries on the other side.

(3) By a subsequent Act obtained by the co. the periods limited by the several Acts relating to the co. for the sale of their superfluous lands were extended to five years from the passing of the last Act, & the several Acts were to be read as if that period had been fixed by each of those Acts:—**Held: this enactment did not defeat a right to unsold superfluous land already vested under a former Act at the time of the passing of the last Act.—MOODY v. CORBERT** (1866), L. R. 1 Q. B. 510; 7 B. & S. 544; 35 L. J. Q. B. 161; 14 L. T. 568; 30 J. P. 728; 14 W. R. 737, Ex. Ch.

Annotations:—As to (2) Distd. Blackmore v. L. & S. W. Ry. (1868), 38 L. J. Ch. 19. **As to (3) Consd. May v. G. W. Ry.**

(1872), L. R. 8 Q. B. 27. *Reid*. Hooper v. Bourne (1877), 3 Q. B. D. 258. *Generally*, *Mentd.* Manchester Corp'n. v. Chapman (1868), 37 L. J. M. C. 173.

2110. Land in respect of which promoters wish to reserve easement.—A railway co. constructed a tunnel by arching over a cutting & placing soil on the arch:—*Held*: (1) they could not sell the surface soil over the tunnel as "superfluous land" within Lands Act, 1845, s. 127; (2) "superfluous land" within the sect. must be land separated from other land required for the purposes of the railway by a vertical & not a horizontal line.

(3) *Seem*: a railway co. cannot, without a special power, sell as superfluous land any land in respect of which they wish to reserve an easement.

(4) *Qu.*: whether land which, at the expiration of the period limited by s. 127 is not superfluous, but which afterwards becomes superfluous, may be sold.—*Re* METROPOLITAN DISTRICT RY. CO. & COSH (1880), 13 Ch. D. 607; 49 L. J. Ch. 277; 42 L. T. 73; 44 J. P. 393; 28 W. R. 685, C. A.

Annotations:—*As to* (1) *Consd.* Rosenberg v. Cook (1881), 8 Q. B. D. 162. *As to* (2) *Consd.* Ware v. L. B. & S. C. Ry. (1882), 52 L. J. Ch. 198. *Consd. & Apld.* Mid. Ry. v. Wright, [1901] 1 Ch. 738. *As to* (3) *Reid*. *Re* Higgins & Hitchman's Contract (1882), 21 Ch. D. 95. *Generally*, *Consd.* *Re* L. & Y. Ry. & Derby's Contract (1908), 100 L. T. 44. *Mentd.* *Re* Smith & Stott (1883), 29 Ch. D. 1009, n.

2111. Land not superfluous at end of prescribed period—Becoming so afterwards.—*Re* METROPOLITAN DISTRICT RY. CO. & COSH, No. 2110, *ante*.

2112. Under Metropolitan Railway Act, 1868—But not subject to Lands Act, 1845, s. 128. TOMLIN v. BUDD (1874), L. R. 18 Eq. 368; 43 L. J. Ch. 627; 22 W. R. 529.

SECT. 2.—HOW LAND BECOMES SUPERFLUOUS.

SUB-SECT. 1.—FROM POSITION OF LAND.

2113. Land separated vertically—Not horizontally.—*Re* METROPOLITAN DISTRICT RY. CO. & COSH, No. 2110, *ante*.

2114. Not land under arches.—MULLINER v. MIDLAND RY. CO., No. 139, *ante*.

2115. Not land over tunnel.—*Re* METROPOLITAN DISTRICT RY. CO. & COSH, No. 2110, *ante*.

2116. —.—*Deft.* purchased from a railway co. land over a tunnel, which, not being "superfluous," the co. had no power to sell, & *pltf.* contracted to purchase the land from *deft.* as freehold building land. One of the conditions of sale was that the title should commence with the conveyance from the co., another, that the purchaser should not require the production of, or investigate or make any objection or requisition in respect of, such conveyance, & another, that the purchaser should send his objections to the title, if any, within seven days from the delivery of the abstract. *Pltf.* declined to complete after the expiration of the seven days, & sued for the deposit:—*Held*: the deposit could not be recovered.—ROSENBERG v. COOK (1881), 8 Q. B. D. 162; 51 L. J. Q. B. 170; 30 W. R. 344, C. A.

Annotation:—*Mentd.* Saxby v. Thomas (1890), 64 L. T. 65.

PART XIV. SECT. 1.

2111 i. Land not superfluous at end of prescribed period.—A ry. co. had at the prescribed date two plots close to its terminal station, used partly as a private means of access to the station, but principally as garden ground. These plots were the only ground available for any extension of the station or ry. buildings:—

Held: (1) the question, whether the plots were superfluous, was to be determined by the circumstances

existing at the prescribed period & (2) the plots were not superfluous.—MACFIE v. CALLANDER & OBAN RY. CO. (1898), 25 R. (Ct. of Sess.) 19; 35 Sc. L. R. 413.—SCOT.

2111 ii. Land not superfluous before undertaking completed.—Lands acquired by a ry. co. under the powers conferred by their Act cannot be presumed to be superfluous lands at the beginning of the undertaking before the co. can have had any experience whether they may or may not be

2117. —.—MIDLAND RY. CO. v. WRIGHT, [1901] 1 Ch. 738; 70 L. J. Ch. 411; 84 L. T. 225; 49 W. R. 474; 17 T. L. R. 261; 45 Sol. Jo. 311.

2118. —.—*Re* LANCASHIRE & YORKSHIRE RY. & DERBY'S (EARL) CONTRACT (1908), 100 L. T. 44.

2119. Land vertically above footings of retaining wall included.—WARE v. LONDON, BRIGHTON & SOUTH COAST RY. CO. (1882), 52 L. J. Ch. 198; 47 L. T. 541; 31 W. R. 228.

2120. Not minerals apart from surface—Land bought with minerals.—Lands had been acquired by a railway co. by agreement under their statutory powers. The time within which they might be sold if not required for railway purposes expired in 1863, at which time they had not been used for such purposes nor sold. The lands were in close proximity to W. station, & since 1868 additional sidings had been required at the station, for which the lands would be needed, but for want of funds such sidings had not been constructed. Meanwhile the lands were let, first to an agricultural tenant, & afterwards to a mining co., the lessors having the right to re-enter at any time at short notice. The lease to the mining co. reserved to the lessors the right to regulate the manner of removing the minerals, so as to prevent injury to the surface. Upon an action brought in 1875 by adjoining landowners to recover the lands as superfluous within Lands Act, 1845, s. 127:—*Held*: (1) the lands were not superfluous, the fact that they were required for the railway in 1868 being strong presumptive evidence that they were so required in 1863, & the burden of proof, especially after so great a lapse of time, being upon *pltf.* to show that they were not; (2) the minerals were not superfluous.

(3) *Seem*: where land is bought by a railway co. with the mines under it the minerals cannot be claimed as superfluous land apart from the surface.—HOOPER v. BOURNE (1880), 5 App. Cas. 1; 49 L. J. Q. B. 370; 42 L. T. 97; 44 J. P. 327; 28 W. R. 493, II. L.; *affg.* (1877), 3 Q. B. D. 258, C. A.

Annotations:—*As to* (1) *Distd.* Hobbs v. Mid. Ry. (1882), 20 Ch. D. 418. *Reid*. Betts v. G. E. Ry. (1878), 3 Ex. D. 182; Best v. Hamand (1879), 12 Ch. D. 1; L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562; Macfie v. Callander & Oban Ry., [1898] A. C. 270. *Generally*, *Mentd.* Bayley v. G. W. Ry. (1884), 26 Ch. D. 434; James v. Lovel (1887), 56 L. T. 739; Barnard v. G. W. Ry. (1902), 86 L. T. 798; L. & N. W. Ry. v. Howley Park Coal & Cannel Co., [1911] 2 Ch. 97.

SUB-SECT. 2.—FROM USER OF AND OTHER ACTS RELATING TO LAND.

2121. General rule.—(1) The meaning of the phrase "superfluous land" in Lands Act, 1845, s. 127 is land acquired by the promoters of the undertaking but not required for the purposes of the undertaking. The word "required" does not mean demanded but necessary, & when it ceases to be necessary this land becomes superfluous land. It may be so in any one of four ways: if more land has been taken than, on the execution

requisite for their purposes.—GLOVER'S TRUSTEES v. CITY OF GLASGOW UNION RY. CO. (1869), 7 Macph. (Ct. of Sess.) 338; 41 Sc. Jur. 202.—SCOT.

j. Land taken for purpose of future doubling of line.—Land taken compulsorily by a ry. co. for the future doubling of its line cannot be regarded as superfluous within Lands (Scot.) Act, 1845.—BROWN v. NORTH BRITISH RY. (1906), 8 F. (Ct. of Sess.) 534.—SCOT.

Sect. 2.—How land becomes superfluous: Sub-sect. 2.]

of the works, appears to be needed; if the co. has been forced to take it by reason of not being able to obtain a part of any property without taking the rest; if taken for works then deemed to be required for permanent use, but which afterwards are found not to be required, & are therefore abandoned; if taken only for a temporary purpose, when that temporary purpose has been answered. The conversion of it to other purposes than those of the undertaking is evidence of its being superfluous. Though land acquired for the purposes of the undertaking has been actually used by the promoters, if that use is only one of a temporary nature, the land having satisfied that use becomes superfluous land.

(2) Where land cannot be shown to be required for the purposes of the undertaking, it vests absolutely in the adjoining owner under the above sect. & having so become vested in the adjoining owner, it is not affected by the circumstance that a private Act, passed afterwards, though before it is claimed by an adjoining owner, extends the time within which the directors may dispose of the superfluous lands belonging to the co.—*GREAT WESTERN RY. CO. v. MAY* (1874), L. R. 7 H. L. 283; 43 L. J. Q. B. 233; 31 L. T. 137; 39 J. P. 54; 23 W. R. 141, H. L.; *affg. S. C. sub nom. MAY v. GREAT WESTERN RY. CO.* (1872), L. R. 8 Q. B. 26, Ex. Ch.

Annotations:—As to (1) Distd. Betts v. G. E. Ry. (1873), L. R. 8 Exch. 294. *Refd. Horne v. Lymington Ry.* (1874), 38 J. P. 788; *Hooper v. Bourne* (1880), 5 App. Cas. 1; *Re Met. Dist. Ry. & Cosh* (1880), 13 Ch. D. 607; *Hobbs v. Mid. Ry.* (1882), 20 Ch. D. 418. *As to (2) Foll. Betts v. G. E. Ry.* (1878), 3 Ex. D. 182. *Generally, Mentd. Re Higgins & Hitchman's Contract* (1882), 21 Ch. D. 95.

2122. Land abandoned on abandonment of undertaking.]—Defts. in 1846 obtained an Act of Parliament for the construction of certain branch railways, called the W. & H. branches, in which were the usual compulsory powers for the purchase of land, but they were not to be exercised after the expiration of three years from the passing of the Act, & the undertaking was to be completed within five years. The term limited for the exercise of the compulsory powers was subsequently enlarged until July, 1851. Defts. purchased from pltf. certain portions of his land for the purposes of the W. railway, an undertaking particularly advantageous to pltf., & commenced constructing the line. It was, however, never completed, & in 1850 was entirely abandoned. Subsequently defts. introduced a bill to construct another line, & for that purpose intended to use the lands purchased from pltf. On demurrer to the bill for want of equity:—*Held*: (1) although a landowner has been compelled to part with his land to a railway co., however beneficial it may be to him that the railway should be made, no obligation is thrown on the co. to complete their undertaking, & no right exists in the landowner to compel them to do so; (2) if the co. should altogether abandon the undertaking, & apply the land taken under the powers of the Act to a different purpose than the making of the railway, the land-

owner has not any new right, arising from the state of things, which can be enforced in a ct. of equity.

(3) The term "superfluous lands" in ss. 127, 128, of the Act preceded by the expression, "the lands which shall not be required for the purposes thereof," is sufficient to include the case of an undertaking being abandoned.

(4) The landowner's right of pre-emption under s. 128 does not arise before the expiration of ten years, unless the co. by some act of theirs have shown that they are about to sell & dispose of the land.

(5) The word "dispose" in the Act means the transfer of the land to some other person, & not the application of it by the co. to a different purpose.—*ASTLEY v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1858), 2 Do G. & J. 453; 27 L. J. Ch. 478; 31 L. T. O. S. 188; 4 Jur. N. S. 567; 6 W. R. 561; 44 E. R. 1065, L. C.

2123. — Not within Lands Act, 1845, s. 127.]—*SMITH v. SMITH* (1868), L. R. 3 Exch. 282; 38 L. J. Ex. 37.

2124. Land taken for one purpose & used for another—Land taken for construction of railway—Used for accommodation works.]—A railway co. brought from pltf. a small piece of land, the whole of which, according to their original plan, would have been covered by the embankment of the railway. Being obliged to provide a communication between severed lands of another landowner, the co. altered their levels so as to narrow the embankment & leave unoccupied a strip of the land purchased from pltf. This strip they turned into a road for the use of the landowner. Pltf. thereupon, before the period named for the sale of superfluous lands had arrived, filed his bill to enforce a right of pre-emption as to the strip:—*Held*: the land was not superfluous land, for that the making accommodation works which the co. were compellable to make was one of the purposes of their Acts, & pltf. had no title to relief.—*BEAUCHAMP (LORD) v. GREAT WESTERN RY. CO.* (1868), 3 Ch. App. 745; 38 L. J. Ch. 162; 19 L. T. 189; 16 W. R. 1155, L. JJ.

Annotations:—Consd. Dowling v. Pontypool, Caerleon & Newport Ry. (1874), L. R. 18 Eq. 714. *Distd. Hobbs v. Mid. Ry.* (1882), 20 Ch. D. 418. *Foll. Wilkinson v. Hull, etc. Ry. & Dock Co.* (1882), 20 Ch. D. 323. *Refd. May v. G. W. Ry.* (1872), L. R. 8 Q. B. 27; *Re Higgins & Hitchman's Contract* (1882), 21 Ch. D. 95; *Macfie v. Callander & Oban Ry.*, [1898] A. C. 270. *Mentd. Pugh v. Golden Valley Ry.* (1879), 12 Ch. D. 274; *Clyde Navigation Trustees v. Blantyre*, [1893] A. C. 703.

2125. Sale of land—Land advertised as "surplus land."]—(1) Where a co., having purchased land for the purposes of its railway, after using some of the land, sells the rest, calling it in the advertisement & particulars "surplus land" this form of sale must be deemed a declaration that the land sold is "superfluous land" within the meaning of Lands Act, 1845, s. 127.

(2) *Qu.*: whether Teddington is a "town" within the meaning of s. 128 of the Act. The lands near it, situated close to the railway station, & not continuously built upon, are not lands within a town, nor lands used for building purposes, within the sect.

PART XIV. SECT. 2, SUB-SECT. 2.

2123i. Land abandoned on abandonment of undertaking—Not within Lands Act, 1845, s. 127.]—Lands were compulsorily taken in 1863 by a ry. co. under their statutory powers. The ry. was to be completed in 1869, but was not finished until 1875, when it was found defective; was never used by the public for traffic, & after 1875 the ry. co. never made any use whatever of it. The public passed over the line

as they wished:—*Held*: the lands had not become superfluous within above sect.—*Re DUFFY'S ESTATE, Ex p. EVOY*, [1897] 1 I. R. 315; 31 L. L. T. 131.—*IR.*

k. Land taken for one purpose—Part used for another purpose—Non-user of remainder.]—A mining co. was empowered by private Act to acquire land for connecting their mine with the coast. The act provided that, if the railway ceased to be used for three

years continuously, the land should revert to the original owners. Part of the railway had not been used for more than three years, the other part was used by the co. in conjunction with a new line:—*Held*: the Ry. had ceased to be used for three years continuously within the proviso.—*PERPETUAL TRUSTEE CO. v. WILLIAMS* (1913), 17 C. L. R. 469; 31 N. S. W. W. N. 5.—*AUS.*

(3) Lands acquired by a railway co. for the purposes of the railway, but not so employed, & merely capable of being afterwards used for building purposes, are not, on account of such capacity alone, to be treated as building land, or "lands used for building purposes," within the exception contained in s. 128.

(4) Though the directors of a railway co. are not compelled to sell their superfluous land within ten years, yet if within that time they make the attempt to sell, the right of an adjoining owner to claim the benefit of pre-emption at once arises. Such land must under s. 128 be first offered to persons whose lands, or some of them, have been taken in virtue of the co.'s Act, or who are "owners of the land adjoining."

(5) A person may be an "adjoining owner" to superfluous lands within s. 128, although he purchased such adjoining lands from the co. itself.

(6) Where, by agreement, a wall has been built on land dividing the property of an individual from that of the co., & the individual & the co. are, by the same agreement, the joint owners of the land on which the wall is built, that circumstance does not affect the individual, so as to prevent him from being considered an "adjoining" owner.

(7) Where an adjoining owner claims from a railway co., a right of pre-emption of certain lands which the co. is about to sell, such lands never having been his, nor severed from any part of his estate, the ct. will direct an inquiry whether there is any other adjoining owner who is equally entitled with himself to make such claim.

(8) Lands will not be brought within the exception in s. 128 as "used for building purposes" merely by being marked out in plots for, & by being capable of being used for, building purposes.—*LONDON & SOUTH WESTERN RY. CO. (DIRECTORS, ETC.) v. BLACKMORE* (1870), L. R. 4 H. L. 610; 39 L. J. Ch. 713; 23 L. T. 504; 35 J. P. 324; 19 W. R. 305, H. L.; *varying S. C. sub nom. BLACKMORE v. LONDON & SOUTH WESTERN RY. CO.* (1868), 38 L. J. Ch. 19.

Annotations:—As to (1) Consd. Hobbs v. Mid. Ry. (1882), 20 Ch. D. 418. *As to (4) Distd. Macfie v. Callander & Oban Ry.*, [1898] A. C. 270. *Refd. G. W. Ry. v. May* (1874), L. R. 7 H. L. 283. *As to (6) Consd. Hobbs v. Mid. Ry.* (1882), 20 Ch. D. 418. *Refd. Cave v. Horsell* (1912), 106 L. T. 147. *Generally, Mentd. Deards v. Goldsmith* (1879), 40 L. T. 328; *Turner v. Turner, Hall v. Turner* (1880), 14 Ch. D. 829; *Joint Stock Trust & Finance Corpn.* (1912), 56 Sol. Jo. 272.

2126. — Whether conclusive—Ultra vires sale to another company for joint purposes.]—The mere fact of a railway co. purporting to convey away lands acquired by them for the purposes of their undertaking is not conclusive to show that the lands so conveyed are superfluous lands within the meaning of Lands Act, 1845, s. 128.

The M. Ry. Co. having, under their special Act passed in 1872, acquired for the purposes of their undertaking certain lands forming part of a farm belonging to H., purported, acting in excess of their parliamentary powers, to sell & convey the lands to the S. Ry. Co. under a *bonâ fide* arrangement by which they were to be held & used for the purposes of the undertakings of both cos. Upon an action brought by H. against both cos. to establish his right of pre-emption, under the above sect. in the lands conveyed, the ten years from the time fixed by the M. Co.'s Act for the completion of their works not having yet

expired:—*Held*: (1) the mere fact of the conveyance was not sufficient to show that the lands were superfluous within the meaning of that sect.; (2) as it appeared that, had the lands remained in the hands of the M. Co., they would not have been superfluous for the purposes of that co. within the sect., pltf.'s right of pre-emption had not yet arisen & the conveyance from the M. Co. to the S. Co. must be set aside as *ultra vires*.—*HOBBS v. MIDLAND RY. CO.* (1882), 20 Ch. D. 418; 51 L. J. Ch. 320; 46 L. T. 270; 30 W. R. 516.

Annotation:—As to (2) Consd. & Distd. Dunhill v. N. E. Ry., [1896] 1 Ch. 121.

2127. Land unused & unsold within prescribed period.]—*CITY OF GLASGOW UNION RY. CO. v. CALEDONIAN RY. CO.*, No. 127, *ante*.

2128. — Bonâ fide retained for purposes of promoters.]—Lands acquired by a co. under Lands Act, 1845 & not sold or used for the purposes of the undertaking within the period specified in s. 127, are not "superfluous lands" within the sect., if at the end of that period there is a purpose within the co.'s Act to answer which the land is retained in good faith by the co.—*BETTS v. GREAT EASTERN RY. CO.* (1879), 49 L. J. Q. B. 197; 42 L. T. 1; 44 J. P. 232; 28 W. R. 50, H. L.; *affg.* (1878), 3 Ex. D. 182, C. A.; *affg.* (1873), L. R. 8 Exch. 294.

Annotations:—Consd. Hooper v. G. W. Ry. (1877), 2 Q. B. D. 339. *Apld. Re Met. Dist. Ry. & Cosh* (1880), 13 Ch. D. 607. *Consd. Hobbs v. Mid. Ry.* (1882), 20 Ch. D. 418. *Refd. Horne v. Lymington Ry.* (1874), 38 J. P. 788; *Bobbett v. S. E. Ry.* (1882), 9 Q. B. D. 424; *Macfie v. Callander & Oban Ry.*, [1898] A. C. 270.

2129. — Land required for additional accommodation for increased traffic.]—*HOOPER v. BOURNE*, No. 2120, *ante*.

2130. Land taken by agreement for extraordinary purposes.]—*CITY OF GLASGOW UNION RY. CO. v. CALEDONIAN RY. CO.*, No. 127, *ante*.

2131. — Not within Lands Act, 1845.]—*HORNE v. LYMINGTON RY. CO.* (1874), 31 L. T. 167; 38 J. P. 788.

See, further, Part II., Sect. 3, sub-sect. 6, ante.

2132. Land treated & dealt with as superfluous land by special Act.]—*TOMLIN v. BUDD* (1874), L. R. 18 Eq. 368; 43 L. J. Ch. 627; 22 W. R. 529.

2133. Land between decayed fence & ditch alongside railway—Cultivated by adjoining owner.]—A railway co. in 1838 bought part of a field under the powers of their Act, & erected a post & rail fence on the boundary. They then made a ditch within the fence, & threw up a bank on which they planted a quickset hedge at the distance of 4 ft. 6 in. from the fence. As the hedge grew up the fence was allowed to fall into decay, & about the year 1846 it was removed. From the year 1854 up to the commencement of this action in 1875, the strip of land between the quickset hedge & the site of the fence was occupied & cultivated with the remainder of the field, partly as an arable field & partly as garden-ground, the railway co. in no way interfering with it except that their workmen went over it to trim the hedge:—*Held*: the circumstances conclusively showed the strip between the hedge & the line of the post & rail fence to be superfluous land within Lands Act, 1845, s. 127, & it had vested in the owner of the rest of the field.—*NORTON v. LONDON & NORTH WESTERN RY. CO.* (1879), 13 Ch. D. 268; 41 L. T. 429; 44 J. P. 22; 28 W. R. 173, C. A.

Annotations:—Refd. Bobbett v. S. E. Ry. (1882), 9 Q. B. D. 424; *Bayley v. G. W. Ry.* (1884), 26 Ch. D. 434; *Marshall*

2127i. Land unused & unsold within prescribed period.]—Ground, acquired by a ry. co. under compulsory powers, had not been used by the co. for more than ten years after completion of

their works, & had not been sold by them. It could not be utilised by the co. unless they could take adjoining land, which was beyond their statutory powers:—*Held*: the ground was

superfluous within Lands (Scot.) Act, 1845, s. 120.—*STEWART v. HIGHLAND RY. CO.* (1889), 16 R. (Cl. of Sess.) 580; 26 Sc. L. R.

Sect. 2.—How land becomes superfluous: Sub-sect. 2. Sects. 3 & 4: Sub-sects. 1 & 2, A., B. & C.]

v. Taylor, [1895] 1 Ch. 641; *Mid. Ry. v. Wright*, [1901] 1 Ch. 738. **Mentd.** *Bonner v. G. W. Ry.* (1883), 24 Ch. D. 1; *Bird v. Eggleton* (1885), 29 Ch. D. 1012; *Foster v. L. C. & D. Ry.*, [1895] 1 Q. B. 711; *Littledale v. Liverpool College*, [1900] 1 Ch. 19; *Kynoch v. Rowlands*, [1912] 1 Ch. 527.

2134. Land used by third party as coal wharf—Land not intended to be treated as superfluous.]—*BOBBETT v. SOUTH EASTERN RY. CO.* (1882), 9 Q. B. D. 424; 51 L. J. Q. B. 161; 46 L. T. 31; 46 J. P. 823.

Annotation:—*Consd. Mid. Ry. v. Wright*, [1901] 1 Ch. 738.

2135. Land used for gardens for promoters' servants—Land occupied by coal shed let to third party—Not superfluous land.]—*HARRIS v. LONDON & SOUTH-WESTERN RY.* (1889), 60 L. T. 392.

2136. Land compulsorily acquired by other promoters.]—Land acquired by the A. Co. for the purposes of their undertaking was, within the period prescribed by statute for the sale by that co. of their superfluous lands, compulsorily purchased by the B. Co.:—Held: such compulsory sale afforded no ground for inferring that the land was not required by the A. Co. for the purposes of their undertaking & was thus superfluous land within the Lands Act, 1845, & the right of pre-emption under s. 128 of the Act did not arise.—*DUNHILL v. NORTH EASTERN RY. CO.*, [1896] 1 Ch. 121; 65 L. J. Ch. 178; 73 L. T. 644; 60 J. P. 228; 44 W. R. 231; 12 T. L. R. 91; 40 Sol. Jo. 143, O. A.

2137. Negotiations for sale during & after prescribed period—Lease of portion.]—The mere facts that both before & after the expiration of the ten years limited by Lands (Scotland) Act, 1845, s. 120, a railway co. has negotiated for a portion of their land, without however effecting a sale, & has leased another portion, are not conclusive evidence that such portions have become "superfluous" within the statutory meaning of the word.—*MACFIE v. CALLANDER & OBAN RY.*, [1898] A. C. 270; 67 L. J. P. C. 58; 78 L. T. 598, H. L.

SECT. 3.—PROOF AND PRACTICE IN REFERENCE TO LAND BECOMING SUPERFLUOUS.

2138. Burden of proof—On party claiming land as superfluous.]—*HOOPER v. BOURNE*, No. 2120, ante.

2139. Land put up for sale by auction as superfluous land—Instructions for preparation of particulars of sale—No express authority.]—In an action against a railway co. to recover a piece of superfluous land which the co. were bound to dispose of within ten years after it had been acquired by them, pltf. proposed to show that, thirteen years after that time, the co. put the land up for sale by public auction as superfluous land. In order to prove this, the auctioneer was called as a witness, who deposed that he had received his instructions for the sale from one of the directors of the co.,

& also from a person who had acted as their solr. on former sales of land:—**Held:** this was not even *prima facie* proof that the sale was by the authority of the co., although more than twelve months had elapsed between the sale & the trial.—*MOODY v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1861), 1 B. & S. 290; 31 L. J. Q. B. 54; 9 W. R. 780; 121 E. R. 722.

2140. Mode of trial—Without jury.]—*SMITH v. NORTH STAFFORDSHIRE RY. CO.* (1880), 44 L. T. 85.

SECT. 4.—SALE OF SUPERFLUOUS LAND.

SUB-SECT. 1.—CONDITIONS OF SALE.

See Lands Act, 1845, ss. 127–129.

2141. Sale must be absolute—Covenant for re-purchase—Of land sold—Void.]—A railway co. sold a piece of land which they did not at the time, but probably would eventually, require for their works. The purchaser covenanted with the co. that he, his heirs & assigns, owner & owners for the time being of the land, would at any time thereafter, whenever the land might be required for the works of the co., upon certain notice given, & upon receiving the purchase-money, reconvey to the co. The land was afterwards sold to the defts. with notice of the covenant:—**Held:** having regard to Railways Act, 1845, s. 127, the conditional sale by the co. was *ultra vires*.—*LONDON & SOUTH WESTERN RY. CO. v. GOMM* (1882), 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620, O. A.

Annotations:—*Distd. Re Thackwray & Young's Contract* (1888), 40 Ch. D. 34. **Consd.** *Ray v. Walker*, [1892] 2 Q. B. 88. **Refd.** *S. E. Ry. v. Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12. **Mentd.** *Dunn v. Flood* (1883), 25 Ch. D. 629; *Austerberry v. Oldham Corpn.* (1885), 29 Ch. D. 750; *Trevelyan v. Trevelyan* (1885), 53 L. T. 853; *Re Harvey, Peck v. Savory* (1888), 39 Ch. D. 289; *Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Re Hargreaves, Midgley v. Tatley* (1890), 59 L. J. Ch. 384; *Re Bowen, Lloyd Phillips v. Davis*, [1893] 2 Ch. 491; *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352; *Rice v. Noakes*, [1900] 1 Ch. 213; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Borland's Trustee v. Steel*, [1901] 1 Ch. 279; *Savill v. Bettrell*, [1902] 2 Ch. 523; *Thomas v. Thomas* (1902), 87 L. T. 58; *Formby v. Barker*, [1903] 2 Ch. 539; *Osborne v. Bradley*, [1903] 2 Ch. 446; *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386; *Worthing Corpn. v. Heather*, [1906] 2 Ch. 532; *Edwards v. Edwards*, [1909] A. C. 275; *Mason v. Fulham Corpn.* (1910), 102 L. T. 188; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Long v. Gray* (1913), 58 Sol. Jo. 46; *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Smith v. Colbourne*, [1914] 2 Ch. 533; *Barker v. Stickney*, [1919] 1 K. B. 121.

2142. ——— Of part of land sold—Void as regards such portion.]—A railway co. sold superfluous lands with a covenant to resell certain portions to them if required:—**Held:** though, under Lands Act, 1845, s. 127, the covenant rendered void the sale of these portions, the sale of the remainder was valid.—*RAY v. WALKER*, [1892] 2 Q. B. 88; 61 L. J. Q. B. 718.

2143. ——— Postponement of time of payment beyond statutory period for sale—Lien for unpaid

PART XIV. SECT. 3.

1. Mode of trial—Reference.] The rule that ry. cos., when acting in good faith, are the best judges of what lands, &c., are required for the ry., does not apply in proceedings by a creditor against the co.; in such case the ct. is the proper authority to determine that point, & may refer the matter for inquiry whether the co. held any lands which were superfluous or not necessary for the use of the co.—*ERIE & NIAGARA RY. CO. v. GREAT WESTERN RY. CO.* (1872), 19 Gr. 43.—**CAN.**

2138i. Burden of proof—On party claiming land as superfluous—Sufficiency of proof.]—A ry. co. under compulsory powers acquired land, most of which they used for the purposes of their undertaking, which was to be completed in 1850. In 1854 they sold to M. the whole unused land except a small portion close to a station. The latter portion was occupied by M. & his successors along with what he had bought until 1877, no rent having been paid for it. The ry. co. in that year claimed possession of the small portion which they required for the purposes

of their line:—

Held: (1) the onus of proving the lands to be "superfluous" lay upon defts.; (2) to make the lands superfluous it was not sufficient to prove that at the end of ten years from the time for concluding the undertaking the lands were not actually in use. This was merely the point of time which was to be looked at for determining whether the lands were or were not superfluous.—*NORTH BRITISH RY. CO. v. MOON'S TRUSTEES* (1879), 6 R. (Ct. of Sess.) 640; 16 Sc. L. R. 329.—**SCOT.**

purchase-money.]—*Re THACKWRAY & YOUNG'S CONTRACT* (1888), 40 Ch. D. 34; 58 L. J. Ch. 72; 59 L. T. 815; 37 W. R. 74; 5 T. L. R. 18.

Annotations:—*Mentd. Re Allsop & Joy's Contract* (1889), 61 L. T. 213; *Re Hollis' Hospital Trustees, & Hague's Contract*, [1899] 2 Ch. 540.

2144. Right to impose restrictive covenants—Sale by railway company.]—A railway co. disposing of its superfluous lands is entitled to sell them under such conditions as to user as may most conduce to the advantage of the co., there being nothing in the Lands Act, 1845, to deprive a railway co. in that respect of the rights of an ordinary owner of land.—*Re HIGGINS & HITCHMAN'S CONTRACT* (1882), 21 Ch. D. 95; 51 L. J. Ch. 772; 46 J. P. 805; 30 W. R. 700.

Annotations:—*Reid. Re Ebsworth & Tidy's Contract* (1889), 42 Ch. D. 23. *Mentd. Re Hargreaves & Thompson's Contract* (1886), 32 Ch. D. 454; *Re Yeilding & Westbrook* (1886), 31 Ch. D. 341; *Re Bryant & Cullingford to Barningham* (1889), 62 L. T. 53; *Re Furneaux & Aird's Contract*, [1906] W. N. 215.

2145. — Sale by local authority—Of land in lots—Local authority bound by covenants as regards lots unsold.]—*HOLFORD v. ACTON URBAN COUNCIL*, [1898] 2 Ch. 240; 67 L. J. Ch. 636; 78 L. T. 829; 14 T. L. R. 476.

Annotations:—*Mentd. Foster & Dicksee v. Hastings Corp'n.* (1903), 19 T. L. R. 204; *Reid v. Bickerstaff*, [1909] 2

2146. — Power to vary covenants expressly retained.]—*A.-G. & LONDON PROPERTY INVESTMENT TRUST, LTD. v. RICHMOND CORPN. & GOSLING & SONS* (1903), 89 L. T. 700; 68 J. P. 73; 20 T. L. R. 131; 2 L. G. R. 628.

Annotations:—*Mentd. A.-G. v. Antrobus*, [1905] 2 Ch. 188; *Josselson v. Weiler* (1911), 75 J. P. 513.

2147. Right to rescind contract—On requisition being pressed—Contract to sell “free from incumbrances.”]—*Re GREAT NORTHERN RY. CO. & SANDERSON* (1884), 25 Ch. D. 788; 53 L. J. Ch. 445; 50 L. T. 87; 32 W. R. 519.

Annotations:—*Reid. Re Monckton & Gilzean* (1884), 27 Ch. D. 555; *Re Simpson & Moy's Contract* (1909), 53 Sol. Jo. 376.

, further, SALE OF LAND.

SUB-SECT. 2.—RIGHT TO

See Lands Act, 1845, ss. 128, 129.

A. When Right arises.

2148. Before promoters “dispose of” land—Offer to adjoining owner after agreement for sale—Agreement valid.]—*LONDON & GREENWICH RY. CO. v. GOODCHILD* (1844), 3 Ry. & Can. Cas. 507; 13 L. J. Ch. 224; 8 Jur. 455.

2149. — What is disposal—Land applied to new purpose.]—*ASTLEY v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, No. 2122, *ante*.

2150. — Offer for sale within prescribed period.]—(1) Land situate within the limits of a parliamentary borough is not necessarily land situate within a town within the meaning of Lands Act, 1845, s. 128. To come within the sect., as situate within a town, the land must be surrounded or covered by continuous, as distinguished from contiguous, houses.

(2) By “land built upon” in the sect. is meant land which, though not in a town, is covered with continuous buildings *codem modo* that the scheme of a town is described to be covered with continuous buildings.

(3) By “land used for building purposes” is

meant land actually so used, & not land merely suitable for building purposes.

(4) Although the right of pre-emption cannot be claimed in regard to superfluous land which remains in the possession of the co. until the expiration of ten years from the time limited by its Act for the completion of its works, yet, if the co. at any earlier period offer the land for sale to a third party, the right arises at once.

(5) The right is confined to land acquired by a co. under its parliamentary powers; but if the usual notice to treat has been given in exercise of the powers, the right is not lost in consequence of the price being subsequently settled by agreement instead of an award or inquiry before a jury.

(6) The right is not confined to the proprietors from whom the co. purchased, but devolves to future proprietors of the lands from which the purchased lands were severed.—*CARINGTON (LORD) v. WYCOMBE RY. CO.* (1868), 3 Ch. App. 377; 37 L. J. Ch. 213; 18 L. T. 96; 16 W. R. 494, L. J.

Annotations:—*As to* (1) *Consd. L. & S. W. Ry. v. Blackmore* (1870), L. R. 4 H. L. 610; *Hobbs v. Mid. Ry.* (1882), 20 Ch. D. 418; *Dunhill v. N. E. Ry.*, [1896] 1 Ch. 121; *Macfie v. Callander & Oban Ry.*, [1898] A. C. 270. *Reid. Beauchamp v. G. W. Ry.* (1868), 19 L. T. 189; *Re Clergy Orphan Corp'n.* (1894), 64 L. J. Ch. 66.

2151. — Attempt to sell within prescribed period.]—*LONDON & SOUTH WESTERN RY. CO. (DIRECTORS, ETC.) v. BLACKMORE*, No. 2125, *ante*.

B. In respect of what Land.

2152. Land acquired compulsorily—Notice to treat given—Price subsequently settled by agreement.]—*CARINGTON (LORD) v. WYCOMBE RY. CO.*, No. 2150, *ante*.

2153. What lands excepted—Meaning of “lands situate within a town.”]—*CARINGTON (LORD) v. WYCOMBE RY. CO.*, No. 2150, *ante*.

2154. —]—*LONDON & SOUTH WESTERN RY. CO. (DIRECTORS, ETC.) v. BLACKMORE*, No. 2125, *ante*.

2155. — Meaning of “lands built upon.”]—*CARINGTON (LORD) v. WYCOMBE RY. CO.*, No. 2150, *ante*.

2156. — Meaning of lands “used for building purposes”]—*Land sold or let & actually laid out for building.]—**COVENTRY v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1867), L. R. 5 Eq. 104; 37 L. J. Ch. 90; 17 L. T. 368; 16 W. R. 267.

Annotations:—*Distd. Hobbs v. Mid. Ry.* (1882), 20 Ch. D. 418. *Mentd. Cave v. Horsell* (1912), 106 L. T. 147.

2157. — Land must be actually & de facto used for building purposes.]—*CARINGTON (LORD) v. WYCOMBE RY. CO.*, No. 2150, *ante*.

2158. — Merely marked out in plots not sufficient.]—*LONDON & SOUTH WESTERN RY. CO. (DIRECTORS, ETC.) v. BLACKMORE*, No. 2125, *ante*.

C. Who entitled to Right.

See Lands Act, 1845, s. 128.

2159. Owner of lands from which superfluous land taken — Purchaser from.]—*CARINGTON (LORD) v. WYCOMBE RY. CO.*, No. 2150, *ante*.

2160. — Successors in title of—“Person” of whom land purchased—Not entitled.]—*HIGHGATE ARCHWAY CO. v. JEAKES* (1871), L. R. 12 Eq. 9; 40 L. J. Ch. 408; 24 L. T. 567; 19 W. R. 692.

2161. Adjoining owners—Who are—Lessee.]—*COVENTRY v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1867), L. R. 5 Eq. 104; 37 L. J. Ch. 90; 17 L. T. 368; 16 W. R. 267.

Annotations:—*Distd. Hobbs v. Mid. Ry.* (1882), 20 Ch. D. 418. *Reid. Cave v. Horsell* (1912), 106 L. T. 147.

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*m. Adjoining owners — Rights of — Abrogated by special Act.]—*An ad-

propriator is not, under North British Railway Act, 1913, s. 41 entitled to prevent the Ry. Co. from

letting superfluous lands.—*NORTH BRITISH RY. CO. v. BIRRELL'S TRUSTEES*, [1918] S. C. (H. L.) 33.—SCOT.

Sect. 4.—Sale of superfluous land: Sub-sect. 2, C. &

2162. ——— Purchaser of adjoining land from promoters.]—LONDON & SOUTH WESTERN RY. CO. (DIRECTORS, ETC.) *v.* BLACKMORE, No. 2125, *ante*.

2163. ——— Lessee with right of way over private road between surplus & adjoining lands.]—COVENTRY *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1867), L. R. 5 Eq. 104; 37 L. J. Ch. 90; 17 L. T. 368; 16 W. R. 267.

*Annotations:—*Distd. Hobbs *v.* Mid. Ry. (1882), 20 Ch. D. 418. *Refd.* Cave *v.* Horsell (1912), 106 L. T. 147.

2164. ——— Effect of boundary wall between surplus & adjoining lands.]—LONDON & SOUTH WESTERN RY. CO. (DIRECTORS, ETC.) *v.* BLACKMORE, No. 2125, *ante*.

2165. ——— Rights of—Where several adjoining owners—Offer to all necessary.]—COVENTRY *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1867), L. R. 5 Eq. 104; 37 L. J. Ch. 90; 17 L. T. 368; 16 W. R. 267.

*Annotations:—*Distd. Hobbs *v.* Mid. Ry. (1882), 20 Ch. D. 418. *Refd.* Cave *v.* Horsell (1912), 106 L. T. 147.

2166. ——— Only one adjoining owner suing.]—LONDON & SOUTH WESTERN RY. CO. (DIRECTORS, ETC.) *v.* BLACKMORE, No. 2125, *ante*.

D. Exercise of Right.

See Lands Act, 1845, s. 130.

2167. Ascertainment of price—By arbitration—Arbitration clauses of Lands Act, 1845—Not applicable.]—JONES *v.* SOUTH STAFFORDSHIRE RY. CO. (1869), 19 L. T. 603.

*Annotation:—*Refd. Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1901] 2 Ch. 37.

2168. ——— Made applicable by special Act—Arbitrator can make order as to costs.]—RE EYRE'S TRUSTS, [1869] W. N. 76.

Ascertainment of purchase price of land compulsorily acquired.]—*See* Part VII., *ante*.

SUB-SECT. 3.—EFFECT OF FAILURE TO SELL WITHIN PRESCRIBED PERIOD.

See Lands Act, 1845, s. 127.

2169. Land vests in owners of adjoining lands—Mode of apportionment.]—MOODY *v.* CORBETT, No. 2109, *ante*.

2170. ——— Notwithstanding later Act extending time for sale.]—MOODY *v.* CORBETT, No. 2109, *ante*.

2171. ———.]—GREAT WESTERN RY. CO. *v.* MAY, No. 2121, *ante*.

2172. Promoters remaining in occupation—Land let to tenant—Tenant estopped from disputing promoters' title.]—LONDON & NORTH WESTERN RY. CO. *v.* WEST (1867), L. R. 2 C. P. 553; 36 L. J. C. P. 245.

SUB-SECT. 4.—RIGHTS AND LIABILITIES OF PURCHASERS.

2173. Rights of purchaser—To return of deposit & damages—On discovering right of pre-emption not waived by prior owners—Sale subject to condition to admit title.]—A contract for sale of superfluous land of a railway co. which had been conveyed by the co. to the vendor contained a

stipulation that the purchaser should assume & admit that everything, if anything was necessary, was done by the co. to enable them to sell the land as surplus land, & should not call for or require production of any evidence to that effect; & a further stipulation that if the purchaser should fail to comply with the terms of the agreement the deposit should be forfeited to the vendor. The land was not situate in a town or used for building purposes. In the course of the investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption; & as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit & damages. The vendor then sold the land to one of the prior owners:—*Held*: the purchaser was bound by the stipulations to admit the title of the co. to sell to the vendor; & as he had refused to abide by that stipulation he had broken the contract, & could not claim a return of his deposit.—*BEST v. HAMAND* (1879), 12 Ch. D. 1; 27 W. R. 742; *sub nom.* HAMAND *v.* BEST, 48 L. J. Ch. 503; *sub nom.* HAMMOND *v.* BEST, 40 L. T. 769, C. A.

*Annotation:—*Refd. *Re Davis & Cavey* (1888), 40 Ch. D. 601.

2174. ——— No greater than those of vendors—Right of support to surface of land.]—In 1865 the owner of land demised the minerals under it to deft. for a term of years, & in 1867 such owner conveyed the surface of the land to a railway co. under the compulsory powers of the Lands Act, 1845, which was incorporated with the co.'s special Act, & some years afterwards the co. sold part of such land as superfluous land to persons who ultimately sold it to pltf. The railway co. never purchased the minerals nor made compensation to deft. as such lessee under the powers conferred on them by the Railways Act, 1845, & deft. worked the mines in the usual manner of working in the district &, by so doing, caused a subsidence which damaged some houses erected by pltf. upon the land. In an action against deft. for working the mines without leaving a sufficient support for pltf.'s land:—*Held*: (1) deft. had not interfered with any right of pltf., who could have no greater right than the railway co. from whom he derived his title; (2) if a railway co. had exercised the option they had under the Railways Act of purchasing land under their compulsory powers without the mines & minerals thereunder, the owner, lessee or occupier of such mines & minerals had a right to work same without regard to whether such working would let down the surface, provided the working was according to the usual way in the district.—*POUNTNEY v. CLAYTON* (1883), 11 Q. B. D. 820; 52 L. J. Q. B. 566; 49 L. T. 283; 47 J. P. 788; 31 W. R. 664, C. A.

*Annotations:—*As to (2) *Consd.* Consett Waterworks Co. *v.* Ritson (1889), 22 Q. B. D. 318; L. & N. W. Ry. *v.* Howley Park Coal & Cannel Co., [1911] 2 Ch. 97. *Refd.* Mid. Ry. & Kettering, Thrapston & Huntingdon Ry. *v.* Robinson (1889), 15 App. Cas. 19; Ruabon Brick & Terra Cotta Co. *v.* G. W. Ry., [1893] 1 Ch. 427; *Re* Gerard & L. & N. W. Ry. (1895), 64 L. J. Q. B. 260. *Generally, Mentd.* Manchester Corpn. *v.* New Moss Colliery, [1906] 2 Ch. 564.

2175. ——— Implied obligation on part of vendor not to derogate from grant.]—A railway co. sold a house in fee to pltf. & retained the adjoining land, & the conveyance recited that the whole of the land so retained would be actually required for the construction of the railway. The windows on the ground-floor & basement of the house derived their light through one of the arches of a

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*n. Land vests in owners of adjoining lands—By conditional limitation not by forfeiture.]—*Where, under Lands

Act, 1845, superfluous lands become, in default of sale within the prescribed period, vested in the adjoining owners, the vesting takes place by force of a

conditional limitation and not of a forfeiture.—*MILLER v. WATERFORD HARBOUR COMRS.*, [1904] 2 I. R. 421; 38 L. L. T. 45.—*IR.*

PART XIV.—SUPERFLUOUS LANDS.

viaduct over which the railway ran. Deft. subsequently acquired through the co. an interest in the adjoining land & the arch, which he blocked up:—*Held*: there was an implied obligation on the part of the railway co. not to interfere with pltf.'s lights except so far as required for the construction of the railway, & pltf. was entitled to an injunction.—*MYERS v. CATTERSON* (1889), 43 Ch. D. 470; 59 L. J. Ch. 315; 62 L. T. 205; 38 W. R. 488; 6 T. L. R. 111, C. A.

Annotations:—*Consd.* Willson v. Queen's Club, [1891] 3 Ch. 522. *Refd.* Balley v. Icke (1891), 64 L. T. 789; Corbett v. Jonas, [1892] 3 Ch. 137; Broomfield v. Williams, [1897] 1 Ch. 602.

2176. Liabilities of purchaser—Revival of restrictive covenants against purchaser.]—An inclosure Act passed in 1806 provided that no buildings should at any time thereafter be erected on a certain strip of land. In 1865 a railway co. under their statutory powers acquired a portion of the strip of land for the purposes of their undertaking. A part of the land thus acquired became superfluous land, & the co. in 1868 sold & conveyed the superfluous part to a purchaser who demised it to deft. Deft. in 1885 commenced building on the land:—*Held*: the land acquired by the co. was freed from the prohibition of building only for the purposes of the co.'s undertaking, &, when part of it was sold as superfluous land, the prohibition of building revived in respect of that part.—*BIRD v. EGGLETON* (1885), 29 Ch. D. 1012; 54 L. J. Ch. 819; 53 L. T. 87; 49 J. P. 644; 33 W. R. 774; 1 T. L. R. 508.

**SECT. 5. -SECURITIES OVER SUPERFLUOUS
LAND AND ITS PROCEEDS.**

2177. Power of company to charge surplus lands—& proceeds—Position of debenture holders.]—
(1) A mortgage debenture, made by a railway co. in the form given in Companies Act, 1845, Schedule C., does not give the debenture holder a specific charge upon the surplus lands of the co., or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or interim rents.

(2) A railway co. may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works.—*GARDNER v. LONDON, CHATHAM & DOVER RY. CO.* (No. 1); *DRAWBRIDGE v. SAME*; *GARDNER v. SAME* (No. 2); *IMPERIAL MERCANTILE CREDIT ASSOCN. v. SAME* (1867), 2 Ch. App. 201; 36 L. J. Ch. 323; 15 L. T. 552; 31 J. P. 87; 15 W. R. 325, L. JJ.

Annotations:—As to (1) Consd. Bowen v. Brecon Ry., *Ex p.* Howell (1867), L. R. 3 Eq. 541. *Folld.* Griffin v. Bishop's Castle Ry. (1867), 15 W. R. 1058. *Distd.* *Re* Panama, New Zealand & Australian Royal Mail Co. (1870), 5 Ch. App. 318. *Apld.* *Re* Exmouth Docks Co. (1873), L. R. 17 Eq. 181. *Consd.* Chandler v. Howell (1876), 4 Ch. D. 651; Holdsworth v. Davenport (1876), 3 Ch. D. 185. *Expld.* *Re* Mitchell's Estate, Mitchell v. Moberly (1877), 6 Ch. D. 655. *Consd.* Attree v. Hawe (1878), 9 Ch. D. 337; *Re* Cornwall Minerals Ry. (1882), 48 L. T. 41; Brocklehurst v. Ry. Printing & Publishing Co., Eldridge & Pearson, Claimants, [1884] W. N. 70; *Re* Hull, Barnsley & West Riding Junction Ry (1888), 40 Ch. D. 119. *Apld.* *Re* Hatton, Robson v. Gibbs (1888), 4 T. L. R. 311. *Expld.* Redfield v. Wickham Corpn. (1888), 13 App. Cas. 467. *Apld.* Blaker v. Herts & Essex Waterworks Co. (1889), 41 Ch. D. 399. *Distd.* Buckley v. Royal National Lifeboat Institution (1889), 6 T. L. R. 42. *Consd.* *Re* David, Buckley v. Royal National Life Boat Institution (1889), 41 Ch. D. 168. *Apld.* *Re* Hallett, Howarth v. Massey (1889), 5 T. L. R. 285. *Consd.* *Re* Yerbury's Estate, Ker v. Dent (1889), 62 L. T. 55; *Re* East & West India Dock Co. (1891), 7 T. L. R. 623; *Re* Parker, Wignall v. Park, [1891] 1 Ch. 682; Whadcoat v. Shropshire Ry. (1893), 9 T. L. R. 589; *Re* Crossloy, Birrell v. Greenhough, [1897] 1 Ch. 928; *Stagg v. Medway (Upper) Navigation Co., [1903] 1 Ch. 169; Central Ontario Ry. v. Trusts & Guarantee Co. [1905] A. C. 576. Apld.* *Re* Woking Urban Council

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Canal) Act, 1911, [1911] 1 Ch. 300. **Reid.**
Re Cambrian Rys. Co.'s Scheme (1867), 3 Ch. App. 278, n.;
Imperial Mercantile Credit Assocn. v. Newry, etc. Ry.
 (1868), 16 W. R. 1070; *Re New Clydach Sheet & Bar Iron*
Co. (1868), L. R. 6 Eq. 514; *Re Herne Bay Waterworks*
Co. (1878), 10 Ch. D. 42; *Bourgoin v. La Compagnie du*
Chemin de fer de Montréal, Ottawa et Occidental (1880),
 5 App. Cas. 381; *Re Christmas, Martin v. Lacon* (1885),
 30 Ch. D. 544; *Re Watts, Cornford v. Elliott* (1885), 33
 W. R. 885; *Re Barton-upon-Humber & District Water*
Co. (1889), 42 Ch. D. 585; *Re David, Buckley v. Royal*
National Lifeboat Institution (1889), 43 Ch. D. 27; *Re*
Eastern & Midlands Ry. (1890), 45 Ch. D. 367; *Proffitt v.*
Wye Valley Ry. (1891), 64 L. T. 669; *Re Borough of*
Portsmouth (Kingston, Fratton & Southsea) Tram. Co.,
 [1892] 2 Ch. 362; *Driver v. Broad*, [1893] 1 Q. B. 744;
Re Pickard, Elmsley v. Mitchell, [1894] 3 Ch. 704; *Sadler*
v. Worley, [1894] 2 Ch. 170; *Re Knott End Ry. Act*, 1898,
 [1901] 2 Ch. 8; *Boehm v. Goodall*, [1911] 1 Ch. 155.
Re Crystal Palace Co., Fox v. Crystal Palace Co. (1911),
 104 L. T. 898. **Generally.** **Distd.** *Bartlett v. West Metro-*
politan Tram. Co., [1893] 3 Ch. 437. **Refd.** *Marshall v.*
South Staffordshire Tram. Co., [1895] 2 Ch. 36. **Mentd.**
Holland v. Coln & Kinsale Ry. (1868), 16 W. R. 1217;
Re Manchester & Milford Ry., Ex p. Cambrian Ry.
 (1880), 14 Ch. D. 645; *Reid v. Explosives Co.* (1886), 56
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 164; *Re Thompson, Bedford v. Teal* (1890), 45 Ch. D.
 161; *De Grelle, Houdret v. Bull* (1894), 1 Mans. 118;
Re Mersey Ry., Gibbs v. Mersey Ry. (1895), 11 T. L. R.
 390; *Pegge v. Neath District Tram. Co.*, [1895] 2 Ch. 508.

2178. — — — — —.] — Railway Companies Act, 1867 (c. 127), s. 23, does not give to the holders of debenture stock in a railway co. any lien or charge on the proceeds of superfluous lands of the co. which have been sold, in priority over the other creditors of the co.—*Re HULL, BARNESLEY & WEST RIDING JUNCTION RY. CO.* (1888), 46 Ch. D. 119; 58 L. J. Ch. 205; 59 L. T. 877; 57 W. R. 145, C. A.

Annotations:—**Reid**. *Proffitt v. Wye Valley Ry.* (1891), 64 L. T. 669. **Mentd.** *Re East & West India Dock Co.* (1890), 62 L. T. 239; *Re Liskeard & Caradon Ry.*, [1903] 2 Ch. 681.

2179. —.]—A navigation co. incorporated by statute had power under a special Act, with which Lands Act, 1845 was not incorporated, to borrow money upon the security of a mtge. of their undertaking, but no express power was given to mortgage their surplus lands:—*Held*: the co. could create a valid charge upon their surplus lands to secure an existing debt in respect of which the creditor by obtaining judgment would be able to take the surplus lands in execution under a writ of *elegit*.—*STAGG v. MEDWAY (UPPER) NAVIGATION Co.*, [1903] 1 Ch. 169; 72 L. J. Ch. 177; 87 L. T. 705; 51 W. R. 329; 19 T. L. R. 143, C. A.

Annotation :—**Refd.** Reeve v. Modway (Upper) Navigation Co. (1905), 21 T. L. R. 400.

See, generally, COMPANIES.

**SECT. 6.—EXECUTION AGAINST SUPERFLUOUS
LAND.**

Sec, generally, EXECUTION.

2180. When order for sale by judgment creditor made—Land must be saleable.]—(1) Before the ct. orders a sale of lands under Judgments Act, 1864 (c. 112), it must be absolutely satisfied that they are saleable.

(2) A judgment creditor petitioned under the Act for an immediate sale of lands of the co. comprised in the return to a writ of *elegit*, & the co., although it had shortly before advertised them for sale expressly as "surplus lands," suggested that possibly they were not surplus lands, & there was no further evidence of their character:—*Held*: an immediate sale must be refused & inquiries in chambers must be directed. —GARDNER v. LONDON, CHATHAM & DOVER RY. Co., *Ex p.* GRISSELL (1867). 2 Ch. App. 385; 15 L. T. 644; 15 W. R. 324, L. JJ.

Annotations:—As to (2) *Folld. Re Bristol & North Somerset Ry.* (1869), 20 L. T. 70; *Kingston v. Cowbridge Ry.* (1871), 41 L. J. Ch. 152.

Sect. 6.—Execution against superfluous land. Part XV. Sect. 1: Sub-sects. 1, 2, 3, 4, 5, 6, 7 & 8. l. 2: Sub-sects. 1, 2, 3 & 4. Sect. 3: l. 1, A., B. & C.]

2181. Debt incurred in respect of one undertaking—Land extended acquired under powers of another undertaking.]—An existing railway co. was authorised to make an extension line by an Act which enacted that the capital might be raised by an issue of new shares, to be called extension shares; & that the works authorised by it should, for financial purposes form a separate undertaking; & that the capital & new shares created under its powers should constitute a separate capital; & that the profits of the extension line applicable to dividend should be wholly applied in payment of dividend on the extension shares; & that the extension shareholders should not be entitled to dividends out of any other profits of the co.; & that the co. might raise by mtge. any additional sums not exceeding £28,000; but not till all the extension capital had been subscribed for & half of it paid up; & that the

money raised by new shares or mtge. should be applied only for the purposes of the extension Act. A contractor, to whom the co. was indebted in respect of the construction of the original line, obtained judgment against the co., extended certain surplus lands acquired under the powers of the extension Act, & then applied to the ct. for a sale:—*Held*: the creditor was entitled to an order for sale for that, whatever might be the rights of the different classes of shareholders *inter se*, the lands were lands of the co., liable to be sold for payment of any judgment debts of the co. —*Re OGILVIE* (1871), 7 Ch. App. 174; 41 L. J. Ch. 336; 25 L. T. 860; 20 W. R. 226, L. JJ.

Annotations:—*Apprvd.* *Pearson v. Dublin & South Eastern Ry.*, [1909] A. C. 217. *Mentd.* *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169.

2182. Form of order—Whether inquiries directed.]—*GARDNER v. LONDON, CHATHAM & DOVER RY. Co.*, *Ex p. GRISSELL*, No. 2180, *ante*.

2183. ———.]—*Re CALNE RY. Co.* (1870), L. R. 9 Eq. 658.

Annotations:—*Appld.* *Re Bithray* (1889), 61 L. T. 383. *Refd.* *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169.

Part XV. Compensation for Land taken or used for Special Purposes.

SECT. 1.—COMMERCIAL UNDERTAKINGS.

SUB-SECT. 1.—RAILWAYS AND CANALS.

Compensation for injurious affection—Arising from working of railway.]—*See* Part III., Sect. 3, sub-sect. 4, D, *ante*.

Duty of promoters to provide accommodation works—Rendered necessary by acquisition of lands.]—*See* RAILWAYS & CANALS.

Rights of persons injured by abandonment of undertaking—To compensation—Under special Act passed on abandonment.]—*See* RAILWAYS & CANALS.

——— **Out of parliamentary deposit.]—***See* PARLIAMENT; RAILWAYS & CANALS.

Compensation for loss of water by construction of canal.]—*See* RAILWAYS & CANALS.

SUB-SECT. 2.—WATERWORKS.

See Waterworks Act, 1847, s. 6.

Acquisition of right to lay pipes.]—*See* EASEMENTS & PROFITS À PRENDRE; WATER SUPPLY.

Compensation for damage—By laying pipes.]—*See* WATER SUPPLY.

——— **By abstraction of water.]—***See* WATER SUPPLY.

SUB-SECT. 3.—GASWORKS.

Right of landowner to compensation—For minerals rendered unworkable—Required for support of gas mains.]—*See* GAS.

Right of adjoining owners to compensation—For interference with rights by erection of gas holders.]—*See* GAS.

SUB-SECT. 4.—ELECTRIC LIGHT AND POWER WORKS.

Liability for compensation for injury caused by works—By erection of cable standard.]—*See* No. 231, *ante*.

See, generally, ELECTRIC LIGHTING & POWER.

SUB-SECT. 5.—MARKETS AND FAIRS.

See Markets & Fairs Clauses Act, 1847 (c. 14), ss. 6, 11 & *generally*, MARKETS & FAIRS.

SUB-SECT. 6.—HARBOURS, DOCKS AND PIERS.

See Harbours Docks & Piers Clauses Act, 1847 (c. 27), s. 6.

Compensation for injurious affection—Arising apart from taking of land.]—*See* WATERS & WATERCOURSES.

Liability of local authority—As successors to harbour trustees—To pay compensation.]—*See* No. 2205, *post*.

SUB-SECT. 7.—CEMETERIES.

See Cemeteries Clauses Act, 1847 (c. 65), ss. 6, 17; & *generally*, BURIAL & CREMATION, Vol. VII., pp. 547, 548.

SUB-SECT. 8.—TRAMWAYS AND LIGHT RAILWAYS.

Compulsory purchase of undertaking.]—*See* TRAMWAYS & LIGHT RAILWAYS.

SECT. 2.—GOVERNMENT PURPOSES.

SUB-SECT. 1.—DEFENCE OF REALM AND NAVAL AND MILITARY PURPOSES.

See CONSTITUTIONAL LAW; ROYAL FORCES.

SUB-SECT. 2.—CUSTOMS.

See REVENUE.

SUB-SECT. 3.—POST OFFICE.

See POST OFFICE; TELEGRAPHS AND TELEPHONES.

SUB-SECT. 4.—PRISONS.

See PRISONS.

SECT. 3.—PURPOSES OF LOCAL GOVERNMENT.

SUB-SECT. 1.—UNDER PUBLIC HEALTH ACTS.

A. In General.

See Public Health Act, 1875 (c. 55), ss. 175, 176.

2184. Under Public Health Act, 1848 (c. 63)—Appointment of umpire—Not complete until consent obtained & formal order made.]—RINGLAND *v.* LOWNDES (1863), 15 C. B. N. S. 173; 33 L. J. C. P. 25; 9 L. T. 479; 10 Jur. N. S. 48; 12 W. R. 168; 143 E. R. 749; *reversd.* on other grounds (1864), 17 C. B. N. S. 514, Ex. Ch.

Annotation:—*Mentd.* Davies *v.* Price (1864), 11 L. T. 203.

2185. — Public authority not liable for compensation—For damage not actionable apart from Act.]—HALL *v.* BRISTOL CORPN. (1867), L. R. 2 C. P. 322; 36 L. J. C. P. 110; 15 L. T. 572; 31 J. P. 376; 15 W. R. 404.

Annotations:—*Consd.* Rhodes *v.* Airedale Drainage Comrs. (1876), 1 C. P. D. 380. *Distd.* Fairbrother *v.* Bury R. S. A. (1889), 37 W. R. 544.

2186. Under Public Health Act, 1875 (c. 55)—Notice of intention to take—Gives owner no right of action—On omission to take lands specified—Though provisional order empowering the taking confirmed.]—BURGES *v.* BRISTOL URBAN SANITARY AUTHORITY, No. 520, *ante.*

2187. — Land acquired for one purpose—Cannot be applied to purpose inconsistent with original purpose—Though not required for original purpose.]—A.-G. *v.* HANWELL URBAN COUNCIL, No. 135, *ante.*

2188. — Public authority liable for compensation—For damage actionable apart from Act—Though caused by lawful act & without negligence.]—LINCKÉ *v.* CHRISTCHURCH CORPN., No. 269, *ante.*

B. Acquisition of Land.

2189. When land may be acquired compulsorily—Under Public Health Act, 1848 (c. 63)—Not for sewage tank or reservoir or deposit beds.]—SUTTON *v.* NORWICH CORPN. (1858), 27 L. J. Ch. 739; 31 L. T. O. S. 389; 22 J. P. 353; 6 W. R. 432.

Annotation:—*Refd.* Newcastle-on-Tyne Corpn. *v.* Houseman, Same *v.* Francis, Same *v.* Jackson, Same *v.* Coote (1898), 63 J. P. 85.

See, also, Part II., Sect. 3, sub-sect. 3, B. (d), *ante.*

2190. When land must be acquired—Under Public Health Act, 1848 (c. 63)—& Public Health Act, 1875 (c. 55)—Not for construction of man-holes to sewer.]—In 1875 a local board, who had constructed a sewer under a public road, constructed on the land adjoining the road a side-entrance or man-hole to the sewer, & subsequently gave the owner of the land notice of their intention to construct two other man-holes. The landowner contended that the man-holes were necessary works within Public Health Act, 1848 (c. 63), s. 46, & Public Health Act, 1875 (c. 58), s. 19, & that the board could not construct them without first acquiring his land by purchase:—*Held*: the man-holes were parts of a sewer within Public Health Act, 1848, s. 45 & Public Health Act, 1875, s. 16, & the board had power to enter on the land & construct the man-holes without purchase, the only remedy of the landowner being compensation.—SWANSTON *v.* TWICKENHAM LOCAL BOARD (1879), 11 Ch. D. 838; 48 L. J. Ch. 623; 40 L. T. 734; 43 J. P. 380; 27 W. R. 924, C. A.

Annotations:—*Consd.* King's College, Cambridge *v.* Uxbridge R. C., [1901] 2 Ch. 768. *Apld.* Metropolitan Water Board

v. L. B. & S. C. Ry., [1914] 3 K. B. 787. *Refd.* Ellis *v.* Bromley R. D. C. (1899), 63 J. P. 711. *Mentd.* Sheffield Waterworks Co. *v.* Bingham (1883), 48 L. T. 604.

2191. — Under Public Health Act, 1875 (c. 55)—For construction of sewage pumping station.]—KING'S COLLEGE, CAMBRIDGE *v.* UXBRIDGE RURAL COUNCIL, [1901] 2 Ch. 768; 70 L. J. Ch. 844; 85 L. T. 303; 17 T. L. R. 762.

— Under Local Government Act, 1858 (c. 98).]—*See* No. 118, *ante.*

— Under Metropolis Local Management Act, 1855 (c. 120).]—*See* Nos. 2243, 2244, *post.*

2192. Basis of compensation—What may be considered—Not depreciation of adjoining lands—Through user of lands taken for sewage pumping station.]—HORTON *v.* COLWYN BAY & COLWYN URBAN COUNCIL, No. 223, *ante.*

Recovery of land improperly taken—Whether public authority entitled to notice of action.]—*See* PUBLIC AUTHORITIES & PUBLIC OFFICERS.

2193. Land acquired by agreement for purposes of street widening—By corporation with compulsory powers—Does not vest in corporation under Public Health Act, 1875 (c. 55), s. 149—Without conveyance.]—*Re* GREAT HOSPITAL, NORWICH (1885), *Times*, Aug. 12.

Restrictions on user of lands acquired.]—*See* Nos. 133, 134, 135, *ante.*

C. User of Subsoil.

2194. Right to compensation—Enforceable by mandamus.]—A mandamus to make compensation for damage done to houses by sewerage works executed by a local board of health in pursuance of the Public Health Act, 1848 (c. 63), recited that claimant had applied to the local board to make him full compensation, & that they had denied all liability to compensate him, & the writ then commanded the local board to cause compensation to be made out of the general or special district rate. Defts. by their return alleged that they had not denied all liability, & were willing to make compensation when it should be ascertained, that it had not been ascertained, nor had the prosecutor taken any steps towards having it ascertained, nor given any notice of the amount, nor whether it exceeded £20, nor appointed an arbitrator, as by the Act provided. The return having been traversed, the jury found that defts. had denied their liability, but that the prosecutor had made no claim for any certain amount:—*Held*: a mandamus might issue in the first instance to compel the local board to make compensation, & it was not a condition precedent that claimant should demand a specific sum as compensation, nor inform the local board whether or not it exceeded £20.—*R. v.* BURSLEM LOCAL BOARD OF HEALTH (1860), 1 E. & E. 1088; 29 L. J. Q. B. 242; 2 L. T. 667; 24 J. P. 563; 6 Jur. N. S. 696; 8 W. R. 584; 120 E. R. 1218, Ex. Ch.

Annotation:—*Consd.* Brierley Hill L. B. *v.* Pearsall (1884), 9 App. Cas. 595.

2195. — Neither demand of specific sum—Nor declaration whether exceeds £20 or not—Conditions precedent.]—*R. v.* BURSLEM LOCAL BOARD OF HEALTH, No. 2194, *ante.*

2196. Who entitled to compensation—Not purchaser taking conveyance of lands affected—After date of injury.]—HELMORE *v.* EAST HAM LOCAL BOARD (1893), *Times*, Dec. 13.

2197. — Owner of Easement—Water supplied to mill & mill-pond by goit—Sewer carried under goit.]—CLECKHEATON URBAN DISTRICT COUNCIL *v.* FIRTH (1898), 62 J. P. 536; 42 Sol. Jo. 669.

2198. Basis of compensation—What may be considered—Owner prevented from building over sewer.]—UTTLEY *v.* TODMORDEN LOCAL BOARD OF

Sect. 3.—Purposes of local government: Sub-sect. 1, c); sub-sect. 2.]

HEALTH (1874), 44 L. J. C. P. 19; 31 L. T. 445; 39 J. P. 56.

Annotation:—*Consd. Brierley Hill L. B. v. Pearsall (1884), 51 L. T. 577.*

2199. — Sewer constructed in defective manner.]—UTTLEY v. TODMORDEN LOCAL BOARD OF HEALTH (1874), 44 L. J. C. P. 19; 31 L. T. 445; 39 J. P. 56.

Annotation:—*Refd. Brierley Hill L. B. v. Pearsall (1884), 51 L. T. 577.*

2200. — Stenches arising from sewer.]—UTTLEY v. TODMORDEN LOCAL BOARD OF HEALTH (1874), 44 L. J. C. P. 19; 31 L. T. 445; 39 J. P. 56.

Annotation:—*Refd. Brierley Hill L. B. v. Pearsall (1884), 51 L. T. 577.*

2201. — Embankment built over raised sewer.]—An urban or rural sanitary authority has power by Public Health Act, 1875, c. 55, to make a sewer in private property, even though the sewer may be raised above the level of the ground & may necessitate an embankment of considerable height being built over it. In such case ample compensation is provided by the Act.—RODERICK v. ASTON LOCAL BOARD (1877), 5 Ch. D. 328; 46 L. J. Ch. 802; 36 L. T. 328; 25 W. R. 403, C. A. **Annotations:—*Consd. Jones v. Conway & Colwyn Bay Joint Water Supply Board, [1893] 2 Ch. 603. Refd. L. & N. W. Ry. v. Evans, [1893] 1 Ch. 16; Jary v. Barnsley Corpn., [1907] 2 Ch. 600; Morris v. Mynyddislwyn U. D. C., [1917] 2 K. B. 309. Mentd. Glamorganshire Canal Navigation v. Nixon's Navigation Co. (1900), 17 T. L. R. 184.***

See, also, No. 2190, ante.

2202. — Not risk of percolation of sewage—Into subjacent mine.]—Re DUDLEY CORPN., No. 381, ante.

2203. — Minerals required for support of sewer—Or rendered unworkable.]—Re DUDLEY CORPN., No. 381, ante.

See, generally, Part IV., ante.

Right to damages—Caused by negligent construction of works.]—See DAMAGES; NEGLIGENCE; NUISANCE; PUBLIC AUTHORITIES & PUBLIC OFFICERS; PUBLIC HEALTH & LOCAL ADMINISTRATION.

Right to support for sewers.]—See, generally, SEWERS & DRAINS.

D. Compensation.

(a) Right to Compensation.

Who entitled—Assignee of claim.]—See CHOSER IN ACTION, Vol. VIII., p. 432, No. 96.

— On acquisition of land.]—See No. 223, ante.

— On user of land for sewers.]—See Nos. 2198, 2201, ante.

2204. — Owner of private road—In which water mains laid by local board.]—Pltf. was the owner of a private road in the W. district. Defts. were the urban sanitary authority of the district, & had the control of the streets generally in that district, & also the power of supplying the inhabitants with water. Defts. commenced without pltf.'s consent to break up his private road for the purpose of laying down water-mains. Pltf. brought an action for an injunction:—*Held*: the words "where the local authority have not the control of the streets" in Public Health Act, 1875 (c. 55), s. 57, which forbade the laying down of pipes in any private road without the consent of the owner, were descriptive of a local authority who had not the control generally of the streets in their district, & had no application to defts., & defts. had power under ss. 16 & 54 to lay down pipes in pltf.'s private road without his consent,

making him proper compensation under s. 308.—HILL v. WALLASEY LOCAL BOARD, [1894] 1 Ch. 133; 63 L. J. Ch. 1; 69 L. T. 641; 42 W. R. 81; 10 T. L. R. 73; 38 Sol. Jo. 56; 7 R. 51, C. A.

Annotations:—*Refd. Jones v. Conway & Colwyn Bay Joint Water Supply Board (1893), 69 L. T. 265; Baird v. Tunbridge Wells Corpn., [1894] 2 Q. B. 867.*

2205. — Person injured by alteration to public highway—Subject to limited dedication—Quay & bridge vested in local authority—As successors to harbour trustees.]—ARNOTT v. WHITBY URBAN DISTRICT COUNCIL (1909), 101 L. T. 14; 73 J. P. 369; 7 L. G. R. 856.

Annotation:—*Mentd. County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.*

— Necessary alteration in level of highway.]—See HIGHWAYS, STREETS & BRIDGES.

For abstraction or pollution of water.]—See WATER SUPPLY; WATERS & WATERCOURSES.

Full compensation under Public Health Act, 1875 (c. 55), s. 308—Whether costs of proceedings resulting from notice to abate nuisance included.]—See PUBLIC HEALTH & LOCAL ADMINISTRATION.

(b) Assessment of Compensation.

i. By Arbitration.

See Public Health Act, 1875 (c. 55), ss. 179–181.

2206. Where amount of compensation in dispute—By arbitration—Not as to liability to make compensation.]—BRADBY v. SOUTHAMPTON LOCAL BOARD OF HEALTH (1855), 4 E. & B. 1014; 24 L. J. Q. B. 239; 25 L. T. O. S. 82; 19 J. P. 644; 1 Jur. N. S. 778; 3 W. R. 413; 3 C. L. R. 771; 119 E. R. 378.

Annotations:—*Consd. Rhodes v. Alredale Drainage Comrs. (1876), 1 C. P. D. 380; Brierley Hill L. B. v. Pearsall (1884), 9 App. Cas. 595.*

2207. Procedure on arbitration—Where lands taken under Lands Act, 1845, incorporated by Public Health Act, 1875 (c. 55)—Governed by Lands Act, 1845—Not by Public Health Act, 1875 (c. 55).]—*Ex p. RAYNER* (1878), 3 Q. B. D. 446; 47 L. J. Q. B. 660; 39 L. T. 232; 42 J. P. 807.

2208. Jurisdiction of arbitrator—Not ousted—By denial of liability—Prima facie evidence of non-liability must be produced.]—BURGESS v. NORTH-WICH LOCAL BOARD (1877), 37 L. T. 355; 26 W. R. 19; subsequent proceedings (1880), 6 Q. B. D. 264, D. C.

Annotation:—*Consd. Brierley Hill L. B. v. Pearsall (1884), 9 App. Cas. 595.*

2209. — Question of liability should be raised in action on award.]—When a claim for compensation is made against a local authority for damage caused by the exercise of the powers conferred upon them by Public Health Act, 1875 (c. 55), the arbitrator has jurisdiction to hold the arbn. & make his award as to the fact of damage & the amount of compensation under ss. 179, 180, 308, although the local authority *bond fide* dispute their liability to make compensation at all under the Act. Their proper course is to raise the question of liability in their defence to an action upon the award.—*BRIERLEY HILL LOCAL BOARD v. PEARSALL* (1884), 9 App. Cas. 595; 54 L. J. Q. B. 25; 51 L. T. 577; 49 J. P. 84; 33 W. R. 56, H. L.; *affg. S. C. sub nom. PEARSALL v. BRIERLEY HILL LOCAL BOARD* (1883), 11 Q. B. D. 735, C. A.

Annotations:—*Refd. St. James & Pall Mall Electric Light Co. v. R. (1904), 73 L. J. K. B. 518; Dawson v. G. N. & City Ry., [1905] 1 K. B. 260. Mentd. Willesden L. B. v. Wright (1896), 75 L. T. 13; Walshaw v. Brighouse Corpn., [1899] 2 Q. B. 286; Hobbs v. Winchester Corpn., [1910] 2 K. B. 46.*

2210. — To assess compensation for damage by sewers—Ousted by abandonment of scheme.]—A notice under Public Health Act, 1875 (c. 55), s. 16 may be withdrawn by the local authority at any time before the works are commenced.

On a submission to arbn. to assess the amount of compensation under s. 308 due by reason of damage caused by the construction & execution of a sewer under s. 16, the arbitrators have no jurisdiction to award compensation for damage merely caused by the giving of the notice under s. 16 before the construction & execution of the sewer is commenced, nor to award costs if the notice is withdrawn before the works are commenced.—*DAVIS v. WITNEY URBAN DISTRICT COUNCIL* (1899), 63 J. P. 279; 15 T. L. R. 275, C. A.

2211. Costs of reference—Must be included in award.]—*PEAKE v. FINCHLEY LOCAL BOARD* (1887), 57 L. T. 882, D. C.

—*See, generally, Part VII., Sect. 5, sub-sect. 12, ante.*

Enlargement of time for award.]—*See, generally, ARBITRATION, Vol. II., pp. 415 et seq.*

ii. *Basis of Compensation.*

On acquisition of land.]—*See No. 223, ante.*

On user of land for sewers.]—*See Nos. 2198, 2199, 2200, 2201, ante.*

(c) *Enforcement of Award.*

2212. Award of arbitrator appointed under Public Health Act, 1875 (c. 55), s. 180—For compensation awarded under s. 308—Not enforceable by motion as other awards.]—*Re WALKER & BECKENHAM, KENT LOCAL BOARD, No. 772, ante.*

—**Enforceable by action.]—***See No. 2209, ante.*

Enforcement of awards.]—*See, generally, ARBITRATION, Vol. II., pp. 567 et seq.*

SUB-SECT. 2.—UNDER HOUSING OF WORKING CLASSES AND SIMILAR ACTS.

2213. Under Artizans' & Labourers' Dwellings Improvement Act, 1875 (c. 36)—Claim by lessee of property taken omitted from provisional award—Included in final award—Application to set aside refused.]—*CARR v. METROPOLITAN BOARD OF WORKS* (1880), 14 Ch. D. 807; 49 L. J. Ch. 272; 42 L. T. 354.

2214. — Effect of notice of intention to acquire compulsorily—Similar to notice to treat under Lands Act, 1845.]—*WILKINS v. BIRMINGHAM CORPN.* (1883), 25 Ch. D. 78; 53 L. J. Ch. 93; 49 L. T. 468; 48 J. P. 231; 32 W. R. 118.

Annotations:—Folld. L. C. C. v. Wilson's Exors., [1916] 1 K. B. 837. Mentd. Mercer v. Liverpool, St. Helens & South Lancashire Ry., [1903] 1 K. B. 652; Zick v. London United Tramways, [1908] 1 K. B. 611.

See, generally, Part VI., ante.

2215. — Right to compensation—Extinction of easement to adjoining premises—Right of light.]—*BADHAM v. MARRIS* (1881), 52 L. J. Ch. 237, n.; 45 L. T. 579.

Annotation:—Folld. Swainston v. Finn & Metropolitan Board of Works (1883), 52 L. J. Ch. 235.

2216. — — — — — Though inchoate.]—The 20th section of the Artizans' and Labourers' Dwellings Improvement Act, 1875 (c. 36), s. 20, provided that upon the purchase by the local authority of any lands required for the purpose of carrying into effect an improvement scheme under the Act all rights of way, rights of laying down or of continuing any pipes, sewers, or drains on, through, or under such lands, & all rights or easements in or relating to such lands should be extinguished, subject to the provision that compensation should be paid by the local authority to any persons or bodies of persons proved to

have sustained loss by the section:—*Held*: the sect. applied to the easement of light, & it included cases where a right or easement was in process of being acquired by enjoyment under Prescription Act, 1832 (c. 71), at the date of the purchase of the land, & had the effect of extinguishing such inchoate rights as well as rights or easements already acquired over such land, & the owner of a house, to which there had been access of light over land purchased by a local authority under the Act for a period of ten years before & ten years after such purchase, did not gain an easement of light under Prescription Act, 1832 (c. 71), by reason of such twenty years' enjoyment.

Semble: such an owner would be entitled to compensation to the extent to which the value of his house might be diminished by the operation of the sect.—*MARLOW v. ROSS* (1890), 24 Q. B. D. 381; 59 L. J. Q. B. 183; 62 L. T. 552; 54 J. P. 660; 38 W. R. 372; 6 T. L. R. 200, C. A.

2217. — — — — — Right of support by struts—No right to injunction.]—*SWAINSTON v. FINN & METROPOLITAN BOARD OF WORKS* (1883), 52 L. J. Ch. 235; 48 L. T. 634; 31 W. R. 498.

2218. — — — — — Not for interest created after notice of intention to acquire.]—*WILKINS v. BIRMINGHAM CORPN.* (1883), 25 Ch. D. 78; 53 L. J. Ch. 93; 49 L. T. 468; 48 J. P. 231; 32 W. R. 118.

Annotations:—Consd. L. C. C. v. Wilson's Exors., [1916] 1 K. B. 837. Refd. Mercer v. Liverpool, St. Helens & South Lancashire Ry., [1903] 1 K. B. 652, C. A.; Zick v. London United Tramways, [1908] 1 K. B. 611.

— **Nature of remedy of person injuriously affected—Whether by compensation or injunction.]—***See No. 2217, ante.*

2219. — — — — — Amount of award paid into court—Subsequently increased by jury on appeal—Claimant entitled to interest on difference—From date of first payment in.]—*Re SHAW & BIRMINGHAM CORPN.* (1884), 27 Ch. D. 614; 54 L. J. Ch. 51; 51 L. T. 684; 33 W. R. 74.

2220. Under Housing of Working Classes Act, 1890 (c. 70)—Assessment of compensation—Not limited to estimate under improvement scheme.]—*DYE v. PATMAN* (1897), 62 J. P. 135; 46 W. R. 200; 42 Sol. Jo. 97.

2221. — — — — — Covenant tying beerhouse may be considered.]—*Re CHANDLER'S WILTSHIRE BREWERY CO. & LONDON COUNTY COUNCIL*, [1903] 1 K. B. 569; 72 L. J. K. B. 250; 88 L. T. 271; 67 J. P. 119; 51 W. R. 573; 19 T. L. R. 268; 47 Sol. Jo. 319; 1 L. G. R. 269.

2222. — — — — — Extinguishment of easement appurtenant to adjoining premises—Loss of trade & value of goodwill not considered.]—*Re HARVEY & LONDON COUNTY COUNCIL*, [1909] 1 Ch. 528; 78 L. J. Ch. 285; 100 L. T. 293; 73 J. P. 124; 25 T. L. R. 221; 7 L. G. R. 247.

2223. — — — — — As at what date value of premises ascertained—At date of notice to treat or of arbitration—Not at date of statutory advertisement.]—*LONDON COUNTY COUNCIL v. WILSON'S EXECUTORS*, [1916] 1 K. B. 837; 85 L. J. K. B. 898; 14 L. G. R. 590; *sub nom. WILSON v. LONDON COUNTY COUNCIL*, 114 L. T. 852; 80 J. P. 252.

See, generally, Part III., Sect. 1, sub-sect. 3, I.

2224. — — — — — Jurisdiction of court to interfere—Only when satisfied that injustice will result.]—*Re HOUSING OF THE WORKING CLASSES ACT, 1890, Ex p. LARMUTH & LEES* (1894), 10 T. L. R. 225, D. C.

2225. — — — — — Where leave to submit compensation to jury refused—Refusal final.]—Where a judge under Housing of Working Classes Act, 1890 (c. 70), Schedule II., s. 26 refuses leave to

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submit a question of compensation to a jury, there is no appeal from his decision.—*Re HOUSING OF THE WORKING CLASSES ACT, 1890, Ex p. STEVENSON*, [1892] 1 Q. B. 609; 61 L. J. Q. B. 492; 66 L. T. 544; 56 J. P. 501; 40 W. R. 417; 8 T. L. R. 486; 36 Sol. Jo. 395, C. A.

Annotation:—Mentd. R. v. Hertfordshire Appeal Tribunal, Ex p. Hills (1916), 86 L. J. K. B. 584.

Compulsory closing orders.]—See PUBLIC HEALTH & LOCAL ADMINISTRATION.

Removal of obstructive buildings.]—See PUBLIC HEALTH & LOCAL ADMINISTRATION.

SUB-SECT. 3.—EDUCATIONAL PURPOSES.

See, generally, EDUCATION.

2226. Statutory power of building on lands taken—May be exercised without regard to restrictive covenants—Whether land taken compulsorily or by agreement.]—KIRBY v. HARROGATE SCHOOL BOARD, No. 297, *ante*.

2227. Power of acquiring land compulsorily—Limited to authorised purposes.]—BATSON v. LONDON SCHOOL BOARD (1903), 67 J. P. 457; 20 T. L. R. 22; 2 L. G. R. 116; *subsequent proceedings* (1904), 69 J. P. 9.

2228. Remedy of person injuriously affected—By disregard of restrictive covenants—In exercise of statutory power of building—Compensation only.]—KIRBY v. HARROGATE SCHOOL BOARD, No. 297, *ante*.

2229. — By compulsory taking of land ultra vires—Damages.]—BATSON v. LONDON SCHOOL BOARD (1903), 67 J. P. 457; 20 T. L. R. 22; 2 L. G. R. 116; *subsequent proceedings* (1904), 69 J. P. 9.

SUB-SECT. 4.—UNDER LOCAL GOVERNMENT ACTS.

2230. Whether land must be acquired compulsorily—Under Local Government Act, 1858 (c. 98)—Not for making sewer.]—THORNTON v. NUTTER, No. 118, *ante*.

See, also, Nos. 2190, 2191, ante; Nos. 2243, 2244, post.

2231. Whether land may be acquired compulsorily—Under Local Government Act, 1858—& particular clause in Local Act—Not authorised.]—FREWEN v. HASTINGS LOCAL BOARD OF HEALTH (1867), 16 L. T. 553.

See, further, Sub-sect. 1, ante.

SUB-SECT. 5.—SMALL HOLDINGS AND ALLOTMENTS.

See, generally, SMALL HOLDINGS & SMALL DWELLINGS.

2232. "Suitable for allotments"—Council *prima facie* judges as to suitability—& acquisition at reasonable price.]—A co. owning land within the area of deft. district council were served by the council with notice of their intention to purchase compulsorily for the purpose of allotments a portion of the land:—*Held*: (1) the urban district council, having failed to secure suitable land by agreement elsewhere, were *prima facie* the judges as to what land was suitable for their purpose, & whether they could acquire it at a reasonable price; (2) "suitable for allotments" *prima facie* meant in Small Holdings & Allotments Act, 1908 (c. 36), s. 25 land which the council, after taking into consideration the entire circumstances of each case, considered suitable for their

purpose & reasonably likely to repay the purchase-money out of rents to be paid by the allotment holders; (3) the effect of Land Settlement (Facilities) Act, 1919 (c. 59), s. 1 (1) that the making of an order for the compulsory acquisition of land should be conclusive evidence that it had been duly made, that Small Holdings and Allotments Act, 1908 (c. 36), had been complied with, & that the order of the council was within the powers conferred by the Act.—WOODFORD LAND & BUILDING CO., LTD. v. WOODFORD URBAN DISTRICT COUNCIL (1921), 19 L. G. R. 559.

2233. — Suitable for purpose—Likely to repay purchase-money out of rents to be paid by allotment holders.]—WOODFORD LAND & BUILDING CO., LTD. v. WOODFORD URBAN DISTRICT COUNCIL, No. 2232, *ante*.

2234. Outgoing tenant—May sell stock on lands taken—Not bound to remove to another farm.]—Re EVANS & GLAMORGAN COUNTY COUNCIL (1912), 76 J. P. 468; 56 Sol. Jo. 668; 10 L. G. R. 805.

2235. Assessment of compensation—Where Railways Act, 1845, ss. 77, 78 incorporated—Arbitrator may disregard existence of minerals.]—CARLISLE (EARL) v. NORTHUMBERLAND COUNTY COUNCIL (1911), 105 L. T. 797; 75 J. P. 539; 10 L. G. R. 50.

See, generally, Parts III., IV., ante.

2236. — Right of outgoing tenant—To expenses of customary refreshments supplied at sale of stock.]—Re EVANS & GLAMORGAN COUNTY COUNCIL (1912), 76 J. P. 468; 56 Sol. Jo. 668; 10 L. G. R. 805.

2237. — — To compensation for loss on compulsory sale.]—Re EVANS & GLAMORGAN COUNTY COUNCIL (1912), 76 J. P. 468; 56 Sol. Jo. 668; 10 L. G. R. 805.

2238. — — Not entitled to costs of valuing stock before sale.]—Re EVANS & GLAMORGAN COUNTY COUNCIL (1912), 76 J. P. 468; 56 Sol. Jo. 668; 10 L. G. R. 805.

2239. — — Not entitled to costs of agreement with local authority.]—Re EVANS & GLAMORGAN COUNTY COUNCIL (1912), 76 J. P. 468; 56 Sol. Jo. 668; 10 L. G. R. 805.

2240. Refusal to convey—Coupled with allegation that order may be bad—Amounts to refusal to convey—Within Lands Act, 1845, s. 80.]—Re JONES & CARDIGANSHIRE COUNTY COUNCIL (1913), 57 Sol. Jo. 374.

See, generally, Part XII., Sect. 3, ante.

2241. Effect of Land Settlement (Facilities) Act, 1919 (c. 59)—Order for compulsory acquisition—Consent of Board of Agriculture & Fisheries not necessary—Necessary for enforcement of order.]—R. v. BEDFORDSHIRE COUNTY COUNCIL, Ex p. SEAR, [1920] 2 K. B. 465; 89 L. J. K. B. 425; 123 L. T. 50; 84 J. P. 97; 36 T. L. R. 369; 18 L. G. R. 249, D. C.

2242. — — Conclusive evidence that order duly made & requirements of Small Holdings & Allotments Act, 1908 (c. 36) complied with—& that order within powers conferred by Act.]—WOODFORD LAND & BUILDING CO., LTD. v. WOODFORD URBAN DISTRICT COUNCIL, No. 2232, *ante*.

SUB-SECT. 6.—OTHER PURPOSES.

Isolation hospitals.]—See Sub-sect. 1, ante, & generally, PUBLIC HEALTH & LOCAL ADMINISTRATION.

Open spaces.]—See OPEN SPACES & RECREATION GROUNDS.

Highways.]—See HIGHWAYS, STREETS & BRIDGES.

SUB-SECT. 7.—SPECIAL PROVISIONS FOR METROPOLIS.

A. Under Metropolis Local Management Acts.

2243. Whether land must be acquired compulsorily—Not for purpose of making sewer.]—Upon the general construction of Metropolis Management Act, 1855 (c. 120), the Metropolitan Board of Works is not compelled, for the purpose of making any sewer, to purchase the land, under which the sewer is driven.—*NORTH LONDON RY. CO. v. METROPOLITAN BOARD OF WORKS* (1859), John. 405; 28 L. J. Ch. 909; 33 L. T. O. S. 383; 23 J. P. 515; 5 Jur. N. S. 1121; 7 W. R. 640; 70 E. R. 479.

Annotations:—Folld. Hughes v. Metropolitan Board of Works (1861), 4 L. T. 318. *Distd.* Macey v. Metropolitan Board of Works (1864), 33 L. J. Ch. 377; Temple Pier Co. v. Metropolitan Board of Works (1865), 12 L. T. 369. *Consd.* Re Dudley Corp'n. (1881), 8 Q. B. D. 86; Lewis v. Weston-super-Mare L. B. (1888), 40 Ch. D. 55. *Refd.* Metropolitan Board of Works v. Met. Ry. (1869), L. R. 4 C. P. 192; Jones v. Conway & Colwyn Bay Joint Water Supply Board, [1893] 2 Ch. 603.

2244. ———.]—HUGHES v. METROPOLITAN BOARD OF WORKS (1861), 4 L. T. 318; 25 J. P. 675; 7 Jur. N. S. 986; 9 W. R. 517.

See, also, Nos. 118, 2190, 2191, *ante*.

2245. Right to compensation—Spring drained by construction of sewer.]—The Metropolitan Board of Works in the construction of their sewers drained a spring rising in a field belonging to pltf., from whence it was diverted in an ornamental stream flowing through his pleasure grounds. The Board were acting within the scope of their powers, & had constructed the sewers in a proper & perfect manner. Upon motion to restrain the Board:—*Held*: pltf. was not entitled to an injunction, it being a case for compensation under Metropolis Management Act, 1855 (c. 120), s. 84, but otherwise if the Board by a slight additional expense could prevent the injury to pltf. without impairing the efficiency of the sewer.—*STANTON v. WOOLRYCH* (1857), 23 Beav. 225; 26 L. J. Ch. 28 L. T. O. S. 333; 21 J. P. 180; 3 Jur. N. S. 257; 5 W. R. 305; 53 E. R. 88.

Annotations:—Distd. New River Co. v. Johnson (1860), 29 L. J. M. C. 93. *Refd.* R. v. Metropolitan Board of Works (1863), 32 L. J. Q. B. 105; Milward v. Redditch L. B. of Health (1873), 21 W. R. 429.

2246. ———. No right to compensation.]—R. v. METROPOLITAN BOARD OF WORKS (1863), 3 B. & S. 710; 1 New Rep. 473; 32 L. J. Q. B. 105; 8 L. T. 238; 27 J. P. 312; 9 Jur. N. S. 1009; 11 W. R. 492; 122 E. R. 266.

Annotations:—Consd. Buccleugh v. Metropolitan Board of Works (1870), L. R. 5 Exch. 221. *Mentd.* Hodgkinson v. Ennor (1863), 4 B. & S. 229.

See, further, SEWERS & DRAINS; WATERS & WATERCOURSES.

2247. ———. Not for temporary obstruction of access.]—HERRING v. METROPOLITAN BOARD OF WORKS, No. 268, *ante*.

2248. Assessment of compensation—By arbitration only where amount in dispute—Not where liability denied.]—R. v. METROPOLITAN SEWERS COMRS. (1853), 1 E. & B. 694; 22 L. J. Q. B. 234; 21 L. T. O. S. 58; 17 J. P. 264; 17 Jur. 787; 1 W. R. 286; 1 C. L. R. 46; 118 E. R. 596.

Annotations:—Distd. Bradby v. Southampton L. B. of Health (1855), 4 E. & B. 1014. *Consd.* R. v. Burslem L. B. of Health (1860), 1 E. & E. 1088; Brierley Hill L. B. v. Pearsall (1884), 9 App. Cas. 595. *Refd.* R. v. L. & N. W. Ry. (1854), 3 E. & B. 443.

2249. Demand for—Not a “proceeding within Metropolis Management Amendment Act, 1862 (c. 102), s. 106.]—By Metropolis Management Amendment Act, 1862 (c. 102), s. 106, no action or proceeding were to be commenced against the Metropolitan Board of Works for anything done or intended to be done under the powers of the Board under certain statutes until after one month's notice, &

every such action & proceeding should be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, & not afterwards:—*Held*: notice of claim & demand of arbn. for damage done to buildings by the Metropolitan Board of Works acting under their statutory powers was not such a proceeding against the Metropolitan Board of Works as to render it necessary that it should be made within six months after the damage was caused.—*DELANY v. METROPOLITAN BOARD OF WORKS* (1867), L. R. 3 C. P. 111; 37 L. J. C. P. 59; 17 L. T. 262; 31 J. P. 788; 16 W. R. 137, Ex. Ch.

Annotations:—Refd. Metropolitan Board of Works v. Met. Ry. (1868), L. R. 3 C. P. 612; Turner v. Mid. Ry. (1911), 104 L. T. 347.

2250. Liability to pay compensation—Transfer of liabilities—Includes liability discovered & claimed for after transfer.]—Re PETTIWARD & METROPOLITAN BOARD OF WORKS (1865), 19 C. B. N. S. 489; 34 L. J. C. P. 301; 12 L. T. 764; 11 Jur. N. S. 932; 144 E. R. 878.

Annotations:—Refd. Metropolitan Board of Works v. Met. Ry. (1869), L. R. 4 C. P. 192; Turner v. Mid. Ry. (1911), 104 L. T. 347.

2251. Remedy of person injuriously affected—Where statutory powers negligently exercised—Action for damages.]—CLOTHIER v. WEBSTER (1862), 12 C. B. N. S. 790; 31 L. J. C. P. 316; 6 L. T. 461; 9 Jur. N. S. 231; 10 W. R. 624; 142 E. R. 1353.

Annotations:—Refd. Ohlby v. Ryde Comrs. (1864), 28 J. P. 663; Mersey Dock Trustees v. Gibbs (1866), L. R. 1 H. L. 93.

See, generally, DAMAGES; NEGLIGENCE; NUISANCE; PUBLIC AUTHORITIES & PUBLIC OFFICERS.

B. Under Metropolitan Paving Act (Michael Angelo Taylor's Act), 1817.

(a) In General.

2252. Power of compulsory acquisition—Limited to altering, widening & extending streets—Does not extend to raising level of street.]—(1) The ct. will look behind the adjudication of the Comrs. of Sewers of the city of London that certain lands are required for the purposes of their intended improvement & will restrain the Comrs. by an interlocutory injunction from acting upon such adjudication, if it appears to have been made under a misapprehension as to their powers.

(2) The owner of property to whom a notice to treat has been given, & who enters into negotiations upon the basis of the notice, is not debarred from afterwards objecting that the Comrs. are acting in excess of their powers, unless he knew, during such negotiations, that the acts of the Comrs. were *ultra vires*.

(3) Metropolitan Paving Act, 1817, authorises the Comrs. to take compulsorily houses or lands for the purpose of altering, widening, & extending a street, but it does not empower them to do so for the mere purpose of altering the level of an existing street, so as to make it agree with the level of a new street which is being made by the comrs.—*LYNCH v. SEWERS COMRS. OF LONDON* (1886), 32 Ch. D. 72; 55 L. J. Ch. 409; 54 L. T. 699; 50 J. P. 548, C. A.

Annotations:—As to (2) *Refd.* Denman v. Westminster Corp'n., Cording v. Westminster Corp'n., [1906] 1 Ch. 464. *Generally, Mentd.* Clanciarde v. Ireland Congested Districts Board (1914), 79 J. P. 481.

(b) Power to take Whole.

2253. Only after formal adjudication—That whole necessary.]—The Commissioners of Sewers acting under Metropolitan Paving Act, 1817,

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(a) Power to take Part.

cannot take compulsorily the whole house unless they have formally adjudged that possession of the whole is necessary for the purpose of executing their powers.—**THOMAS v. DAW** (1886), 2 Ch. App. 1; 36 L. J. Ch. 201; 15 L. T. 200; 31 J. P. 131; 15 W. R. 113, L. C.

Annotations:—**Consd. & Apld.** *Gard v. Sewers Comrs. of London* (1883), 28 Ch. D. 486. **Consd.** *Teuliere v. St. Mary Abbots, Kensington, Vestry* (1885), 30 Ch. D. 642. **Distd.** *Lynch v. Sewers Comrs. of London* (1886), 32 Ch. D. 72. **Consd.** *Gordon v. St. Mary Abbots, Kensington, Vestry*, [1894] 2 Q. B. 742; *Pescod v. Westminster Corpn.*, [1905] 2 Ch. 475; *Thompson v. Hammersmith Corpn.*, [1906] 1 Ch. 299. **Refd.** *Davies v. London Corpn.*, [1913] 1 Ch. 415. **Mentd.** *A.-G. v. London Parochial Charities Trustees*, [1896] 1 Ch. 541.

2254. Not where part only required—& owners wish to sell part only.]—A metropolitan vestry required for the purpose of widening a street, a part of the buildings & site of an orphanage that would leave a substantial portion of the premises:—**Held:** the owners wishing to sell the part required only, the vestry could not take the whole.—**TEULIERE v. ST. MARY ABBOTTS, KENSINGTON, VESTRY** (1885), 30 Ch. D. 642; 55 L. J. Ch. 23; 53 L. T. 422; 50 J. P. 53; 1 T. L. R. 680.

Annotations:—**Apld.** *Aldis v. London Corpn.*, [1899] 2 Ch. 169. **Consd.** *Pescod v. Westminster Corpn.*, [1905] 2 Ch. 475; *Denman v. Westminster Corpn.*, *Cording v. Westminster Corpn.*, [1906] 1 Ch. 464; *Davies v. London Corpn.*, [1913] 1 Ch. 415. **Refd.** *Gordon v. St. Mary Abbots, Kensington, Vestry* (1894), 10 T. L. R. 557; *Fernley v. Limehouse Board of Works* (1900), 82 L. T. 524; *Wild v. Woolwich B. C.* (1909), 101 L. T. 580.

2255. ——— Unless remainder useless as house.]—**ALDIS v. LONDON CORPN.**, [1899] 2 Ch. 169; 68 L. J. Ch. 576; 80 L. T. 683; 63 J. P. 376; 47 W. R. 514; 43 Sol. Jo. 495.

Annotations:—**Consd.** *Denman v. Westminster Corpn.*, *Cording v. Westminster Corpn.*, [1906] 1 Ch. 464. **Refd.** *Fernley v. Limehouse Board of Works* (1900), 82 L. T. 524; *Davies v. London City Corpn.*, [1913] 1 Ch. 415.

2256. ——— Question of fact.]—**DENMAN (J. L.) & CO., LTD. v. WESTMINSTER CORPN.**, **CORDING (J. C.) & CO., LTD. v. WESTMINSTER CORPN.**, [1906] 1 Ch. 464; 75 L. J. Ch. 272; 94 L. T. 370; 70 J. P. 185; 54 W. R. 345; 22 T. L. R. 270; 4 L. G. R. 442.

Annotations:—**Consd.** *Davies v. London City Corpn.*, [1913] 1 Ch. 415. **Refd.** *R. v. Brighton Corpn.*, *Ex p. Shoosmith* (1907), 96 L. T. 762.

2257. Where acquisition of whole essential—For widening street.]—**FERNLEY v. LIMEHOUSE BOARD OF WORKS** (1900), 82 L. T. 524; 64 J. P. 328.

2258. ——— Danger or excessive cost of severance.]—**PESCOD v. WESTMINSTER CORPN.**, [1905] 2 Ch. 475; 74 L. J. Ch. 664; 93 L. T. 160; 69 J. P. 387; 54 W. R. 89; 21 T. L. R. 743; 49 Sol. Jo. 713; 3 L. G. R. 1272.

Annotation:—**Distd.** *Denman v. Westminster Corpn.*, *Cording v. Westminster Corpn.*, [1906] 1 Ch. 464.

2259. Where freeholder wishes to sell whole—Though tenant willing to sell part only—Views of freeholder to be considered.]—**BEYFUS v. WESTMINSTER CORPN.** (1914), 84 L. J. Ch. 838; 112 L. T. 119; 79 J. P. 111; 59 Sol. Jo. 129; 13 L. G. R. 40.

2260. Loss of right—Not by admission of owner's right of pre-emption of remainder—Where whole actually required.]—**FERNLEY v. LIMEHOUSE BOARD OF WORKS** (1900), 82 L. T. 524; 64 J. P. 328.

2261. ——— Not by agreement to resell remainder—Prior to adjudication that whole required.]—**PESCOD v. WESTMINSTER CORPN.**, [1905] 2 Ch. 475; 74 L. J. Ch. 664; 93 L. T. 160; 69 J. P. 387; 54 W. R. 89; 21 T. L. R. 743; 49 Sol. Jo. 713; 3 L. G. R. 1272.

Annotation:—**Refd.** *Denman v. Westminster Corpn.*, *Cording v. Westminster Corpn.*, [1906] 1 Ch. 464.

(c) Power to take Part.

2262. After bona fide adjudication that part only necessary.]—Where the authority having control of the streets in a London district *bona fide* adjudge that part of a house obstructs the widening of a street under some circumstances they have authority to take such part & the owner cannot compel them to take the whole; they can do so when the taking will not involve a substantial alteration of the character & condition of the house, or substantially interfere with the convenience of the occupier or render it necessary to make structural alterations in order to carry on a different or more limited business than before.—**GORDON v. ST. MARY ABBOTTS, KENSINGTON, VESTRY**, [1894] 2 Q. B. 742; 63 L. J. M. C. 193; 71 L. T. 196; 58 J. P. 463; 10 T. L. R. 557; 38 Sol. Jo. 580; 10 R. 539, D. C.

Annotations:—**Expld.** *Aldis v. London Corpn.*, [1899] 2 Ch. 169. **Consd.** *Gibbon v. Paddington Vestry*, [1900] 2 Ch. 794. **Expld.** *Wild v. Woolwich B. C.*, [1910] 1 Ch. 35. **Refd.** *Pescod v. Westminster Corpn.*, [1905] 2 Ch. 475; *Thompson v. Hammersmith Corpn.*, [1906] 1 Ch. 299; *Davies v. London Corpn.*, [1913] 1 Ch. 415.

2263. ———.]—**DAVIES v. CITY OF LONDON CORPN.**, [1913] 1 Ch. 415; 82 L. J. Ch. 286; 108 L. T. 546; 77 J. P. 294; 29 T. L. R. 315; 57 Sol. Jo. 341; 11 L. G. R. 595.

2264. Where substantial alteration of character of house not involved.]—**GORDON v. ST. MARY ABBOTTS, KENSINGTON, VESTRY**, No. 2262, *ante*.

2265. Not where substantial use & enjoyment interfered with.]—**GIBBON v. PADDINGTON VESTRY**, [1900] 2 Ch. 794; 69 L. J. Ch. 746; 83 L. T. 136; 64 J. P. 727; 49 W. R. 8; 16 T. L. R. 538; 44 Sol. Jo. 674.

Annotations:—**Consd.** *Green v. Hackney Corpn.*, [1910] 2 Ch. 105. **Expld.** *Wild v. Woolwich B. C.*, [1910] 1 Ch. 35. **Refd.** *Thompson v. Hammersmith Corpn.*, [1906] 1 Ch. 299; *Davies v. City of London Corpn.*, [1913] 1 Ch. 415; *Beyfus v. Westminster Corpn.* (1914), 84 L. J. Ch. 838.

2266. ———.]—**THOMPSON v. HAMMERSMITH CORPN.**, [1906] 1 Ch. 299; 75 L. J. Ch. 129; 94 L. T. 135; 70 J. P. 100; 54 W. R. 279; 22 T. L. R. 179; 50 Sol. Jo. 140; 4 L. G. R. 331.

2267. ——— Though building capable of user for former purpose—After alteration & rearrangement.]—**GREEN v. HACKNEY CORPN.**, [1910] 2 Ch. 105; 80 L. J. Ch. 16; 102 L. T. 722; 74 J. P. 278; 9 L. G. R. 427.

Annotation:—**Refd.** *Beyfus v. Westminster Corpn.* (1914), 84 L. J. Ch. 838.

2268. ——— & owner objects.]—**BEYFUS v. WESTMINSTER CORPN.** (1914), 84 L. J. Ch. 838; 112 L. T. 119; 79 J. P. 111; 59 Sol. Jo. 129; 13 L. G. R. 40.

2269. Not where freeholder wishes to sell whole—Though tenant willing to sell part.]—**BEYFUS v. WESTMINSTER CORPN.** (1914), 84 L. J. Ch. 838; 112 L. T. 119; 79 J. P. 111; 59 Sol. Jo. 129; 13 L. G. R. 40.

(d) Adjudication of Necessity for Acquisition.

2270. Necessary—Not confined to physical necessity.]—**DAVIES v. CITY OF LONDON CORPN.**, [1913] 1 Ch. 415; 82 L. J. Ch. 286; 108 L. T. 546; 77 J. P. 294; 29 T. L. R. 315; 57 Sol. Jo. 341; 11 L. G. R. 595.

2271. What must be considered—Wishes & intentions of owner.]—**DENMAN (J. L.) & CO., LTD. v. WESTMINSTER CORPN.**, **CORDING (J. C.) & CO., LTD. v. WESTMINSTER CORPN.**, [1906] 1 Ch. 464; 75 L. J. Ch. 272; 94 L. T. 370; 70 J. P. 185; 54 W. R. 345; 22 T. L. R. 270; 4 L. G. R. 442.

Annotations:—**Consd.** *R. v. Brighton Corpn.*, *Ex p. Shoosmith* (1907), 96 L. T. 762. **Refd.** *Davies v. City of London Corpn.*, [1913] 1 Ch. 415.

2272. ———.]—**DAVIES v. CITY OF LONDON CORPN.**, [1913] 1 Ch. 415; 82 L. J. Ch. 286; 108

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L. T. 546; 77 J. P. 294; 29 T. L. R. 315; 57 Sol. Jo. 341; 11 L. G. R. 595.

—Where wishes of freeholder & tenant inconsistent.]—See No. 2269, *ante*.

2273. Whether final—If made bonâ fide.]—GARD v. SEWERS COMRS. OF LONDON, No. 111, *ante*.

2274. — Only after considering all facts.]—DENMAN (J. L.) & Co., LTD. v. WESTMINSTER CORPN., CORDING (J. C.) & Co., LTD. v. WESTMINSTER CORPN., [1906] 1 Ch. 464; 75 L. J. Ch. 272; 94 L. T. 370; 70 J. P. 185; 54 W. R. 345; 22 T. L. R. 270; 4 L. G. R. 442.

*Annotations:—*Consd. R. v. Brighton Corpn., *Ex p.* Shoomsmith (1907), 96 L. T. 762. *Refd.* Davies v. City of London Corpn., [1913] 1 Ch. 415.

2275. — Not where made under misapprehension of powers—Subject to review by court.]—LYNCH v. SEWERS COMRS. OF LONDON, No. 2252, *ante*.

See, also, No. 2263, ante.

2276. What is bonâ fide adjudication—Circumstances must warrant decision.]—GARD v. SEWERS COMRS. OF LONDON, No. 111, *ante*.

2277. — Adjudication in pursuance of agreement—To assist tramway scheme—Rendering street widening necessary.]—PARRY v. HAMMER-SMITH METROPOLITAN BOROUGH (1904), 92 L. T. 161; 69 J. P. 35; 21 T. L. R. 56; 3 L. G. R. 95.

2278. — Outside interests must not be considered.]—DENMAN (J. L.) & Co., LTD. v. WESTMINSTER CORPN., CORDING (J. C.) & Co., LTD. v. WESTMINSTER CORPN., [1906] 1 Ch. 464; 75 L. J. Ch. 272; 94 L. T. 370; 70 J. P. 185; 54 W. R. 345; 22 T. L. R. 270; 4 L. G. R. 442.

*Annotations:—*Consd. R. v. Brighton Corpn., *Ex p.* Shoomsmith (1907), 96 L. T. 762. *Refd.* Davies v. City of London Corpn., [1913] 1 Ch. 415.

(e) Effect of Notice to Treat.

2279. Binds vestry to purchase.]—BIRCH v. ST. MARYLEBONE VESTRY (1869), 20 L. T. 697; 33 J. P. 501; 17 W. R. 1014.

2280. Notice relating to four houses—Jury cannot be summoned to assess compensation for one only.]—Where under Metropolitan Paving Act, 1817, notice has been served on the owners in fee of four houses requiring them to treat for the sale to the Comrs. of Sewers, the Comrs. will not be allowed to summon a jury to assess the value of one of the houses separately.]—ECCLESIASTICAL COMRS. v. SEWERS COMRS. OF LONDON (1880), 14 Ch. D. 305; 28 W. R. 824.

2281. Owners must accept or repudiate as a whole.]—WILD v. WOOLWICH BOROUGH COUNCIL, No. 550, *ante*.

Followed by negotiations—Effect on owner's right to relief.]—See Nos. 2252, 2265, *ante*.

Effect of notice to treat under Lands Clauses Acts, see Part VI., Sect. 2, sub-sect. 5, *ante*.

(f) Owner's Right to Relief.

2282. Not lost by negotiating on notice to treat—Where notice to treat ultra vires—Unless to knowledge of owner.]—LYNCH v. SEWERS COMRS. OF LONDON, No. 2252, *ante*.

See, also, No. 2279, ante.

2283. — For sale of part—If originally entitled to have whole taken.]—GIBBON v. PADDINGTON VESTRY, [1900] 2 Ch. 794; 69 L. J. Ch. 746; 83 L. T. 136; 64 J. P. 727; 49 W. R. 8; 16 T. L. R. 538; 44 Sol. Jo. 674.

*Annotations:—*Apld. Thompson v. Hammersmith Corpn., [1906] 1 Ch. 299. *Consd.* Green v. Hackney Corpn., [1910] 2 Ch. 105. *Expld.* Wild v. Woolwich B. C., [1910] 1 Ch. 35. *Refd.* Davies v. City of London Corpn., [1913] 1 Ch. 415; Beyfus v. Westminster Corpn. (1914), 84 L. J. Ch. 838.

2284. Lessee taking lease involving alterations—With knowledge of widening scheme—Not pre-

cluded from relief.]—THOMPSON v. HAMMERSMITH CORPN., [1906] 1 Ch. 299; 75 L. J. Ch. 129; 94 L. T. 135; 70 J. P. 100; 54 W. R. 279; 22 T. L. R. 179; 50 Sol. Jo. 140; 4 L. G. R. 331.

Nature of relief—Injunction restraining proceedings.]—See Nos. 111, 2252, 2284, *ante*.

(g) Assessment of Compensation.

2285. By jury—Enforceable by mandamus—Whether plea that notice ultra vires a defence.]—BIRCH v. ST. MARYLEBONE VESTRY (1869), 20 L. T. 697; 33 J. P. 501; 17 W. R. 1014.

See, also, No. 2252, ante.

2286. — Omission by owner or occupier to give particulars of interest no defence.]—BIRCH v. ST. MARYLEBONE VESTRY (1869), 20 L. T. 697; 33 J. P. 501; 17 W. R. 1014.

— As to part only of premises comprised in notice.]—See No. 2280, *ante*

2287. Costs of assessment—Owner not entitled to—Though title to land unsuccessfully disputed by local authority.]—R. v. LONDON JJ., [1895] 1 Q. B. 881; 64 L. J. M. C. 186; 72 L. T. 564; 59 J. P. 311; 43 W. R. 590; 39 Sol. Jo. 399; 15 R. 401.

C. Under Other Acts.

2288. Under Metropolitan Improvement Act, 1840—Expenses of tenant for life in deducing title—Not payable as expenses of reinvestment.]—Re STRACHAN'S ESTATE (1851), 9 Hare, 185; 20 L. J. Ch. 511; 17 L. T. O. S. 198; 15 Jur. 505; 68 E. R. 467.

*Annotations:—*Consd. *Ex p.* St. Sepulchre (1864), 4 De G. J. & Sm. 232. *Refd.* *Re* Cherry's S. E. (1861), 31 L. J. Ch. 38. *Mentd.* *Re* Mercer (1877), 7 Ch. D. 184.

2289. — Court has no jurisdiction to apportion—Between tenant for life & remainderman.]—Re STRACHAN'S ESTATE (1851), 9 Hare, 185; 20 L. J. Ch. 511; 17 L. T. O. S. 198; 15 Jur. 505; 68 E. R. 467.

*Annotations:—*Consd. *Ex p.* St. Sepulchre (1864), 4 De G. J. & Sm. 229. *Refd.* *Re* Cherry's S. E. (1861), 31 L. J. Ch. 38. *Mentd.* *Re* Mercer (1877), 7 Ch. D. 184.

2290. — Court has no jurisdiction to order payment out of capital.]—Re STRACHAN'S ESTATE (1851), 9 Hare, 185; 20 L. J. Ch. 511; 17 L. T. O. S. 198; 15 Jur. 505; 68 E. R. 467.

*Annotations:—*Consd. *Ex p.* St. Sepulchre (1864), 4 De G. J. & Sm. 229. *Refd.* *Re* Cherry's S. E. (1861), 31 L. J. Ch. 38. *Mentd.* *Re* Mercer (1877), 7 Ch. D. 184.

2291. Under London (City) Improvement Act, 1847—& Holborn Valley Improvement Act, 1864—Claimants having distinct interests in same property—Entitled to assessment of compensation by separate juries.]—Upon the construction of London (City) Improvement Act, 1847, ss. 20, 21, & Holborn Valley Improvement Act, 1864, with which the former Act is incorporated, where separate interests are claimed in the same property it is the right of every person making a separate claim to have a separate assessment by a separate jury of the amount of compensation payable to him.]—ABRAHAM v. LONDON CORPN. (1868), L. R. 6 Eq. 625; 37 L. J. Ch. 732; 18 L. T. 811. *Annotations:—*Consd. Starr v. London Corpn. (1869), L. R. 7 Eq. 236; Eccl. Comrs. v. Sewers Comrs. of London (1880), 14 Ch. D. 305.

2292. — Claimant having several interests in one property—Or in several distinct properties—Not entitled to assessment of compensation by separate juries—Or at separate trials.]—STARR v. LONDON CORPN. (1869), L. R. 7 Eq. 236; 20 L. T. 937.

2293. — Land belonging to railway company—Not required for actual roadway or street—Arbitration a condition precedent to taking.]—(1) Though the word "street" may include the

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houses abutting or fronting upon a public thoroughfare as well as the actual roadway or footways yet the strict & *prima facie* meaning of the word "street" is confined to the roadway & footways.

(2) In the construction of Holborn Valley Improvement Act, 1864, which gave the Corpn. of London powers to construct a viaduct or raised way over Holborn Valley, & to make certain new streets & to acquire lands for the purposes of the Act, & which by s. 36 enacted that in any case in which the Corpn. might require to take any lands already purchased by the L. Railway Co., & the Co. were unwilling to dispose of same, or required same for the purposes of their railway, it should be referred to arbn. in manner provided; provided always that this provision should not be construed to prevent the Corpn. taking all such lands of the Co. as might be required for the construction of the viaduct or raised way of the line of the new streets authorised by the Act:—*Held*: the latter provision did not apply to a case where the Corpn. required to take a piece of land already purchased by the Co., but did not require same for the construction of the actual roadway or footways of the viaduct or new streets, & the Corpn. were restrained from taking the piece of land till the matter had been determined by arbn. as provided by the Act.—*LONDON, CHATHAM & DOVER RY. CO. v. LONDON CORPN.* (1868), 19 L. T. 250, L. J.J.

2294. ——— *Lands Act, 1845, s. 121 applies to.*—*R. v. LONDON CORPN.*, No. 209, *ante*.

See, generally, Part XIII., Sect. 6, ante.

2295. *Under Public Health (London) Act, 1891 (c. 76), s. 44—User of subsoil for sanitary convenience.*—*Semble*: under above sect. the sanitary authority have not to pay compensation to the landowner for the subsoil which they use.—*LONDON & NORTH WESTERN RY. CO. v. WESTMINSTER CORPN.*, [1904] 1 Ch. 759; 73 L. J. Ch. 386; 90 L. T. 461; 68 J. P. 249; 52 W. R. 596; 20 T. L. R. 340; 48 Sol. Jo. 330; 2 L. G. R. 638, C. A.; *reversd.* on other grounds *sub nom.* *WESTMINSTER CORPN. v. LONDON & NORTH WESTERN RY. CO.*, [1905] A. C. 426, H. L.

2296. ——— *Owner of subsoil not entitled to compensation.*—*LONDON & NORTH WESTERN RY. CO. v. WESTMINSTER CORPN.*, No. 2295, *ante*.

2297. *Under Metropolitan Water Board (Various Powers) Act, 1907—Board entitled to lay pipes—Under land belonging to railway company—Without purchasing or acquiring easement.*—By

*Metropolitan Water Board (Various Powers) Act, 1907 (c. clxxiv.), s. 61 (i), the Board may exercise at any place or places within their limits of supply the like powers with respect to the laying of mains & pipes as were exercisable by local authorities under Public Health Act, 1875 (c. 55) with the respect to the laying of mains & pipes within their respective districts for the purpose of water supply. By s. 96 (6) the Board may not without the consent in writing of the railway cos. under their common seal purchase or acquire any of the lands or property of the railway cos., but the Board may acquire, & the ry. cos. must, if required, grant to the Board, an easement of right of constructing & maintaining works on, through, in, under, over or along such lands & property, the sum to be paid for the acquisition of such easement or right to be settled in the manner provided by Lands Act, 1845:—*Held*: the Board are entitled under the powers conferred upon them by the above Acts to lay a main under land belonging to a railway co. without purchasing or acquiring an easement in respect of such land.—*METROPOLITAN WATER BOARD v. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, [1915] 2 K. B. 297; 84 L. J. K. B. 1216; 113 L. T. 30; 79 J. P. 337; 13 L. G. R. 576, C. A.*

2298. ——— *Compensation payable by Board—Assessed under Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57)—Not under Lands Act, 1845.*—*METROPOLITAN WATER BOARD v. DULWICH COLLEGE* (1920), 36 T. L. R. 834; *sub nom.* *METROPOLITAN WATER BOARD v. BERTON*, 18 L. G. R. 766.

SECT. 4.—OTHER PURPOSES.

SUB-SECT. 1.—CHURCH BUILDING.

See ECCLESIASTICAL LAW.

SUB-SECT. 2.—LAND DRAINAGE.

2299. *Warrant for summoning jury—To assess compensation—Need not refer to notice requiring lands—Or state particulars of land required.*—*OSTLER v. COOKE*, No. 811, *ante*.

2300. *Extent of liability for compensation—Limited to liability under Lands Act, 1845—Construction of local Act—Incorporating Lands Act, 1845.*—*RHODES v. AIREDALE DRAINAGE COMRS.*, No. 727, *ante*.

CONCEALMENT OF BIRTH

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<i>Ambassadors, etc., Privileges of</i>	<i>See</i> CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.	<i>Foreign Enlistment</i>	<i>See</i> CRIMINAL LAW AND PROCEDURE.
<i>Colonial Jurisdiction</i>	DEPENDENCIES, COLONIES AND BRITISH POSSESSIONS.	<i>Foreign Relations</i>	„ CONSTITUTIONAL LAW.
<i>Consular Officers</i>	CONSTITUTIONAL LAW.	<i>Fugitive Offenders</i>	„ EXTRADITION AND FUGITIVE OFFENDERS.
<i>Contracts, generally</i>	„ CONTRACT.	<i>Judicial Notice</i>	„ EVIDENCE.
<i>Copyright</i>	COPYRIGHT AND LITERARY PROPERTY.	<i>Jurisdiction</i>	„ COURTS.
<i>Criminal Jurisdiction</i>	„ CRIMINAL LAW AND PROCEDURE.	<i>Legitimation</i>	„ ALIENS; BASTARDY.
<i>Devolution of Property, generally</i>	„ DESCENT AND DISTRIBUTION.	<i>Marriages, generally</i>	„ HUSBAND AND WIFE.
<i>Divorce, generally</i>	„ HUSBAND AND WIFE.	<i>Matrimonial Causes, generally</i>	„ HUSBAND AND WIFE.
<i>Domicil of Companies</i>	„ COMPANIES.	<i>Naturalisation and Denizens.</i>	„ ALIENS.
<i>Domicil of Corporations</i>	„ CORPORATIONS.	<i>Negotiable Instruments.</i>	„ BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.
<i>Extradition</i>	„ EXTRADITION AND FUGITIVE OFFENDERS.	<i>Offences relating to Foreign Nations</i>	„ CRIMINAL LAW AND PROCEDURE.
<i>Foreign Bankruptcy</i>	BANKRUPTCY AND INSOLVENCY.	<i>Prize Law</i>	„ PRIZE LAW AND JURISDICTION.
<i>Foreign Corporations</i>	COMPANIES; CORPORATIONS.	<i>Proof of Foreign Law</i>	„ EVIDENCE.
		<i>Royal Marriages</i>	„ CONSTITUTIONAL LAW.
		<i>Shipping Law, generally</i>	„ ADMIRALTY; SHIPPING AND NAVIGATION.
		<i>Taking Evidence Abroad</i>	„ EVIDENCE.

Part I.—Principles of Jurisdiction.

SECT. 1.—LIMITATIONS OF JURISDICTION IN FOREIGN MATTERS.

Acts of state—By foreign Governments.]—See Part VIII., Sect. 5, *post*, & generally, PUBLIC AUTHORITIES & PUBLIC OFFICERS.

Foreign sovereign—Actions by & against.]—See ACTION, Vol. I., pp. 45–50.

1. Foreigners generally — Permanently or temporarily within allegiance of English Crown.]—The English Ct. of Bkpcy. has no jurisdiction to make an adjudication of bkpcy. against a foreigner domiciled & resident abroad, who has never been in England, even though he is a member of an English firm which has traded & contracted debts in England, & against which an execution in respect of a judgment debt above £50 has been levied by seizure & sale of goods of the firm in England. In such a case the ct. ought not to make an order for service out of the jurisdiction of a bkpcy. petition on the foreigner. An act of bkpcy. must be a personal act or default, & it cannot be committed through an agent, nor by a firm as such.

Prima facie an English statute affects only English subjects, or foreigners who come, either permanently or temporarily, within the allegiance of the English Crown.—*Re SAWERS, Ex p. BLAIN* (1879), 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334, C. A.

Annotations:—*Consd. Re Pearson, Ex p. Pearson*, [1892] 2 Q. B. 263; *Re A. B.*, [1900] 1 Q. B. 541; *Cooke v. Vogeler Co.*, [1901] A. C. 102. *Reid. Re Clark, Ex p. Beyer, Peacock*, [1896] 2 Q. B. 476; *Re Clark, Ex p. Schultze* (1897), 4 Mans. 231; *Dulaney v. Merry*, [1901] 1 K. B. 536.

— Jurisdiction of Court of Bankruptcy over.]—See BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 24–26.

Foreign company.]—See COMPANIES.

Foreign corporation.]—See CORPORATIONS.

Foreign partnership.]—See PARTNERSHIP.

Infant—Alien resident abroad—Whether made ward of court.]—See INFANTS & CHILDREN.

— Appointment of guardian.]—See Part XIII., Sect. 3, *post*.

2. As regards extra-territorial jurisdiction.]—COCKNEY v. ANDERSON, No. 340, *post*.

3. As regards territorial jurisdiction.]—(1) Territorial jurisdiction generally attaches upon all persons so long as they are either permanently or temporarily resident within the territory but

it does not follow them when they have withdrawn from the territory. It always exists as to land & may be exercised over movables within the territory &, in questions of status & succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory.

(2) No territorial legislation can give jurisdiction which any foreign ct. ought to recognise against absent foreigners who owe no allegiance or obedience to the power which so legislates.

(3) In all personal actions the cts. of the country in which deft. resides, not the cts. of the country where the cause of action arose, should be resorted to.

Ex p. money decrees passed by the ct. of F. against a person who had been treasurer of F., but at the date of suit had ceased to be such & was resident in J., of which state he was a domiciled subject:—*Held*: a nullity by international law.—*GURDYAL SINGH (SIRDAR) v. FARIDKOTE (RAJAH)*, [1894] A. C. 670; 10 T. L. R. 621; 11 R. 340, P. C. **Annotations:—***As to* (1) *Folld. Emanuel v. Symon*, [1908] 1 K. B. 302. *As to* (2) *Reid. Gavin Gibson v. Gibson*, [1913] 3 K. B. 379; *Phillips v. Batho*, [1913] 3 K. B. 25. *As to* (3) *Consd. Jaffer v. Williams* (1908), 25 T. L. R. 12. *Reid. Pemberton v. Hughes*, [1899] 1 Ch. 781.

As regards immovables—In general.]—See No. 3, *ante*, & Part IV., *post*.

— Succession to.]—See Part VI., Sect. 1, *post*.

As regards movables—In general.]—See No. 3, *ante*, & Part V., *post*.

— Succession to.]—See No. 3, *ante*, & Part VI., Sect. 2, *post*.

As regards contracts.]—See Part VII., *post*.

As regards torts.]—See Part VIII., *post*.

As regards crimes.]—See CRIMINAL LAW & PROCEDURE.

As regards marriage.]—See Part IX., *post*.

As regards matrimonial suits.]—See Part X., *post*.

4. Foreign revenue laws—Customs duties—Scotland—Whether action on bond for payment of duties maintainable.]—Before the Union this ct. had no jurisdiction of the revenues in Scotland & the question is whether the statute is not exclusive of us, since it is giving a further jurisdiction to them who had it exclusive of us before (*PENGELLY, C.B.*).—*A.-G. v. LUTWYDGE* (1729), Bunb. 280; 145 E. R. 674.

5. — Ireland—Information for penalties for smuggling not maintainable.]—A., residing

another into O., & arrest him for a debt contracted abroad, is limited to cases in which the debtor is temporarily within the jurisdiction, & is about to return to his own country. Where the debtor has absconded from his own country to O., & does not intend returning, or intends to go to some other country, an arrest is legal.—*BUTLER v. ROSENFELDT, SWERTZER v. ROSENFELDT* (1879), 8 P. R. 175.—CAN.

— be served with subpoena.]—When a party to an action who lives in a foreign country comes within the jurisdiction, service upon him of an appointment & subpoena, as in the case of resident litigants, is sufficient to compel his attendance.—*COMSTOCK v. HARRIS* (1887), 12 P. R. 17.—CAN.

g. — — —.]—A non-resident foreigner, who is a subject of a protected Native State, may be sued in the cts. of B. I., if the cause of action

PART I. SECT. 1.

a. Foreigners generally.]—Under the principles of International Law, the cts. of every country are competent & ought not to refuse to adjudicate upon suits coming before them between foreigners. This doctrine applies with especial force to commercial matters.—*COOBY v. THE GEORGE L. COLWELL* (1898), 6 Exch. C. R. 196.—CAN.

b. — — —.]—All legislation is, *prima facie*, territorial. It binds all subjects of the Crown, but only such subjects of other countries as have brought themselves within the allegiance of the Sovereign. A person not a British subject resident out of the jurisdiction, but carrying on a branch business in B. through an agent, is not liable to be sued in B. where the cause of action has arisen wholly outside the jurisdiction.—*KESOWJI DAMODAR JAIRAM v. KHINJI JAIRAM* (1888), 1 L. L. 12 Bom. 507.—IND.

c. — — — Permanently or tem-

porarily within jurisdiction.]—A ct. of equity has jurisdiction to entertain a suit against an alien temporarily resident in the jurisdiction provided he is served while so resident, although the suit arises out of a contract made in a country out of the jurisdiction & to be executed in another country also outside the jurisdiction.—*AUSTRALIAN ASSETS CO., LTD. v. HIGGINSON* (1897), 18 N. S. W. Eq. 189; 14 N. S. W. W. N. 97.—AUS.

d. — — — Arrest for debt.]—Deft. absconded from C. in 1866, being at the time largely indebted. In 1877 he returned for a temporary purpose, having in the meantime acquired a foreign domicile, & was arrested for a debt due to plff.:—*Held*: the arrest was illegal, & deft. was discharged.—*CLEMENTS v. KIRBY* (1877), 7 P. R. 103.—CAN.

rule that it is against the policy of the law to permit one foreigner to follow

in England, entered into arrangements with B. for procuring a vessel for the purpose of smuggling tobacco into Ireland. The vessel was accordingly hired by them, & proceeded on her voyage & having taken on board a cargo of tobacco in the Flushing Roads, arrived & was unshipped at Cork without payment of the duties. An information was filed against A. for assisting & being otherwise concerned in unshipping the tobacco, the duties not having been paid; A. was not proved to have taken any part in the transaction further than above stated:—*Held*: he was not triable on this information in England.—*A.-G. v. KENIFFECK* (1837), 2 M. & W. 715; Murp. & H. 215; 6 L. J. Ex. 214; 1 Jur. 264; 150 E. R. 944.

6. — Colonial municipal charges—Street improvements—Action to recover amount of—Not maintainable.]—An Act of the Legislature of New South Wales authorised the municipal council of the city of Sydney to carry out improvements in a street within that city, & imposed upon the owners of property situate within the improvement area the liability to contribute towards the cost. For the purpose of enforcing payment the council were empowered to distrain the goods of the owners liable to contribute &, in addition to the remedy by distress, to recover by action the amounts due & payable. Being unable to recover by means of distress the amount of contribution due from an owner of property within the improvement area, the council brought an action in this country to recover the amount:—*Held*: the action would not lie in this country, because (a) the liability being imposed by the foreign state solely for its own domestic purposes, the action to enforce it was analogous to an action to recover a penalty or a tax; (b) the action was one relating to real property situate abroad.—*SYDNEY MUNICIPAL COUNCIL v. BULL*, [1909] 1 K. B. 7; 78 L. J. K. B. 45; 99 L. T. 805; 25 T. L. R. 6.

— Action on judgment under.]—See No. 1218, *post*.

See, also, Nos. 14, 15, 16, *post*.

7. Foreign penal laws—Not enforceable.]—*FOLLIOTT v. OGDEN*, No. 1280, *post*.

8. — — —.]—Penalties imposed by a foreign country must be enforced in the cts. of that country & not in England.—*THE LE LOUIS* (1817), 2 Dods. 210.

Annotations:—*Reid*. The San Juan Nepomuceno (1824), 1 Hag. Adm. 265; *Santos v. Illidge* (1839), 5 Jur. N. S. 1358; *Buron v. Denman* (1848), 2 Exch. 167.

arose within the jurisdiction.—*TADAPALLI SUBBA RAO v. MIR GULAM ALLIKHAN OF BANGANAPALLI* (1905), 1 L. R. 29 Mad. 69.—IND.

h. — — —.]—According to the general principles of English jurisprudence temporary presence & the accrual of the cause of action within the limits of the ct. would each by itself be a ground of jurisdiction.—*SRINIVASA MOORTHY v. VENKATA VARADA AYYANGAR* (1905), 1 L. R. 29 Mad. 239.—IND.

i. — — —.]—In an action raised against a foreigner when on a visit to S., upon a claim arising out of transactions in a foreign country:—*Held*: the ct. had jurisdiction.—*TULLOCH v. WILLIAMS* (1846), 8 Dunl. (Ct. of Sess.) 657; 18 Sc. Jur. 334.—SCOT.

k. — — —.]—*SPRINGLE v. MERCANTILE ASSOCN. OF SWAZILAND, LTD.*, [1904] T. S. 163.—S. AF.

l. — — —.]—*LECOMTE v. W. & B. SYNDICATE OF MADAGASCAR* [1905] T. S. 696.—S. AF.

m. — — —.]—Pursuer, a native of S., in an action for breach of promise of marriage, averred that she in 1853 became engaged to marry defender, a native of & then resident in S. In 1855 he went to reside in L., where in 1858 he married another woman. He was cited personally when he had been a week in S. on a visit:—*Held*: defender, being personally cited, was liable to the jurisdiction of the S. cts. *ratione contractus*.—*SINCLAIR v. SMITH* (1860), 22 Dunl. (Ct. of Sess.) 1475; 32 Sc. Jur. 671.—SCOT.

2 i. As regards extra-territorial jurisdiction.]—A ct. in O. has no jurisdiction to compel foreigners to come there with their claim & litigate it, where the debt has no existence in O.—*Re BENFIELD & STEVENS* (1897), 17 P. R. 339.—CAN.

2 ii. — — —.]—The rule of International Law that cts. cannot, by their judgments, bind absent foreigners who have not submitted to their jurisdiction is not restricted in its application to foreign Independent States only,

— Action on judgment under.]—See Part XIV., Sect. 2, sub-sect. 5, *post*.

Bastardy proceedings—Against party resident abroad.]—See BASTARDY, Vol. III., pp. 393, 394, Nos. 311, 312.

Lunacy—Jurisdiction over aliens domiciled abroad.]—See LUNATICS & PERSONS OF UNSOUND MIND.

— Inquisition as to person resident abroad owning property in England.]—See LUNATICS & PERSONS OF UNSOUND MIND.

Workmen's compensation—Employer resident in Scotland.]—See MASTER & SERVANT.

SECT. 2.—SUBMISSION TO JURISDICTION OF COURT.

By foreign sovereign.]—See ACTION, Vol. I., pp. 48, 49, Nos. 387, 389–395.

By diplomatic officers.]—See CONSTITUTIONAL LAW.

By appearing or taking other steps.]—See PRACTICE & PROCEDURE.

— In admiralty actions.]—See ADMIRALTY, Vol. I., pp. 111, 166, 167; Nos. 144, 766, 771.

— In administration suits.]—See EXECUTORS & ADMINISTRATORS; PRACTICE & PROCEDURE.

— In matrimonial suits.]—See Part X., Sect. 1, *post*, & generally, HUSBAND & WIFE.

— In bankruptcy proceedings.]—See BANKRUPTCY & INSOLVENCY, Vol. IV., p. 45.

What amounts to—To satisfy condition precedent to enforcement of foreign judgment—That defendant submitted to jurisdiction of court pronouncing judgment.]—See Part X., Sect. 1,

SECT. 3.—APPLICATION OF FOREIGN LAW BY COURT.

9. General rule.]—If, in any case, the rights of foreigners out of their own country are governed by their own laws, it is not by force of those laws themselves, but by the law of the country in which they may be, adopting those laws as part of its own law for the purpose of regulating such rights.—*CALDWELL v. VANVLISSINGEN* (1851), 9 Hare, 415; 21 L. J. Ch. 97; 18 L. T. O. S. 192; 16 Jur. 115; 68 E. R. 571.

Annotations:—*Mentd*. *Betts v. Neilson* (1865), 3 Do G. J. & Sm. 82; *Betts v. Neilson*, *Betts v. De Vitro* (1868), 3 Ch. App. 429; *Betts v. Willmott* (1871), 6 Ch. App. 239;

but is also applicable where the country in which the judgment was passed & that in which it is sought to be enforced have separate & distinct systems of administration & judicature, though owing allegiance to the same sovereign.—*SHAIK ATHAM SAHIB v. DAVID SAHIB* (1909), 1 L. R. 32 Mad. 469.—IND.

PART I. SECT. 3.

n. General rule.]—It is not desirable, even with the consent of parties, that the ct. should construe the law of a foreign country, instead of the fact of what is the law there being proved by lawyers of such country.—*MEAGHER v. AETNA INSURANCE CO.* (1873), 20 Gr. 354.—CAN.

o. — — —.]—In applying the law of a foreign state, the construction shown by evidence to be placed upon the provision of its statutes by the cts. of that state must be given effect to. The interpretation cannot depend on the view taken of it by the domestic ct.—*ALLEN v. STANDARD TRUSTS*, [1919] 3 W. W. R. 974.—CAN.

Sect. 3.—Application of foreign law by court. Part

Adair v. Young (1879), 12 Ch. D. 13; *Nobel's Explosives Co. v. Jones, Scott* (1881), 17 Ch. D. 721; *Jackson v. Needle* (1884), *Griffin's Patent Cases*, 132; *United Telephone Co. v. Sharples* (1885), 29 Ch. D. 164; *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439.

10. — Locus regit actum.]—*GUEPRATTE v. YOUNG*, No. 665, *post*.

To determine whether property movable or immovable.]—*See* Part III., Sect. 2, *post*.

As regards immovables—Assignment of.]—*See* Part IV., Sect. 3, *post*.

— Burdens on.]—*See* Part IV., Sect. 5, *post*.

— Succession to.]—*See* Part VI., Sect. 1, sub-sect. 1, *post*.

Wills of.]—*See* Part VI., Sect. 1, sub-sect. 2, *post*.

As regards movables—Assignment of.] *See* Part V., Sect. 3, sub-sect. 2, *post*.

Succession to.]—*See* Part VI., Sect. 2, sub-sect. 1, *post*.

— Wills of.]—*See* Part VI., Sect. 2, sub-sect. 3, *post*.

11. To ascertain nationality — “German national” — Within Treaty of Peace with Germany & Treaty of Peace Order, 1919.]—Whether a man is a German national or not must be decided by German municipal law & not by English municipal law.—*STOECK v. PUBLIC TRUSTEE*, [1921] 2 Ch. 67; 90 L. J. Ch. 386; 125 L. T. 851; 37 T. L. R. 666; 65 Sol. Jo. 605.

*Annotation:—**Apprvd. Re Chamberlain's Settmt.*, [1921] 2 Ch. 533.

12. — — —.]—By a settlement dated in 1902 a fund of £5000 was vested in trustees on trust to invest & pay the income of the trust funds to C. during his life or until he should become bkpt. or charge it, or until some event shall happen . . . whereby the said income or any part thereof if belonging absolutely to him would become vested or charged in favour of some other person or persons or corpn. & in the event of the determination during the life of C. of the above trust in his favour the trustees were given a discretion to apply the income for the benefit of all or any the said C. & his present or any other after-taken wife & his issue & the persons interested for the time being under the ulterior trusts, & subject thereto, were directed to hold the capital & income of the trust funds upon trust for the benefit of the issue of C. & in default of issue upon trust for C.'s nephews & nieces. C. was born in England of English parents but had resided in Germany since 1906 & had been twice married there to German wives. During the war—namely, on Aug. 8, 1916—he obtained a certificate of naturalisation as a German. In these circumstances a summons was taken out by the trustees to have it determined whether the life interest of C. in the funds was forfeited by virtue of the charge imposed on property of German nationals in this country on Jan. 10, 1920, by virtue of art. 297 of the Treaty of Peace with Germany or the Treaty of Peace Order, 1919, &

13 i. Whether foreign law assumed to be similar to that of domestic law.]—In the absence of proof to the contrary, the ct. will presume the law of a foreign country to be the same as its own.—*BRODIE v. COWAN* (1852), 7 L. C. J. 96.—**CAN.**

13 ii. —.]—*Re O'BRIEN* (1883), O. R. 326.—**CAN.**

13 iii. —.]—*MACAULAY v. O'* (1897), 5 B. C. R. 510.—**CAN.**

13 iv. —.]—Where the law of a foreign state has not been proved the ct. is justified in assuming, in the absence of special circumstances, that

the common law prevails in that foreign state.—*PINK v. PERLIN & Co.* (1898), 40 N. S. R. 260.—**CAN.**

13 v. —.]—The ct. is not able to assume that the law of the foreign country in which lands are situate corresponds to the statutory law of the country in which action is brought.—*PURDOM v. PAVEY & Co.* (1896), 26 S. C. R. 412.—**CAN.**

p. —.]—There is no presumption that the law of a foreign country is the same as the statutory law of this country.—*SCHNAIDER v. JAFFE* (1916), 7 C. P. D. 696.—**S. AF.**

how the income accrued since Aug. 4, 1914, ought to be disposed of. It was admitted at the hearing on behalf of C. that in a German Ct. applying German law he would be recognised as a German citizen. No question arose as to the income before Nov. 4, 1915, which had been paid over to C.'s agent:—

Held: (1) the decision whether a person was a German national within the meaning of the Treaty & Order fell to be determined exclusively by German municipal law & accordingly C. was a German national within the meaning of the Treaty & Order:

(2) C.'s interest under the settlement was forfeited as on Jan. 10, 1920, & subject to the payment of costs the accumulations of income in the trustees' hands from Nov. 4, 1915, to Jan. 10, 1920, must be paid to the custodian.—*Re CHAMBERLAIN'S SETTLEMENT*, [1921] 2 Ch. 533; 37 T. L. R. 966; 66 Sol. Jo. (W. R.) 3.

*Annotation:—**Consd. Fasbender v. A.-G.* (1921), 38 T. L. R. 114.

13. Foreign law presumed to be similar to English law.]—(1) In absence of evidence to the contrary it is presumed that the law of a foreign state is similar to that of England. The onus of proof of difference lies on the party alleging such difference.

(2) A contract having been made in Germany to carry certain goods to this country, the consignees here sued the carriers for damage to them *in transitu*. It having been proved that defts., having only acted as forwarding agents, were by German law not liable as common carriers:—**Held:** plffs. could not recover, as the contract was governed by German law.—*DE CLEREMONT v. BRASCH* (1885), 1 T. L. R. 370.

Proof of foreign law.]—*See* EVIDENCE.

14. Foreign revenue laws not regarded.]—No country ever takes notice of the revenue laws of another (*LORD MANSFIELD*).—*HOLMAN v. JOHNSON* (1775), 1 Cowp. 341; 98 E. R. 1120.

*Annotations:—**Consd. Waymell v. Reed* (1794), 5 Term Rep. 599. *Reid. Rotch v. Edie* (1795), 6 Term Rep. 413; *Hodgson v. Temple* (1813), 5 Taunt. 181; *Pellegat v. Angell* (1835), 4 L. J. Ex. 326; *Hobbs v. Henning* (1861), 17 C. B. N. S. 791. *Mentd. Biggs v. Lawrence* (1789), 3 Term Rep. 454; *Clugas v. Ponaluna* (1791), 4 Term Rep. 466; *Lightfoot v. Tenant* (1796), 1 Bos. & P. 551; *Cobb v. Symonds* (1822), 1 Dow. & Ry. K. B. 111; *Bristow v. Sequeville* (1850), 5 Exch. 275; *Feret v. Hill* (1854), 2 W. R. 493; *Fisher v. Bridges* (1854), 1 Jur. N. S. 157; *Abbott v. Rogers* (1855), 16 C. B. 277; *Taylor v. Chester* (1869), L. R. 4 Q. B. 309; *Seymour v. London & Provincial Marine Insee.* (1872), 41 L. J. C. P. 193; *Barton v. Muir* (1874), L. R. 6 P. C. 134; *Scott v. Brown, Doering, McNab, Slaughter & May v. Brown, Doering, McNab*, [1892] 2 Q. B. 724; *Re Thomas, Jaquess v. Thomas*, [1894] 1 Q. B. 747; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Godge v. Royal Exchange Insee. Corpn.* [1900] 2 Q. B. 214; *Kaufman v. Gerson* (1903), 51 W. R. 683; *Prevost v. Wood* (1905), 21 T. L. R. 684; *Gordon v. Metropolitan Police Chief Comr.*, [1910] 2 K. B. 1080; *Kregor v. Hollins* (1913), 109 L. T. 225; *North Western Salt Co. v. Electrolytic Alkali Co.*, [1913] 3 K. B. 422; *Farmers' Mart v. Milne*, [1915] A. C. 106; *Montefiore v. Menday Motor Components Co.*, [1918] 2 K. B. 241; *Brightman v. Tate*, [1919] 1 K. B. 463; *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520; *Wild v. Simpson*, [1919] 2 K. B. 544.

q. Foreign law not regarded—Registration of lien notes.]—M., who lived in B. in M. owned a horse which he sold to P., taking as part payment a lien note on the horse. Such note need not be registered in M. J., from S., subsequently bought the horse, & in P., sold it to pltf., also from S., who paid \$235 cash for it, & took it home. Later, bringing it back to B., M. seized under his lien. In S. such liens must be registered:—**Held:** the law of S. would not be taken notice of.—*ROSS v. HENDERSON* (1909), 11 W. L. R. 656.—**CAN.**

15. —.]—The cts. in this country do not take notice of foreign revenue laws.—**PLANCHIE v. FLETCHER** (1779), 1 Doug. K. B. 251; 99 E. R. 165.

Annotations :—**Refd.** *Atkinson v. Abbott* (1809), 11 East, 135. **Mentd.** *Furtado v. Rogers* (1802), 3 Bos. & P. 191.

16. —.]—The cts. of this country will take no notice of the revenue laws of foreign states. Therefore where assumpsit was brought for money lent in France & unstamped receipts were produced in proof of the loan, evidence to show that by the law of France such receipts required stamps to render them valid, was rejected.—**JAMES v. CATHERWOOD** (1823), 3 Dow. & Ry. K. B. 190.

Annotation :—**Refd.** *Bristow v. Sequeville* (1850), 5 Exch. 275.

17. **Foreign confiscatory law—Of Government recognised by the English Government—Treated as valid.**—(1) The cts. of this country will not inquire into the validity of the acts of a foreign Govt. which has been recognised by the Govt. of this country. In this respect it is all one whether the foreign Govt. has been recognised as a government *de jure* or *de facto*.

The Russian Socialist Federal Soviet Republic passed a decree in June, 1918, declaring all mechanical sawmills of a certain capital value &

all woodworking establishments belonging to private or limited cos. to be the property of the Republic. In 1919 agents of the Republic seized pl'ts.' mill or factory in Russia & the stock of manufactured wood therein. In Aug. 1920, agents of the Republic purported to sell a quantity of the stock so seized to defts., who imported it into England. In letters dated in Apr. 1921, the Secretary of State for Foreign Affairs stated that His Majesty's Govt. recognised the Soviet Govt. as the *de facto* Govt. of Russia; that a govt. known as the Provisional Govt. came into power in Mar. 1917, & was recognised by His Majesty's Govt., & remained in session until Dec. 13, 1917, & was then dispersed by the Soviet authorities. In an action by pl'ts. for a declaration that they were entitled to the wood above mentioned :—**Held** : (2) the Govt. of this country had recognised the Soviet Govt. as the *de facto* Govt. of Russia existing at a date before the decree of June, 1918; (3) the validity of that decree & the sale of the wood to defts. could not be impugned, & defts. were entitled to judgment.—**AKSIONAIRNOYE OBSHESTVO A. M. LUTHER v. SAGOR (JAMES) & Co.**, [1921] 3 K. B. 532; 90 L. J. K. B. 1202; 125 L. T. 705; 37 T. L. R. 777; 65 Sol. Jo. 604, C. A.

See, also, Nos. 4, 5, 6, *ante*.

Part II.—Domicil.

SECT. 1.—IN GENERAL.

18. **Domicil.**—(1) Domicil implies a permanent not a mere temporary home.

(2) Change of domicil can only be effected *animo et facto*, i.e. intention to change the existing place of residence for a permanent residence in a new place must accompany the act of change. The fact of change may be conclusively evidenced by residence in a new place, but with regard to the intention, residence is an equivocal act.

(3) The domicil of origin is not so readily lost as is an acquired domicil.

(4) In order that a new domicil may be acquired the existing domicil must be abandoned, which abandonment must be evidenced by *animus*, i.e. intention to abandon the old place of residence & permanently to reside in the new place.

Qu. : whether in the absence of other evidence an intention to abandon a domicil may be inferred from long & continuous residence in some other place.

(5) A new domicil cannot be acquired by residence during infancy.

A domiciled Scotsman went to India where he was engaged in his own business for many years, returning only once to Scotland where he spent one year. He had always expressed his intention of returning finally to settle in Scotland & had written to his mother in Scotland declaring such to be his intention, but he died in India before he could carry out his intention. Two of his children, born in India, died there during infancy :—**Held** : (6) the domicil of the infant children depended upon the domicil of the father & the father had never lost his original Scottish domicil; (7) Anglo-Indian domicil could only arise in the case of covenanted servants of the East India Co.—**JOPP v. WOOD** (1865), 4 De G. J. & Sm. 616; 5 New Rep. 422; 34 L. J. Ch. 212; 12 L. T. 41; 11 Jur. N. S. 212; 13 W. R. 481; 46 E. R. 1057, L. J.J.

Annotations :—*As to* (1) **Refd.** *Allardice v. Ouslow* (1864),

33 L. J. Ch. 431. *As to* (2) **Consd.** *Doucet v. Geoghegan* (1878), 9 Ch. D. 441. *As to* (7) **Consd.** *Re Tootal's Trusts* (1883), 23 Ch. D. 532; *Re Mitchell, Ex p. Cunningham* (1884), 13 Q. B. D. 418; *Casdagli v. Casdagli*, [1918] P. 89.

19. **Every one has a domicil.**—Every individual at his birth becomes the subject of some particular country by the tie of natural allegiance, which fixes his political status, & becomes subject to the law of the domicil, which determines his civil status. To suppose that for a change of domicil there must be a change of natural allegiance is to confound the political & the civil status & to destroy the distinction between *patria* & *domicilium* (LORD WESTBURY). A man may change his domicil as often as he pleases but not his allegiance. *Exuere patriam* is beyond his power (LORD HATHERLEY, C.).

It is a settled principle that no man shall be without a domicil & to secure this end the law attributes to every individual as soon as he is born the domicil of his father if the child be legitimate & the domicil of his mother if the child be illegitimate. This is called the domicil of origin & is involuntary. It is the creation of law, not of the party. It may be extinguished by act of law, e.g. by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal, but it cannot be destroyed by the will & act of the party (LORD WESTBURY).

(3) Domicil of choice is the creation of the party. When a domicil of choice is acquired the domicil of origin is in abeyance, but is not absolutely extinguished or obliterated. When a domicil of choice is abandoned, the domicil of origin revives, a special intention to revert to it being unnecessary.

Story says that the moment a foreign domicil is abandoned, the native domicil is re-acquired. The word re-acquired is an inaccurate expression. The meaning is that the abandonment of an acquired domicil *ipso facto* restores the domicil of origin (LORD CHELMSFORD).

If after having acquired a domicil of choice a

Sect. 1.—*In*

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man abandons it & travels in search of another domicile of choice, the domicile of origin comes instantly into action, & continues until a second domicile of choice has been acquired.

A natural-born Englishman may domicile himself in Holland, but if he breaks up his establishment there & quits Holland, declaring that he will never return, it is absurd to suppose that his Dutch domicile clings to him until he has set up his tabernacle elsewhere (LORD WESTBURY).

(4) The status of the child, with respect to its capacity to be legitimated by the subsequent marriage of its parents, depends wholly on the status of the putative father, not on that of the mother (LORD HATHERLEY, C.).

According to English law, where at the time of a bastard's birth the father has his domicile in England, no subsequent change of domicile can render practicable the bastard's legitimation.—

UDNY v. UDNY (1869), L. R. 1 Sc. & Div. 441, H. L. Annotations:—*As to* (1) **Consd.** Brunel v. Brunel (1871), L. R. 12 Eq. 298; Hamilton v. Dallas (1875), 1 Ch. D. 257. *As to* (2) **Consd.** Firebrace v. Firebrace (1878), 4 P. D. 63. **Refd.** *Re* Patience, Patience v. Main (1885), 29 Ch. D. 976; Simon v. Phillips (1916), 80 J. P. 197. *As to* (3) **Consd.** Haldane v. Eckford (1869), L. R. 8 Eq. 631; Wilson v. Wilson (1872), L. R. 2 P. & D. 435; Platt v. A.-G. of New South Wales (1878), 3 App. Cas. 336; *Re* Robertson (1885), 2 T. L. R. 178; *Re* Marrett, Chalmers v. Wingfield (1887), 3 T. L. R. 392; Abd-ul-Messih v. Farra (1888), 13 App. Cas. 431; *Re* Grove, Vaucher v. Treasury Solicitor (1888), 40 Ch. D. 216; Winans v. A.-G., [1904] A. C. 287; *Re* James, James v. James (1908), 98 L. T. 438; Casdagli v. Casdagli, [1919] A. C. 145. **Refd.** Douglas v. Douglas, Douglas v. Webster (1871), L. R. 12 Eq. 617; King v. Foxwell (1876), 3 Ch. D. 518; Doucet v. Geoghegan (1878), 9 Ch. D. 441; *Re* Tootal's Trusts (1883), 23 Ch. D. 532; Bradford v. Young (1884), 26 Ch. D. 656; *Re* Cooke's Trusts (1887), 56 L. J. Ch. 637; *Re* Johnson, Roberts v. A.-G., [1903] 1 Ch. 821. *As to* (4) **Consd.** *Re* Grove, Vaucher v. Treasury Solicitor (1888), 40 Ch. D. 216. **Refd.** Shedden v. Patrick & A.-G. (1869), L. R. 1 Sc. & Div. 470; *Re* Goodman's Trusts (1881), 17 Ch. D. 266. **Generally, Mentd.** Tingley v. Miller, [1917] 2 Ch. 144.

20. Party can have only one domicile—For purposes of succession.]—The succession to the personal estate of an intestate is regulated by the law of that place, which was his domicile at the time of his death. For that purpose there can be but one domicile, & the *lex loci rei sitæ* does not prevail. The mere place of birth or death does not constitute the domicile. The domicile of origin, which arises from birth & connections, remains, until clearly abandoned & another taken. In the case of Lord Somerville, of two acknowledged domicils, the family seat in Scotland, & a leasehold house in London, upon the circumstances the former, which was the original domicile, prevailed.—SOMERVILLE v. SOMERVILLE (LORD) (1801), 5 Ves. 750; 31 E. R. 839.

Annotations:—**Consd.** *Re* Ewing's Estate (1830), 1 Tyr. 91; Munro v. Munro (1840), 7 Cl. & Fin. 842. **Distd.** Forbes v. Forbes (1854), Kay, 341. **Consd.** Crookenden v. Fuller (1859), 1 Sw. & Tr. 441; Maxwell v. Maclure (1860), 2 L. T. 65; Aikman v. Aikman (1861), 4 L. T. 374; *Re* Mitchell, *Ex p.* Cunningham (1884), 13 Q. B. D. 418. **Refd.** Pottinger v. Wightman (1817), 3 Mer. 67; Curling v. Thornton (1823), 2 Add. 6; Stanley v. Bernes (1830), 3 Hag. Ecc. 373; De Bonneval v. De Bonneval (1838), 1 Curt. 856; Anderson v. Laneville (1854), 2 Ecc. & Ad. 41; Lyall v. Paton (1856), 25 L. J. Ch. 746; Hodgson v. De Beauchesne (1858), 12 Moo. P. C. C. 286; A.-G. v. Rowe (1862), 1 H. & C. 31.

21. ———.]—(1) A man cannot have two domicils, at least with reference to the succession to his personal estate. Legitimate children acquire by birth the domicile of their father. An infant cannot change his domicile by his own act. A new domicile cannot be acquired except by intention & act, but, being *in itinere* to the intended domicile, is a sufficient act for this purpose; but the strongest intention of abandoning a domicile & actual abandonment of residence will not de-

prive a man of that domicile, unless he has acquired another.

(2) An engagement to serve & actual service in the Indian Army, under a commission from the East India Co. when the duties of such an appointment necessarily required residence in India for an indefinite period, conferred upon the officer an Anglo-Indian domicile; for the law, in such a case, presumed an intention consistent with his duty & held his residence to be *animo et facto* in India, even if he had property in the country which was his domicile of origin. An Anglo-Indian was not, for all purposes, an English domicile.

(3) A domiciled Scotsman, having ancestral property but no house in his native country, by accepting a commission & serving in the Indian Army, abandoned his domicile of origin & acquired an Anglo-Indian domicile. He afterwards attained the rank of general in the Indian Army & was made colonel of a regiment, & then left India with the intention of not returning thither, but came to Great Britain, where he lived part of the year in a house which he had built on his estate in Scotland, & part in a hired house in London, under circumstances which, if he had been a single man, would have given him again a Scottish domicile; but his wife & establishment of servants resided constantly at the house in London:—**Held:** this fact counterbalanced the effect of the other circumstances & proved that his intention was permanently to reside in England, & he must be considered to have abandoned his acquired domicile in India & acquired, by choice, a new one in England.—FORBES v. FORBES (1854), Kay, 341; 2 Eq. Rep. 178; 23 L. J. Ch. 724; 18 Jur. 642; 2 W. R. 253; 69 E. R. 145.

Annotations:—*As to* (1) **Refd.** United States President v. Drummond (1864), 10 Jur. N. S. 533. *As to* (2) **Consd.** *Re* Mitchell, *Ex p.* Cunningham (1884), 13 Q. B. D. 418; Casdagli v. Casdagli, [1919] A. C. 145. **Refd.** Jopp v. Wood (1864), 34 Beav. 88; *Re* Tootal's Trusts (1883), 23 Ch. D. 532. *As to* (3) **Distd.** Hodgson v. De Beauchesne (1858), 12 Moo. P. C. C. 286. **Foldd.** Haldane v. Eckford (1869), L. R. 8 Eq. 631. **Apld.** Aitchison v. Dixon (1870), L. R. 10 Eq. 589. **Refd.** Hoskins v. Matthews (1855), 24 L. T. O. S. 231; Cockrell v. Cockrell, (1856), 25 L. J. Ch. 730; Maxwell v. Maclure (1860), 2 L. T. 65; Douglas v. Douglas, Douglas v. Webster (1871), L. R. 12 Eq. 617; *Re* Bullen-Smith, Berners v. Bullen-Smith (1888), 58 L. T. 578.

22. ———.]—(1) A will made in execution of a power is not an exception to the general rule, which requires wills to be duly executed in conformity with the law of domicile.

A man can have only one domicile for the purpose of succession. The domicile of origin is to prevail until he has not only acquired another, but has manifested & carried into effect an intention of abandoning his former domicile & taking another as his sole domicile.

(2) M. C. died near C. in France, on Jan. 3, 1858, having on Nov. 4, 1857, made & duly executed her will.

Testatrix, from 1844 till her death, had no home in England, & always passed the winter abroad, returning to England for the summer, but sometimes remained abroad throughout the year. From 1844 to 1853 she had no residence abroad which could be considered as fixed or permanent. In 1855 she encouraged her son to purchase a property at C. & assisted him to do so by a loan of £2,000. The property was not purchased by her, but by her son, & was conveyed to him. She lent him £2,000 to help him to pay for it, which was to be repaid by him to her exors., & he gave her a promissory note for it. She had expressed to L., her son-in-law, her desire to be buried in England, & in 1855 she much wished to pass the winter in England but could not on

account of her health. In 1856, at C., in a casual conversation respecting the modes of disposing of dead bodies which had been adopted by different nations, one of the witnesses expressed an opinion in favour of burning, upon which she said, "Don't have me burnt; I should prefer lying on the hill" at C. where the cemetery was situate. The following winter she arranged with her son for the occupation of the whole of the chateau, & several friends spent the winter with her there. Having complained that the accommodation was not sufficient, she arranged for the construction of a new house on her son's property. Subsequently she wrote to her solr. in London, in answer to his inquiry whether she meant to reside permanently abroad. "My visits to England will probably be annual, but I suppose I must be considered as living in France, spending seven or eight months yearly in that country." She subsequently came to England & made a will there for the purpose of preventing the distribution of her property according to French law, after she had been told that her will must be made according to the law of her domicile. In the will she described herself of Croydon, late of Camden Town, never mentioning France:—*Held*: it was impossible to say that testatrix ever *animo et facto* abandoned her English domicile & acquired another in France.

(3) When issue is joined on the question of domicile the burden of proof is on the party setting up the abandonment of the domicile of origin.—*CROOKENDEN v. FULLER* (1859), *Sea. & Sm.* 3; 1 *Sw. & Tr.* 441; 29 *L. J. P. & M.* 1; 1 *L. T.* 70; 5 *Jur. N. S.* 1222; 8 *W. R.* 49; 164 *E. R.* 804.

Annotations:—*As to* (1) *Expld.* *In the Goods of Alexander* (1860), 29 *L. J. P. M. & A.* 93. *Refd.* *In the Goods of Hallyburton* (1866), *L. R.* 1 *P. & D.* 90; *In the Goods of Huber*, [1896] *P.* 209.

23. Distinguished from residence.—A person may be said to have more than one residence. If he have houses in different places, at each of which he keeps an establishment, each may be called his residence, though he may not go there for years; but the meaning of the word residence is different from domicile, for an infant has the domicile of his parents until he attains his full age & does some act to acquire a new one, & thus his domicile may be in a country in which he has never personally been, whereas residence implies personal presence at some time or other.

A proviso in a will, requiring the devisee for life of a mansion-house & estates to reside there for six months in every year & imposing a penalty for breach of such condition, & if he should neglect to observe it for five years, devising the estate to others, rendered it necessary for the devisee to be

personally present in the house 168 days in each year in order to escape the penalty or forfeiture:—*Held*: it would be sufficient if, keeping up an establishment at the house, he were merely to visit it each day, & it was not necessary for him to spend a night there.—*WALCOT v. BOTFIELD* (1854), *Kay*, 534; 2 *Eq. Rep.* 758; 23 *L. T. O. S.* 127; 18 *Jur.* 570; 2 *W. R.* 393; 69 *E. R.* 226.

Annotations:—*Refd.* *Re Wright, Mott v. Issott*, [1907] 1 *Ch.* 231. *Mentd.* *Re Vivian, Vivian v. Swansea* (1920), 36 *T. L. R.* 222.

24. —.]—The difference in the construction arises from a confusion between domicile & residence. Domicile once acquired can only be lost by clear evidence. Domicile is a status & has nothing to do with the question of residence though residence is an element from which domicile can be inferred. Residence cannot exist without residence at all & only when the residence is the main & principal residence (*DAY, J.*).—*WARD v. MACONOCHE* (1891), 7 *T. L. R.* 536, *D. C.*

25. Distinguished from allegiance.—*UDNY v. UDNY*, No. 19, *ante*.

26. —.]—Domicile is a difficult word to define but it is clear now that whatever else it embraces, it does not embrace the idea of putting off one's nationality or of substituting another nationality for one's original nationality, the idea which is implied in the expression *exuere patriam* (*COLLINS, M. R.*).—*A. G. v. WINANS*, No. 68, *post*.

SECT. 2.—CREATION, ADHERENCE AND REVIVAL OF DOMICIL.

SUB-SECT. 1.—DOMICIL OF ORIGIN.

27. Creation—Birth.—*SOMERVILLE v. SOMERVILLE (LORD)*, No. 20, *ante*.

28. — — — *Legitimate child.*—*FORBES v. FORBES*, No. 21, *ante*.

29. — — — *Illegitimate child.*—*UDNY v. UDNY*, No. 19, *ante*.

30. — — — *Creation of law.*—*UDNY v. UDNY*, No. 19, *ante*.

31. Adherence—Until abandonment—& acquisition of another.—*SOMERVILLE v. SOMERVILLE (LORD)*, No. 20, *ante*.

32. — — — —.]—(1) The domicile of origin continues until another is acquired. A new domicile is not acquired by residence unless it be taken up with an intention of abandoning the former domicile.

A Frenchman having quitted France in 1792 in consequence of the Revolution in that country & having resided in England until 1814, when he

PART II. SECT. 2, SUB-SECT. 1.

27 i. Creation—Birth.—A child was born in S., of foreign parents, during the residence of the father there on military service:—*Held*: S. was not his *forum originis*.—*WYLIE v. LAYE* (1834), 12 *Sh. (Ct. of Sess.)* 927; 9 *Fac. Coll.* 495.—*SCOT.*

27 ii. — — — —.]—A., whose domicile of origin was Scottish, acquired an English domicile in 1871: his son B. was born in that year in England:—*Held*: B.'s domicile of origin was English.—*CORBRIDGE v. SOMERVILLE* (1914), 51 *Sc. L. R.* 406.—*SCOT.*

r. — — — *By adoption—In infancy.*—*Re THROSSSEL* (1910), 12 *W. L. R.* 683.—*CAN.*

s. — — — —.]—*FORBES v. BAILEY* (1914), 14 *E. L. R.* 514.—*CAN.*

t. — — — *By parents acquiring domicile of choice.*—Where a person is brought in infancy to a country which parents adopt as their domicile of

choice, that country may be regarded as such person's domicile of origin.—*ROBERTS v. ROBERTS* (1903), 17 *E. D. C.* 132.—*S. AF.*

31 i. Adherence to.—A domicile of origin is most difficult to be lost & most easy to be regained.—*LOWNDES v. DOUGLAS* (1862), 24 *Dunl. (Ct. of Sess.)* 1391; 34 *Sc. Jur.* 717.—*SCOT.*

31 ii. — — — *Until abandonment—And acquisition of another.*—The domicile of origin will prevail until the party has not only acquired another but has manifested & carried into execution an intention of abandoning his former domicile & taking another as his sole domicile.—*BURTON v. FISHER* (1828), *Milw.* 183; 2 *Ir. L. Rec.* 152.—*IR.*

31 iii. — — — —.]—In question of domicile it is an established principle that the domicile of origin must prevail until the party has not only acquired another, but has manifested & carried into execution an intention of abandon-

ing his former domicile & acquiring another as his sole domicile.—*MUNRO v. MUNRO* (1840), 1 *Robin. App.* 492.—*SCOT.*

31 iv. — — — —.]—*CAMPBELL v. CAMPBELL* (1861), 23 *Dunl. (Ct. of Sess.)* 256; 33 *Sc. Jur.* 116.—*SCOT.*

31 v. — — — —.]—*STEEL v. STEEL* (1888), 15 *R. (Ct. of Sess.)* 896; 25 *Sc. L. R.* 675.—*SCOT.*

31 vi. — — — —.]—*BROOKS v. BROOKS' TRUSTEES* (1902), 4 *F. (Ct. of Sess.)* 1014.—*SCOT.*

31 vii. — — — —.]—A citizen of B. left before it was incorporated into the German Empire & never returned. During his absence he acquired temporary citizen rights in a foreign country which he subsequently allowed to lapse:—*Held*: his temporary acquisition of foreign citizen rights did not destroy his German nationality.—*THE TREASURY v. WOLFF*, [1919] *T. P. D.* 25.—*S. AF.*

Sect. 2.—Creation, adherence and revival of domicile:
Sub-sect. 1.]

returned to France, & from that time having resided occasionally in both countries:—*Held*: he had not abandoned his original domicile.

(2) The validity of a will is to be determined by the law of the country where the deceased was domiciled at his death.—*DE BONNEVAL v. DE BONNEVAL* (1838), 1 Curt. 856; 163 E. R. 296.

Annotations:—*As to* (1) *Refd.* *Anderson v. Laneville* (1854), 2 Ecc. & Ad. 41. *As to* (2) *Consd.* *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24. *Refd.* *Craigie v. Lewin* (1843), 3 Curt. 435; *Crocker v. Hertford* (1844), 4 Moo. P. C. C. 339. *Generally, Mentd.* *Hawarden v. Dunlop* (1861), 2 Sw. & Tr. 150.

33. ————.]—*CROOKENDEN v. FULLER*, No. 22, *ante*.

34. ————.]—(1) R. was born in Scotland in 1757, being tenant in tail of a Scottish estate in strict settlement expectant on the death of his uncle. In 1773 he went to sea, & till 1805 traded in ships chartered by the East India Co. but was not properly in their service. He spent the intervals of trading chiefly in London, living in lodgings, but occasionally visiting Scotland. Having left the service in 1805, he still resided in London, partly for pleasure & trying to get other employment. In 1812 he bought a farm in Scotland & hired a residence there near the Scottish family entailed estate & he became a justice of the peace & a country gentleman there, his sister acting as manager of his house. He kept this house till 1818 all the while spending about half the year in London in lodgings & cohabiting with women in a clandestine manner. In 1812 he met with Miss C. in London & cohabited with her in lodgings there till 1815, when he bought a house for her in which they lived. In 1820, having at that time given up the Scottish farm & house & having no residence except that in which he & C. cohabited in London, they went to Scotland for a few days & were married, returning & living in London afterwards. R. did not succeed to the Scottish estate till 1821, & his wife after visiting it part of each year & becoming averse to live there, he let it in 1834 & lived in London ever afterwards till his death in 1844:—*Held*: at the marriage in 1820 R. had never lost his Scottish domicile of origin, & children born before the marriage were legitimated by the law of Scotland.

(2) If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency will not prevent such residence from changing his domicile of origin.

(3) The domicile of origin must be presumed to continue until another sole domicile has been acquired by actual residence, with the intention of abandoning the domicile of origin.—*AIKMAN v. AIKMAN* (1861), 4 L. T. 374; 7 Jur. N. S. 1017; 3 Macq. 854, H. L.

Annotations:—*As to* (3) *Consd.* *A.-G. v. Rowe* (1862), 1 H. & C. 31; *Moorhouse v. Lord* (1863), 10 H. L. Cas. 273. *Appld.* *A.-G. v. Blucher De Wahlstatt* (1864), 3 H. & C. 374. *Consd.* *Re Capdevielle* (1864), 2 H. & C. 985. *Generally, Mentd.* *Stuart v. Moore, Re Bute* (1861), 4 L. T. 382.

35. ————.]—*Testatrix*, an unmarried Englishwoman, in 1849 went to reside abroad at the house of her married sister at B. in Germany. She resided there, contributing towards the expenses of housekeeping, until 1863, in which year she died. Her property consisted of money invested in English securities, but she also possessed a valuable library, which she caused to be transported to B. She occasionally came over to England with her married sister to

visit her friends & while in England in May, 1854, she made her will, describing herself as now on a visit to my sister C., bequeathing her property to trustees to pay the annual income to her sister for life for her separate use, without power of anticipation & with a power of appointment to her sister by deed or will. Female deft., as sole executrix, proved the will in the Probate Ct. *Testatrix* told her sister that if she survived her she should continue to live in Germany & that nothing would induce her to return to England, except on an occasional visit. She also named the churchyard where she wished to be buried, where she was afterwards buried:—*Held*: (1) her acts & declarations did not show a sufficient intention to change her domicile, & assuming she intended to give up her English domicile, until she acquired a new domicile, her English domicile continued, & the Crown was entitled to legacy duty; (2) Succession Duty Act, 1853 (c. 51), applies to all persons wherever domiciled.

(3) The proof lies upon the party who asserts the change of domicile (*PIGOTT, B.*).—*A.-G. v. BLUCHER DE WAHLSTATT (COUNTESS)* (1864), 3 H. & C. 374; 5 New Rep. 135; 34 L. J. Ex. 29; 11 L. T. 454; 10 Jur. N. S. 1159; 13 W. R. 163; 159 E. R. 576.

Annotations:—*As to* (1) *Consd.* *Haldane v. Eckford* (1869), L. R. 8 Eq. 631. *Refd.* *Douglas v. Douglas, Douglas v. Webster* (1871), L. R. 12 Eq. 617.

36. ————.]—(1) The law is, beyond all doubt, clear with regard to the domicile of birth, that the personal status indicated by that term clings & adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired (*LORD CAIRNS, C.*). The domicile of origin adheres until a new domicile is acquired (*LORD WESTBURY*). (2) The onus of proving a change of domicile is on the party who alleges it (*LORD CHELMSFORD*).—*BELL v. KENNEDY* (1868), L. R. 1 Sc. & Div. 307, H. L.

Annotations:—*As to* (1) *Consd.* *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435; *Re Marrett, Chalmers v. Wingfield* (1887), 36 Ch. D. 400; *Winans v. A.-G.*, [1904] A. C. 287. *Distd.* *Huntly v. Gaskell*, [1906] A. C. 56. *Refd.* *Re Tootal's Trust* (1883), 23 Ch. D. 532; *Re Patience, Patience v. Main* (1885), 29 Ch. D. 976; *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431; *Re Craignish, Craignish v. Hewitt*, [1892] 3 Ch. 180; *Waddington v. Waddington* (1920), 36 T. L. R. 359. *As to* (2) *Consd.* *Casdagli v. Casdagli*, [1919] A. C. 145.

37. ————.]—A person's domicile of origin remains unless he acquires a new domicile of choice by residence in another country with the intention of permanently residing there. If he puts an end to his domicile of choice, his domicile of origin reverts. A mere intention to abandon the domicile of choice is not enough; the abandonment must be *animo et facto*.—*Re MARRETT, CHALMERS v. WINGFIELD* (1887), 36 Ch. D. 400; 57 L. T. 896; 36 W. R. 344; 3 T. L. R. 707, C. A. *Annotation*:—*Consd.* *Abdallah v. Rickards* (1888), 4 T. L. R. 622.

38. ————.]—The onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues unless a fixed & settled intention of abandoning the first domicile & acquiring another as the sole domicile is clearly shown.

An American citizen left the United States & lived many years in England, where he died, leaving by will a legacy on which the Crown claimed legacy duty on the ground that testator had acquired a domicile in England:—*Held*: the onus of showing a change of domicile was upon the Crown & the proof of a fixed & settled purpose was not clearly made out & legacy duty was not

payable.—**WINANS v. A.-G.**, [1904] A. C. 287; 73 L. J. K. B. 613; 90 L. T. 721; 20 T. L. R. 510, H. L.; *reusg.* S. C. *sub nom.* A.-G. v. **WINANS** (1901), 85 L. T. 508, C. A.

Annotations:—**Consd.** *Casdagli v. Casdagli*, [1919] A. C. 145. **Refd.** *Re De Almeda, Sourdis v. Keyser* (1902), 18 T. L. R. 414; *Re James, James v. James*, (1908), 98 L. T. 438; *Waddington v. Waddington* (1920), 36 T. L. R. 359; *Lord Advocate v. Jaffroy*, [1921] 1 A. C. 146.

39. ——— **Until extinguishment—By act of law.**—**UDNY v. UDNY**, No. 19, *ante*.

40. **Revival—On abandonment of domicile of choice.**—(1) A British subject domiciled abroad must conform in his testamentary acts to the formalities required by the *lex domicilii* even though he was a natural-born subject & showed evidence of an *animus revertendi* & claimed to be considered & treated as a British subject.

(2) For the purpose of the rule *mobilia sequuntur personam* it is necessary to ascertain the national character of the person & in so doing the character acquired from the place of birth is first to be considered & is to prevail until the party manifested & carried into execution an intention of abandoning the former domicile & taking another as a fixed & permanent domicile. Such a change of intention may be manifested by long residence, marriage, naturalisation, change of religion, or by the person investing himself with the privileges which could be acquired at his place of residence. On the intentional abandonment of such a domicile of choice the domicile of origin revives.

(3) The will & first two codicils of a British-born subject naturalised & resident in the Portuguese dominions disposing of effects in Portugal & in England & executed & purporting to be executed according to Portuguese law were admitted to probate, but two later codicils disposing solely of money in the British funds but not executed nor purporting to be executed according to Portuguese law refused probate.—**STANLEY v. BERNES** (1830), 3 Hag. Ecc. 373; 162 E. R. 1190.

Annotations:—*As to* (1) **Consd.** *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. C. 286. **Refd.** *Price v. Dewhurst* (1838), 4 My. & Cr. 76; *Craigie v. Lewin* (1843), 3 Curt. 435; *Croker v. Hertford* (1844), 4 Moo. P. C. C. 339; *Laneville v. Anderson* (1853), 21 L. T. O. S. 209; *Bremer v. Freeman* (1857), 10 Moo. P. C. C. 506; *Whicker v. Hume* (1858), 7 H. L. Cas. 125; *Crispin v. Dogliani* (1863), 3 Sw. & Tr. 96; *Bloxam v. Favre* (1883), 8 P. D. 101. *As to* (2) **Refd.** *A.-G. v. Dunn* (1840), 6 M. & W. 511; *Anderson v. Laneville* (1854), 9 Moo. P. C. C. 325. *As to* (3) **Consd.** *De Bonneval v. De Bonneval* (1838), 1 Curt. 856.

41. ——— ———.]—(1) The domicile of origin does not revive until an acquired domicile is finally abandoned.

(2) A domicile once acquired remains until finally abandoned or another is acquired; the length of time is not important, one day will be sufficient, provided the *animus* exists: if a person goes from one country to another, with the intention of remaining, that is sufficient; whatever time he may have lived there is not enough, unless there be an intention of remaining.

(3) A person, in order to make a valid will, must conform to the law of the country where he is domiciled; just as where he makes no will, he must be supposed to have intended distribution according to the law of that country.

(4) A native Scotsman, having, by employment in the military service of the East India Co. acquired a domicile in India:—**Held**: by his return to Scotland on leave *animo manendi* his original domicile did not revive, the party still

holding his commission & being liable to be called upon to return to India, & intending to return if called upon to do so.—**CRAIGIE v. LEWIN** (1843), 3 Curt. 435; 2 Notes of Cases, 185; 7 Jur. 519; 163 E. R. 782.

Annotations:—*As to* (1) **Consd.** *Aikman v. Aikman* (1861), 4 L. T. 374. *As to* (4) **Consd.** *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. C. 286. **Refd.** *Forbes v. Forbes* (1854), Kay, 341; *Jopp v. Wood* (1864), 34 Beav. 88. *Generally, Refd.* *A.-G. v. Pottinger* (1861), 6 H. & N. 741.

42. ——— ———.]—**HOSKINS v. MATTHEWS**, No. 120, *post*.

43. ——— ———.]—**UDNY v. UDNY**, No. 19, *ante*.

44. ——— ———.]—Testator was born in Scotland in 1797. In 1822, his father with all his family, including testator, left Scotland permanently & emigrated to New Brunswick. In 1846 testator came to England, entered himself at C. College, Cambridge, & in 1850 took a degree. He was soon afterwards ordained. He returned to America & between 1850 & 1854 was professor of mathematics at colleges in Virginia, Pennsylvania & Ohio. In 1855 he returned to England, resided for some time in college at Cambridge & took occasional clerical duty in Cumberland & other places, including Rouen. His most permanent engagement was at a small parish near Cambridge, where he served the church, residing during the week at his college. Between 1860 & 1865 he visited America, & in a letter written from New Brunswick in July, 1864, he expressed his intention of settling himself among his friends in the United States. This intention was not carried out in consequence of the war & his subsequent illness. He died in 1869 in England. His property was invested in American securities & the exors. of his will were citizens of the United States of America:—**Held**: if testator ever acquired a New Brunswick domicile he had abandoned it, & if he did not subsequently acquire an English domicile he was domiciled in Scotland, his domicile of origin having reverted.—**THOMPSON v. BIRCH**, [1876] W. N. 278, C. A.

45. ——— ———.]—(1) In order to change his domicile of origin a man must voluntarily fix his sole or principal residence in a country which is not his country of origin with the intention of residing there for a period not limited as to time. The domicile so acquired may be put an end to simply by abandoning it without acquiring a new domicile of choice, & in such a case the domicile of origin reverts.

(2) Naturalisation is neither essential to nor conclusive of domicile; it is important as evidence of an intention to reside permanently.

K., an Englishman, emigrated to the United States of America in 1851, where he carried on a shoemaker's trade; in 1856 he was admitted as a citizen of the United States of America. He buried his first wife in America, & remarried there in 1866:—**Held**: he had acquired an American domicile of choice.

K. left America in 1867, without the intention of returning, lived an unsettled life in England, where he made his will. He died suddenly in Jersey, in 1871:—**Held**: his English domicile of origin had reverted.—**KING v. FOXWELL** (1876), 3 Ch. D. 518; 45 L. J. Ch. 693; 24 W. R. 629.

Annotations:—*As to* (1) **Consd.** *Re Grove, Vaucher v. Treasury Solicitor* (1888), 40 Ch. D. 216; *A.-G. v. Winans* (1901), 85 L. T. 508. **Refd.** *Doucet v. Geoghegan* (1878), 9 Ch. D. 441.

40 i. **Revival—On abandonment of domicile of choice.**—Where a person leaves his domicile of choice without any intention of returning, his domicile of origin is immediately restored, &

retained until he acquires a new domicile of choice.—**STRIKE v. GLEICH** (1879), O. B. & F. 50.—**N.Z.**

40 ii. ——— ———.]—Removal from the Union under Act 22 of 1913, s. 22,

extinguishes a domicile of choice & revives the domicile of origin until a new domicile of choice is acquired.—*Ex p.* **DONNELLY**, [1915] W. L. D. 29.—**S. AF.**

Sect. 2.—Creation, adherence and revival of domicile: Sub-sects. 1 & 2. Sect. 3: Sub-sect. 1, A.]

46. ———.]—In 1855 a domiciled Manxman came to England & married an Englishwoman & resided in England for twenty years. At the date of the marriage the wife was entitled to a vested reversionary interest in a legacy which fell into possession in 1885. In 1875 the husband & wife returned to the Isle of Man, where the husband carried on business till 1878, when he became insolvent & executed a deed of assignment of all his property, including his wife's interest in the legacy, for the benefit of his creditors. In 1880 the parties returned to England, where they resided till 1882, when the husband went to Mexico to seek employment. The doctrine of a wife's equity to a settlement is unknown to Manx law:—*Held*: the Manx domicile of the husband, which had been lost by the twenty years' residence in England, reverted on his return to the Isle of Man & nothing happened afterwards to re-establish the English domicile, & as the domicile was therefore Manx the wife's equity to a settlement could not be asserted.—*Re MARSLAND* (1886), 55 L. J. Ch. 581; 54 L. T. 635; 34 W. R. 540; 2 T. L. R. 608. *Annotation*:—*Distd. Re De Nicols, De Nicols v. Curlier*, [1898] 1 Ch. 403.

47. ———.]—*Re MARRETT, CHALMERS v. WINGFIELD*, No. 37, *ante*.

48. ———.]—In 1839 N., a domiciled Englishwoman, being then an infant, married in France a Frenchman. Previously to the marriage she entered into a notarial contract dealing with her property according to French law. There were children of the marriage. In 1845 she separated from her husband & went with her children to reside in Jersey. In 1849 an act of separation of property between the husband & wife was made by the Royal Cts. of Jersey. In 1853 N., believing her husband to be dead, went through the ceremony of marriage with B. & accompanied him & her children to New South Wales where she lived until her death in 1879. Her husband did not in fact die until 1877. In 1878 she made a will by which she left all her property to B.:—*Held*: (1) by going to New South Wales N. had acquired a new domicile there, inasmuch as there were present both the elements necessary for such acquisition, namely, the *factum* & the *animus manendi*; but even if not so, it must be taken that she had abandoned her French domicile & that her English domicile of origin had revived; (2) the validity of the notarial contract must be decided according to the law of her domicile of origin & consequently she being an infant such contract was invalid; therefore there was nothing to prevent her making a will or to disentitle B. to take under it as against the children of the French marriage.—*Re COOKE'S TRUSTS* (1887), 56 L. J. Ch. 637; 56 L. T. 737; 35 W. R. 608; 3 T. L. R. 558.

Change.]—*See Sect. 3, post.*

SUB-SECT. 2.—DOMICIL OF CHOICE.

49. Created by party.]—UDNY *v.* UDNY, No. 19, *ante*.

PART II. SECT. 3, SUB-SECT. 1.—A.

50 i. *Intention & act necessary.*]—A domicile of origin continues unless a fixed & settled intention of abandoning it & acquiring another is clearly shown.—*COLEMAN v. COLEMAN*, [1919] 3 W. W. R. 490.—CAN.

51 i. *Presumption against change of domicile—Intention & act necessary.*]—The domicile of origin will be presumed to continue until a new one is acquired. To effect a change of the domicile of origin there must not only be a change of residence but an intention to abandon

Requisites of acquisition.]—*See Sect. 3, sub-sect. 1, B., post.*

Abandonment of.]—*See Sect. 3, sub-sect. 2, post.*

SECT. 3.—CHANGE OF DOMICIL.

SUB-SECT. 1.—IN GENERAL.

A. Domicil of Origin.

50. *Intention & act necessary.*]—(1) The purchase of a house to reside in is a strong point in the question of domicile. The circumstances connected with the purchase show an intention of permanent abode there.

(2) Occasional or even annual visits to a place of former domicile are not sufficient *per se* to retain that domicile.

(3) Intention alone is not sufficient to change a domicile.

(4) Stronger facts are required to change a domicile of origin than an acquired domicile.

(5) An intention to abandon an acquired domicile, which is not a mere temporary residence, upon a certain contingency happening, does not destroy that domicile.

(6) A. was born in Ireland, where he inherited a considerable landed estate, which belonged to him till his death. At nineteen he was sent to France to be educated & there formed an attachment to L., who, during the French Revolution, saved his life & procured his escape to England. For about forty years afterwards he resided in England, in a house which he occupied, until he advertised in the French papers for L., of whom he had lost sight. On discovering her, he sold off all his furniture & broke up his English establishment & went to France & lived for thirteen years with L., in a house which they bought jointly, till his death which took place there. During all this time he never returned to Ireland & only visited England periodically for purposes of business; but he used to say, if L. died, he would return & live in England. Almost all his property was money in the English funds:—*Held*: his domicile was France.—*ANDERSON v. LANEUVILLE* (1854), 9 Moo. P. C. C. 325; 2 Ecc. & Ad. 41; 24 L. T. O. S. 281; 14 E. R. 320, P. C.; *affg.* S. C. *sub nom.* LANEUVILLE *v.* ANDERSON (1853), 21 L. T. O. S. 209; *subsequent proceedings, sub nom.* LANEUVILLE *v.* ANDERSON (1860), 2 Sw. & Tr. 24.

Annotations:—*As to* (1) & (2) *Reid. Hoskins v. Matthews* (1855), 24 L. T. O. S. 231. *As to* (6) *Consd. Bremer v. Freeman* (1856), Dea. & Sw. 192. *Reid. Dease v. Kelly* (1852), 2 Rob. Eccl. 510; *Bremer v. Freeman* (1857), 10 Moo. P. C. C. 232.

51. ———.]—(1) The presumption of law is against the intention to abandon the domicile of origin.

(2) Length of residence in a foreign country *per se*, according to time & circumstances, raises a presumption of intention to abandon the domicile of origin, & to acquire a new domicile, but such presumption may be rebutted by facts, showing that there was no such intention. A change of domicile is not to be inferred from the fact of a lengthened residence in a foreign country. To constitute a change of domicile it must be *animo et facto*.

the former domicile & acquire another. Long-continued residence is strong evidence of intent to change the domicile, but alone & unaccompanied by the intent will not effect the change. The question is, in all cases, a question of fact to be determined by the par-

H., a domiciled Englishman in the military service of the East India Co., came to England from India in the year 1829, upon furlough. By the rules of the service, H. was liable at any time to be recalled to India on active service. In the year 1838, he acquired the brevet rank of Major-General in Her Majesty's army. While on furlough & in the year 1832, he went to France, where he resided with his wife & daughter & died there in 1855. He occupied lodgings during that time in Paris. He also purchased a burial-place for his wife, who died & was buried there & purposed to be buried there himself. His residence in Paris was not continuous, as he frequently came to England & Scotland upon visits, but he had no permanent abode in either of those countries, nor did he give up his lodgings in Paris during these visits. All his property, except the furniture of the lodgings in Paris, was in England:—*Held*: (3) it was not competent to H. to acquire a domicile in a foreign state, as such domicile was incompatible with the obligations & duty of an officer in the military service of the Queen & the East India Co.; (4) the presumption of law arising from his profession & status was against any intention by H. to abandon his original domicile & acquire a new domicile in a foreign state, as it would be inconsistent to presume an intention contrary to his duty as an officer in the military service of Her Majesty & the East India Co.; (5) England being the domicile of origin of H., the *onus probandi* was upon the party who alleged H. had abandoned it & had acquired another domicile, to establish that proposition; (6) the presumption raised by H.'s residence in France, of his intention to acquire a French domicile, was rebutted by the facts proved in evidence.—*HODGSON v. DE BEAUCHESNE* (1858), 12 Moo. P. C. C. 285; 33 L. T. O. S. 36; 7 W. R. 397; 14 E. R. 920, P. C.

Annotations:—As to (1) *Refd.* Crookenden v. Fuller (1859), Sea. & Sm. 3. As to (2) *Consd.* Hamilton v. Dallas (1875), 1 Ch. D. 257; *Re* Patience, Patience v. Main (1885), 29 Ch. D. 976. *Refd.* Maxwell v. Machure (1860), 2 L. T. 65; Moorhouse v. Lord (1863), 10 H. L. Cas. 272; Jopp v. Wood (1865), 4 De G. J. & Sm. 616; King v. Foxwell (1876), 45 L. J. Ch. 693; Doucet v. Geoghegan (1878), 9 Ch. D. 441; A.-G. v. Winans (1901), 85 L. T. 508. As to (3) *Consd.* A.-G. v. Pottinger (1861), 6 H. & N. 733. *Expld.* *Re* Mitchell, *Ex p.* Cunningham (1884), 13 Q. B. D. 418. As to (4) *Consd.* Hamilton v. Dallas (1875), 1 Ch. D. 257. As to (6) *Consd.* *Re* Mitchell, *Ex p.* Cunningham (1884), 13 Q. B. D. 418.

52. ———.]—In order to lose a domicile of origin & to acquire a new domicile, a man must intend *quatenus in illo exuere patriam*. It is not enough for him to take a house in the new country, even with the probability & the belief that he may remain there all the days of his life. Change of residence alone, however long continued, does not effect a change of domicile as regulating the testamentary acts of the individual. There must be an intention to change the domicile.

C., born in Scotland, went to India & acquired an Anglo-Indian domicile. On his return to Europe he settled in Scotland, at his native place, occupying the family estate. After some years he left Scotland, where, however, he still kept up his house & went to France, chiefly for the benefit of his health & for special reasons & rented an unfurnished house there till he died, in France:—*Held*: Scottish domicile had been re-acquired & had not been changed by the residence in France.

particular circumstances of each case.—*DAVIS v. ADAIR*, [1895] 1 L. R. 379.—*IR.*

51 ii. ———.]—The ct. does not lightly presume in favour of a change of domicile of origin; but, where the evidence satisfies a careful mind that there has been not merely a change of

residence into the new country but also an intention of establishing a permanent home there, the ct. will find that a domicile of choice has been acquired.—*CLEAR v. CLEAR* (1913), 4 C. P. D. 835.—*S. AF.*

52 i. ———.]—*Must not be taken*

A mere change of residence, however long continued, does not effect a change of domicile in a testamentary sense, unless there is also an intention to change the domicile, or throw off his native country; *e.g.* if an Englishman go to France he must not only reside in France, but intend to become a Frenchman instead of an Englishman, before his domicile will be held changed.—*MOORHOUSE v. LORD* (1863), 10 H. L. Cas. 272; 1 New Rep. 555; 32 L. J. Ch. 295; 8 L. T. 212; 9 Jur. N. S. 677; 11 W. R. 637; 11 E. R. 1030, H. L.

Annotations:—*Consd.* *Re* Mitchell (1863), 33 L. J. Ch. 187; Allardice v. Onslow (1864), 33 L. J. Ch. 434; *Re* Capdevielle (1864), 2 H. & C. 985; Drevon v. Drevon (1864), 4 New Rep. 316; Pitt v. Pitt (1864), 10 L. T. 626; Jopp v. Wood (1865), 4 De G. J. & Sm. 616; Haldane v. Eckford (1869), L. R. 8 Eq. 631; Brunel v. Brunel (1871), L. R. 12 Eq. 298; King v. Foxwell (1876), 45 L. J. Ch. 693; A.-G. v. Winans (1901), 85 L. T. 508. *Refd.* A.-G. v. Blucher de Wahlstatt (1864), 3 H. & C. 374; Sharpe v. Crispin (1869), L. R. 1 P. & D. 611; Udny v. Udny (1869), L. R. 1 Sc. & Div. 441; Douglas v. Douglas, Douglas v. Webster (1871), 25 L. T. 530; Winans v. A.-G., [1904] A. C. 287; Huntly v. Gaskell, [1906] A. C. 56; *Re* James, James v. James (1908), 98 L. T. 438; Casdagli v. Casdagli, [1919] A. C. 145. *Mentd.* *Re* Lord's Estate, Lord v. Lord (1867), 17 L. T. 105.

53. ———.]—*JOPP v. WOOD*, No. 18, *ante*.

54. ———.]—*How proved*.—(1) For many purposes a domicile of origin requires more to change it than a domicile of acquisition, & in order to prove that the domicile of an adult of sound mind has been changed an intention on his part must be shown. It might be convenient to insist as evidence of the requisite intention on the proof of a desire to change the civil status of the party, as that would leave the question to be governed by the domicile of origin, but such although the stricter rule is not that of the law of England. All which that law requires is proof of an intention to settle in a new country as a permanent home. If that is proved certain legal consequences ensue, whether intended or not, & even although perhaps the exact contrary of those consequences may have been intended. The evidence necessary to support the intention must be either express, or such as to show that if the question had been formally submitted to the party whose domicile is in dispute he would have declared his wish in favour of a change, *i.e.* such an intention must be proved to have actually existed in the mind of the party, or it must appear that it was reasonably certain it would have existed, if the question had arisen in a form requiring a deliberate & solemn determination.

(2) The widow of a domiciled Scotsman filed a bill in this ct. for the administration of her husband's estate, under an English will, & prayed *inter alia* that her infant children should elect & collate, in order to enable her to ascertain her rights & remedies according to Scots law, & insisted on a Scottish domicile. The residuary legatee under the English will filed a cross bill, to establish an English domicile & for the administration of the estate accordingly:—*Held*: the questions raised by the widow were well raised, & could be disposed of by this ct.

(3) A child of Scottish parents for some time resident in England, who was born there & was for many years himself a resident with his wife & children there, died & was buried in England:—*Held*: he had not lost his Scottish domicile of origin.—*DOUGLAS v. DOUGLAS*, *DOUGLAS v.*

separately.—Neither length of time nor intention, taken separately, will do to establish a change of domicile of origin, although the two taken together may work a change.—*WALCOTT v. WALCOTT* (1915), 48 N. S. R. 322.—*CAN.*

Sect. 3.—Change of domicile: Sub-sect. 1, A. & B.; sub-sect. 2, A.]

WEBSTER (1871), L. R. 12 Eq. 617; 41 L. J. Ch. 74; 25 L. T. 530; 20 W. R. 55.

Annotations:—As to (1) & (3) **Consd.** Platt v. A.-G. of New South Wales (1878), 3 App. Cas. 336; Winans v. A.-G., [1904] A. C. 287. **Refd.** Doucet v. Geoghegan (1878), 9 Ch. D. 441; Re Garden (1895), 11 T. L. R. 167; Casdagli v. Casdagli, [1919] A. C. 145. **Generally, Refd.** Re Hancock, Hancock v. Pawson, [1905] 1 Ch. 16.

— Sufficiency of proof.]—See Sect. 3, sub-sect. 2, *post*.

55. Presumption against change of domicile.]—HODGSON v. DE BEAUCHESNE, No. 51, *ante*.

56. Stronger presumption against acquisition of domicile in foreign country—Than in country where not foreigner.]—HODGSON v. DE BEAUCHESNE, No. 51, *ante*.

57. ———.]—(1) That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself & his family, not for a mere special & temporary purpose, but with a present intention of making it his permanent home, unless & until something which is unexpected or uncertain shall occur to induce him to adopt some other permanent home.

(2) To constitute an acquired domicile two things must concur, residence & the intention of making it the home of the party.

(3) Slighter evidence is required to warrant the conclusion that a man intends to abandon an acquired domicile, & to resume his domicile of origin, than is necessary to justify the conclusion that he means to abandon his domicile of origin & to acquire a new one.

(4) It requires stronger & more conclusive evidence to justify the *ct.* in deciding that a man has acquired a new domicile in a foreign country than in one where he is not a foreigner.

A person was born in Scotland, resided many years in India, returned to Scotland & lived in his paternal house for six years; then resided in France for six years, & died at Boulogne, on his return from a journey to Scotland, where he had been for some weeks. He was said to have preferred France & to have been annoyed by his neighbours in Scotland. He had apartments at Paris & furnished them handsomely. He sent for his horses, but not for his furniture or plate, from Scotland. He never let his paternal estate, & attended to the management of it:—**Held:** he had not abandoned his Scottish domicile.—**LORD v. COLVIN** (1859), 4 Drew. 366; 28 L. J. Ch. 361; 32 L. T. O. S. 377; 5 Jur. N. S. 351; 7 W. R. 250; 62 E. R. 141; *subsequent proceedings* (1860), 1 Drew. & Sm. 24; 3 L. T. 228.

Annotations:—As to (3) & (4) **Consd.** Crookenden v. Fuller (1859), Sea. & Sm. 3. **Expld.** Jopp v. Wood (1864), 34 Beav. 88. **Refd.** Stirling-Maxwell v. Cartwright (1879), 48 L. J. Ch. 562.

58 i. Presumption 'in favour of original domicile.]—Although very clear evidence is in general necessary to establish a change of the domicile of origin, much slighter evidence is sufficient where the existence of the domicile of origin rests only on legal presumptions.—**SELIS v. RHODES** (1905), 26 N. Z. L. R. 87.—**N.Z.**

58 ii. ———.]—Circumstances which would warrant the inference of a change of residence from one province in C., wherein a person has his domicile of origin, to another province would not necessarily warrant the inference of a change to a foreign domicile.—**FAIRCHILD v. MCGILLIVRAY** (1911), 16 W. L. R. 562.—**CAN.**

PART II. SECT. 3, SUB-SECT. 1.—B.

u. General rule.]—The domicile of choice may be more readily abandoned

than a domicile of origin.—**v. WHITEHOUSE** (1900), 21 N. S. W. L. R. 16; 17 N. S. W. W. N. 123.—**AUS.**

60 i. Evidence required.]—In the absence of evidence of a contrary intention, the acquirement of a domicile of choice may be inferred from the circumstances under which a person left his domicile of origin & the length of his residence in the jurisdiction where the domicile of choice is alleged to have been acquired.—**Re SEILO ESTATE**, [1918] 1 W. W. R. 441.—**CAN.**

60 ii. ———.]—Where a domicile of origin is proved it lies upon one asserting a change of domicile to establish it; no presumption of change of domicile arises from mere change of residence.—**COLEMAN v. COLEMAN**, [1919] 3 W. W. R. 490.—**CAN.**

58. Presumption in favour of original domicile.]—(1) A change of domicile must be a residence *sine animo revertendi*. A temporary residence for the purposes of health, travel, or business does not change the domicile.

(2) Every presumption is to be made in favour of the original domicile.

(3) No change can occur without an actual residence in a new place.

(4) No new domicile can be obtained without a clear intention of abandoning the old.—**THE LAUDERDALE PEERAGE** (1885), 10 App. Cas. 692, H. L.

Annotations:—As to (2) **Refd.** Winans v. A.-G., [1904] A. C. 287; Casdagli v. Casdagli, [1919] A. C. 145. **Generally, Mentd.** The Lovat Peerage (1885), 10 App. Cas. 763.

59. By British peer.]—(1) A peer of the British Parliament is not, by reason of his obligation to attend the House of Peers whenever his presence there is required, incapacitated from acquiring a domicile of choice in a foreign country.

(2) A *de facto* domicile governing the succession to personal property of which he dies intestate may be acquired in France by a foreigner who has not obtained the Government authorisation imposed by the Code Napoleon, Art. 13, as the condition for enjoyment by a foreigner resident in that country of full civil rights.—**HAMILTON v. DALLAS** (1875), 1 Ch. D. 257; 45 L. J. Ch. 15; 33 L. T. 495; 24 W. R. 264; *subsequent proceedings* (1878), 38 L. T. 215.

Annotation:—As to (2) **Refd.** Casdagli v. Casdagli, [1918] P. 89.

Proof of change of domicile.]—See Sect. 3, sub-sect. 4, *post*.

B. Domicil of Choice.

60. Evidence required.]—**ANDERSON v. LANEUVILLE**, No. 50, *ante*.

61. ———.]—**LORD v. COLVIN**, No. 57, *ante*.

62. ———.]—**JOPP v. WOOD**, No. 18, *ante*.

63. Intention & act necessary—Mere abandonment not sufficient—Party in itinere to intended domicile.]—An acquired domicile is not lost by mere abandonment, but continues until a subsequent domicile is acquired, which can only be, *animo et facto*, unless the party die *in itinere*, toward an intended domicile.—**MUNROE v. DOUGLAS** (1820), 5 Madd. 379; 56 E. R. 940.

Annotations:—**Consd.** Lyall v. Paton (1856), 25 L. J. Ch. 746; Jopp v. Wood (1865), 34 L. J. Ch. 212; Udny v. Udny (1869), L. R. 1 Sc. & Div. 441. **Refd.** Forbes v. Forbes (1851), Kay, 311; Hodgson v. De Beauchesne (1858), 12 Moo. P. C. C. 286.

64. ——— Mere intention of leaving not sufficient.]—**Re MARRETT, CHALMERS v. WINGFIELD**, No. 37, *ante*.

65. ——— Party in itinere to intended domicile.]—**FORBES v. FORBES**, No. 21, *ante*.

———.]—See No. 63, *ante*.

———.]—See, further, Sub-sect. 2, F., *post*.

63 i. Intention & act necessary—Mere abandonment not sufficient.]—A. had acquired a domicile of choice in C.: he left his wife & went to live in T. for some years:—**Held:** there was no proof that he had changed his domicile.—**ADAMS v. ADAMS** (1882), 2 S. C. 24.

w. ——— Imprisonment not sufficient.]—Confinement in prison in another country is not an abandonment of an acquired domicile.—**MOFFAT v. MOFFAT** (1866), 3 W. W. & A.R. 87.—**AUS.**

y. ———.]—A. was born in C., & acquired a domicile in N.S.W. He was imprisoned in Q. for a long term:—**Held:** his N.S.W. domicile was not abandoned.—**WHITEHOUSE v. WHITEHOUSE** (1900), 21 N. S. W. L. R. 16; 17 N. S. W. W. N. 123.—**AUS.**

66. Residence in another country for two years for temporary purpose.]—A Scotsman who had acquired a domicile of choice in England, went to reside for two years in France & then returned to England, where he died. By an unsigned testamentary instrument in the Scottish form, & containing several technical words of Scottish law, which had been admitted to probate in England, he purported to appoint the residue of his personal estate to his natural daughter, & failing her & her issue, the life-rent of the residue to belong to & be enjoyed by her husband, if she should have left a husband surviving her, & failing his daughter & her issue & on the decease of her husband, either before or after his daughter, he appointed his brother for his life-rent use, & his lawful children, or their issue in fee or remainder, his residuary legatees. The daughter never married:—*Held*: the domicile of testator being English & there being no indication that testator intended the will to be construed according to Scottish law, the will was to be construed as an English will, & upon the true construction the personal representative of the daughter was absolutely entitled to the residue.—*BRADFORD v. YOUNG* (1885), 29 Ch. D. 617; 53 L. T. 407; 33 W. R. 860, C. A.

SUB-SECT. 2.—EVIDENCE OF CHANGE OF DOMICIL.

A. Expressions of Intention.

67. General rule—Cannot override acts.]—The expression of an intention not to renounce a domicile of origin cannot prevail against the intention & facts collected from the acts of the party, if those are otherwise sufficient to constitute a domicile abroad. Therefore, where a testator left England, & took up his residence at Hamburg, & the facts showed that he intended to live there permanently, & he did live & die there:—*Held*: his domicile was there, notwithstanding that in a will made during a visit to England, testator said that although he intended to return to Hamburg, he did not mean by such declaration of intention to renounce his domicile of origin as an Englishman.—*Re STEER* (1858), 3 H. & N. 594; 28 L. J. Ex. 22; 32 L. T. O. S. 130; 157 E. R. 606.

Annotations:—*Consd.* *Re Marrett, Chalmers v. Wingfield* (1887), 3 T. L. R. 392. *Refd.* *A.-G. v. Pottinger* (1861), 6 H. & N. 733; *Winans v. A.-G.*, [1904] A. C. 287; *Casdagli v. Casdagli*, [1919] A. C. 143.

Form & contents of wills.]—*See, further*, Subsect. 2, C., *post*.

PART II. SECT. 3, SUB-SECT. 2.—A.

67 i. General rule—Cannot override acts.]—M. was born in L. in 1827 of English parents. In 1852 he went to U.S.A. as agent for his father's business in L., but visited England every year. In 1858 he married an American. He purchased a house & land in U.S.A., & he also bought a fishing in C., where he went every year. He refused to become a naturalised citizen of U.S., & frequently expressed the intention of returning to England as soon as he had made his fortune. His wife died in L. in 1884. In 1888 he retired from business, & sold most of his property in U.S.A.; & in 1891, married another American in U.S.A. In 1892 he bought a property in England:—*Held*: M.'s domicile was American.—*DAVIS v. ADAIR*, [1895] 1 I. R. 379.—*IR.*

69 i. To renounce domicile.]—K. carried on business in St. J. as a brewer, up to 1893, when he sold the brewery to his sons, & conveyed his home & furniture to his adult children, in trust for them all. He then went to N.Y., where he carried on a business, having offices for such business & living at a

hotel. He avowed his *bonâ fide* intention of making it his home permanently, or at least for an indefinite time, & his determination not to return to St. J. to reside. He spent about four months in each of four years at St. J., visiting his children & taking recreation:—*Held*: he had acquired a new domicile, & that in St. J. had been abandoned.—*JONES v. CITY OF ST. JOHN* (1899), 20 C. L. T. Occ. N. 112; 30 S. C. R. 122.—*CAN.*

z. — Endeavour to shake off nationality.]—Although domicile is independent of nationality, the fact that a person does all he can to shake off his nationality & to sever his connection with his country is strong evidence of his intention to abandon his domicile in it.—*SELLS v. RHODES* (1905), 26 N. Z. L. R. 37.—*N.Z.*

69 ii. — Residence & death abroad.]—W., whose domicile of origin was Irish, & who was an officer in British Army in 1859, was sent with his regiment to S. Af. While there he was discharged from the army, & married there in 1867. In 1879, his first wife having died, he married there again & in 1887 made a joint will with

68. General rule—Cannot override acts.]—(1) If the acts of a person reasonably indicate that he intends to make his home for an indefinite period in a foreign country, the fact that he declares from time to time his intention ultimately to return to his native country will not be sufficient to prevent his acquiring a domicile of choice in the foreign country.

(2) Domicile as distinguished from allegiance discussed (*see* No. 26, *ante*).—*A.-G. v. WINANS* (1900), 83 L. T. 634; 65 J. P. 8; 17 T. L. R. 94, D. C.; *affd.* (1901), 85 L. T. 508, C. A.; *reversd.* on other grounds, *sub nom.* *WINANS v. A.-G.*, [1904] A. C. 287, H. L.

Annotations:—*As to* (1) *Consd.* *Casdagli v. Casdagli*, [1919] A. C. 145. *Refd.* *Re De Almeida, Sourdís v. Keyser* (1902), 18 T. L. R. 414; *Re James, James v. James* (1908), 98 L. T. 438; *Waddington v. Waddington* (1920), 36 T. L. R. 359; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146. *As to* (2) *Refd.* *Waddington v. Waddington* (1920), 36 T. L. R. 359.

69. To renounce domicile—Death abroad.]—An Englishwoman resided uninterruptedly in France for a period of fifteen years, without any business or occupation in that country; renting apartments upon lease, and making declarations never to return to England; providing, moreover, a vault in the cemetery of Père la Chaise in Paris, where she expressed her wish to be buried. In 1842, she made a will in Paris in the English form, executed according to the Wills Act, 1837 (c. 26), but not in accordance with the requirements of the French law. By this will she bequeathed personal property, the bulk of which was in the English funds, to parties resident in England. The deceased at the time of making the will & at her death was not naturalised in France, nor had she obtained any authorisation as required by the 13th Art. of the Code Napoleon.

Held: (1) by the *jus gentium* deceased was *de facto* domiciled in France, & the authorisation of the French Government was not necessary in order to give the right of testacy.

(2) The will not having been executed in conformity with the requirements of the law of the domicile, was invalid, & probate refused.—*BREMER v. FREEMAN* (1857), 10 Moo. P. C. C. 306; 29 L. T. O. S. 251; 5 W. R. 618; 14 E. R. 508, P. C.

Annotations:—*As to* (1) *Refd.* *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. C. 285; *Crookenden v. Fuller* (1859), 1 Sw. & Tr. 441; *Hamilton v. Dallas* (1875), 1 Ch. D. 257. *As to* (2) *Consd.* *Crookenden v. Fuller* (1859), *Sea. & Sm.* 3. *Distd.* *Hamilton v. Dallas* (1875), 1 Ch. D. 257. *Consd.* *Pepin v. Bruyère*, [1900] 2 Ch. 504; *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442. *Refd.* *Whicker v. Hume* (1858), 7 H. L. Cas. 124; *Crispin v. Doglioni* (1863), 2 New Rep. 290; *Bloxam v. Favre* (1883), 8 P. D. 101; *Barrett v. Young*, [1900] 2 Ch. 339; *Re Martin, Loustalan v.*

his second wife in form in use in Cape Colony. He continued to reside from 1859 till his death in 1893 in S. Af. M. had spoken of his desire to return to L., & of so doing when his financial position had improved:—*Held*: M. had abandoned his Irish domicile, & was in 1864 domiciled in S. Af.—*MOFFETT v. MOFFETT*, [1920] 1 I. R. 57, 74.—*IR.*

69 iii. — — — — —.]—A Scotsman domiciled in S. went to T. in 1802, & remained there without interruption till 1838. He acquired estates, had establishments, carried on business. Between 1838 & 1850, he made very frequent visits to S., rented premises in Glasgow, where he carried on business through an agent, & purchased an estate in Argyshire, on which he built a mansion-house. This investment he spoke of as made to give employment to a nephew whom he made his heir. He had expressed an intention of "dying in harness" & none of returning permanently to S., & died at T. in 1850:—*Held*: his domicile was in Trinidad.—*LORD ADVOCATE v. LAMANT* (1857), 19 Dunl. (Ct. of Sess.) 779.—*SCOT.*

Sect. 3.—Change of domicil: Sub-sect. 2, A.
B. (a).]

Loustalan, [1900] P. 211; *Re Wernher*, *Wernher v. Belt*, [1918] 1 Ch. 339. *Generally, Mentd.* *Di Sora v. Phillippa* (1863), 10 H. L. Cas. 624; *Wilkinson v. Corfield* (1881), 6 P. D. 27; *Concha v. Murrieta*, *De Mora v. Concha* (1889), 40 Ch. D. 543; *Hanfstaengl v. Empire Palace* (1894), 70 L. T. 854.

70. ———.]—A will must be executed according to the law of the country where testator was domiciled at the time of his death.

The grant of probate not appealed against, conclusively established that it was so executed.

A. was born in Scotland; when a young man he went to the East Indies, where he remained above 20 years in the Co.'s service: he then returned to Scotland & lived in Edinburgh, where he put his name on the books of the municipality, married, took a house, entered into business as a partner in a banking-house, & became a member of various societies there established. At the end of a few years he left Edinburgh in anger, the banking business had come to an end, & he took off his name from the books of the municipality & of the various societies, and declared his intention never to return to "Auld Reekie": he lived in London, first in lodgings, & then in houses hired for different periods, lectured on Oriental literature, & endeavoured thereby to increase the sale of some books which he had written on the Hindustani language. At the end of some years he went to Paris to avoid some annoyances in London, but never made any such declarations with respect to London that he had made with respect to Edinburgh, & he left his works in London, & likewise some ornamental furniture which he desired a friend to keep for him till his return. He died in Paris, having just before made a will in English form, as "of Edinburgh," "now residing in . . . Paris":—*Held*: he had lost his Scottish, & obtained an English domicil.—*WHICKER v. HUME* (1858), 7 H. L. Cas. 124; 28 L. J. Ch. 396; 31 L. T. O. S. 319; 22 J. P. 591; 4 Jur. N. S. 933; 6 W. R. 813; 11 E. R. 50, H. L.

Annotations:—*Consd.* *Drevon v. Drevon* (1864), 34 L. J. Ch. 129; *Winans v. A.-G.*, [1904] A. C. 287. *Reid.* *Lord v. Colvin* (1859), 4 Drew. 366; *Moorhouse v. Lord* (1863), 10 H. L. Cas. 272; *Jopp v. Wood* (1865), 4 De G. J. & Sm. 616; *Bradford v. Young* (1884), 26 Ch. D. 656; *Re Patience*, *Patience v. Main* (1885), 29 Ch. D. 976. *Mentd.* *Crookenden v. Fuller* (1859), *Sea. & Sm.* 3; *Tardrew v. Howell*, *Parry v. Howell* (1861), 9 W. R. 296; *Beaumont v. Oliveira* (1869), 4 Ch. App. 309; *Thurburn v. Steward* (1871), L. R. 3 P. C. 478; *Concha v. Concha* (1886), 11 App. Cas. 541; *Jex v. McKinney* (1889), 14 App. Cas. 77; *Re Berridge*, *Berridge v. Turner* (1890), 62 L. T. 365; *Canterbury Corpn. v. Wyburn & Melbourne Hospital*, [1895] A. C. 89; *Re Macduff*, *Macduff v. Macduff*, [1896] 2 Ch. 451.

71. ——— Death in England—After return in special circumstances—Statements that except for such special circumstances party would never have returned.]—Testator was born in England, went to the United States in 1858, & between that time & 1861 he paid four visits to England. On the last visit in 1861, he was accompanied by an American lady whom he had just married in the United States of America, & whom he introduced as his wife. He carried on business in the United States, but had no private residence there, living himself in hotels, whilst his wife lived with her mother. In 1870 his wife obtained in New York a decree of dissolution of marriage. Testator then returned

to this country, & took apartments in London, & in 1875 he married an English lady, & took a private house. On more than one occasion he informed his second wife's father that if he had not been divorced from his first wife, he would never have returned to England. In 1881, testator died, having left his property to his second wife for life. She died in 1889, & a question arose as to the persons entitled to a portion of the testator's residuary personality which was not disposed of by his will. The first wife claimed that her right to the property undisposed of was not affected by the dissolution of her marriage by the New York decree, as testator's domicil was at the date of the decree not American, but English.

Held: at the date of the decree of dissolution of marriage testator's domicil was in the United States, & the decree must be treated as binding here. The first wife had no title, & the legal representatives of the second wife were entitled to the widow's share of testator's undisposed of property.—*Re ESCHMANN (DECEASED)* (1893), 9 T. L. R. 426.

— *In will.*]—*See* Sub-sect. 2, C., *post*.

72. To retain domicil—In England—Memorandum accompanying will.]—A. was born & educated in England, & for a time held a commission in her Majesty's army. In 1835 he sold out, married an English woman, & went to reside abroad. He travelled about to different places, but from the year 1846 until his death, in March, he resided either at Boulogne, or at St. Germain en Laye, in France. He periodically visited his brother in England, & sent his eldest son to be educated in this country. In 1846 he made his will in the English form, but in 1848 he executed a copy of it according to the law of France, & at the same time wrote a memorandum, in which he stated that he did so by reason of some doubts which had lately arisen as to the validity of wills made in the English form by persons residing & dying abroad, & that he had no intention to reside permanently away from England. All the deceased's property was in England, except some furniture in his house at St. Germain:—*Held*: deceased had not lost his domicil of origin, & his will made in the English form was entitled to probate.—*In the Goods of WEST* (1860), 6 Jur. N. S. 831.

73. ——— Declaration on coming of age.]—In a petition by the wife for divorce, on the ground of the husband's adultery & desertion, it appeared that both husband & wife were born in France, of parents born in England but resident in France. The marriage took place in England, but the husband & wife subsequently resided in France. The resp., on coming of age, made a declaration of his intention to retain his English nationality, & it also appeared that both he & his father contemplated returning to England when they had made sufficient money to maintain them. The resp., after deserting his wife, led an unsettled life in New Zealand & the Australian Colonies:—*Held*: both parties had an English domicil at the commencement of the proceedings, & the ct., therefore, had power to entertain the petition & to dissolve the marriage.—*GOULDER v. GOULDER*, [1892] P. 240; 61 L. J. P. 117; 8 T. L. R. 572.

74. ——— Letter expressing hope of return after repatriation—Writer an alien enemy.]—*THIELE v. THIELE* (1920), 150 L. T. Jo. 387.

72 i. To retain domicil—In America—Affidavit of intention to retain.]—A Frenchman domiciled in A., sailed from U.S. on a French ship intending to settle in France. The vessel sailed in ignorance of existing war between France & England, & while on her

voyage received the first intelligence of this event. She at once stood for the nearest port in U.S., & was captured by an English vessel. He put in an affidavit that upon his receiving information of war, he had totally

abandoned his intention of removing to France, & designed to return to his domicil in U.S. In a cause for condemnation:—*Held*: he had not changed his U.S. domicil.—*THE TROIS FRÈRES* (1803), *Stewart*, 1.—*CAN.*

75. Oral declarations.]—In 1858 M. left Canada, which was his domicile of origin, sold his house & burial-ground there, & came to Paris to educate his children. He lived in Paris ten years, but went over several times to Montreal, & amongst other things made his will there, describing himself as of Montreal. In 1868 he came to England & took a lease of a house in London. His daughter married & settled in London, & he purchased for his son a share in a business in London. M. died in 1871:—*Held*: M. had acquired & shown an intention to retain an English domicile.—*STEVENSON v. MASSON* (1873), L. R. 17 Eq. 78; 43 L. J. Ch. 134; 29 L. T. 666; 22 W. R. 150.

Annotation:—*Consd.* Doucet v. Geoghegan (1878), 9 Ch. D. 441.

76. — In Ireland—Entry in diary.]—The distribution of the estate of an intestate depended upon her domicile at the date of her death. A. was born in Ireland & resided in England or travelled abroad until she was forty-seven, then in 1865 went abroad & never returned. She bought some land near Cannes in 1869 with a view to build a house, but never did build upon it. There were indications of an intention to return; for instance, in 1885 the intestate took a house at St. Leonard's for three years, but never occupied it:—*Held*: A. had not abandoned her domicile of origin.—*Re WILLS-SANDFORD, WILLS-SANDFORD v. WILLS-SANDFORD* (1897), 41 Sol. Jo. 366.

77. — In France—Solemn act for preservation of co-hereditary right of succession.]—*Re CAPDEVIELLE*, No. 130, *post*.

78. — Oral declarations—Intention to return "on making fortune."]—Testator was a Frenchman but had lived twenty-seven years in England, during the greater part of which time he was a partner in an English house of business, paying occasional visits to France. He married successively in English churches, two wives, who were Englishwomen & Protestants, though himself a Roman Catholic, & his children were brought up in England as Protestants. He made his will in the English form & left his property in a manner inconsistent with French law. Upon an action to establish a French domicile, numerous witnesses deposed that he had made various parol declarations that he intended to return to France when he made his fortune. It was also proved that he always refused to be naturalised in England & would not take a lease of more than 3 years of his house.

Held: the acts of testator manifested an intention to acquire an English domicile; & his declarations of intention to return to France when he had made his fortune were not sufficient to rebut the conclusion to be derived from the facts of his life, especially of his English marriages.—*DOUCET v. GEOGHEGAN* (1878), 9 Ch. D. 441; 26 W. R. 825, C. A.

Annotations:—*Consd.* *Re Patience, Patience v. Main* (1885), 29 Ch. D. 976. *Refd.* *Sottomayer v. De Barros* (1879), 5 P. D. 94; *Re Craignish, Craignish v. Hewitt*, [1892] 3 Ch. 180; *Re Eschmann* (1893), 9 T. L. R. 426; *Winans v. A.-G.*, [1904] A. C. 287. *Mentd.* *Bradford v. Young* (1884), 26 Ch. D. 656.

— *In will.*—*See* Sub-sect. 2, C., *post*.

79. To acquire new domicile.]—Petitioner met her husband in Brussels, & relying on his promise that he would make his permanent home in

England, she consented to marry him, & they were married in 1909 at Barcelona, both at the British Consulate & the Chilean Consulate. In March, 1910, they came to England, & the whole of their married life was spent here. There were separations owing to resp.'s conduct, & he took the children to Chile, but returned in 1915, the children following with a nurse. He then told her that he never settled down in Chile, & that he never intended to go to Chile again, & it was his absolute intention always to live in England. He also repeatedly told her, that he wished his son to be brought up as an Englishman & educated at an English public school:—*Held*: resp. had acquired an English domicile of choice.—*WADDINGTON v. WADDINGTON* (1920), 36 T. L. R. 359.

B. residence.

(a) In General.

80. Whether conclusive.]—The personal property of an intestate, wherever situated, must be distributed by the law of the country, where his domicile was; which is *prima facie* the place of his residence; but that may be rebutted, & supported by circumstances.

The question of domicile *prima facie* is much more a question of fact than of law. The actual place, where he is, is *prima facie* to a great many given purposes his domicile. You encounter that, if you show it is either constrained, or from the necessity of his affairs, or transitory; that he is a sojourner; & you take from it all character of permanency. If on the contrary you show, that the place of his residence is the seat of his fortune; if the place of his birth, upon which I lay the least stress; but if the place of his education, where he acquired all his early habits, friends, & connexions, & all the links, that attach him to society, are found there; if you add to that, that he had no other fixed residence upon an establishment of his own, you answer the question; which would be, where does he reside? In London. Is that his domicile? It is; unless you show that is not the place where he would be, if there was no particular circumstance to determine his position in some other place at that period (*LORD LOUGHBOROUGH, C.*).—*BEMPE v. JOHNSTONE* (1796), 3 Ves. 198; 30 E. R. 967, L. C.

Annotations:—*Consd.* *Anderson v. Lancuville* (1854), 9 Moo. P. C. C. 325. *Refd.* *Forbes v. Forbes* (1854), Kay, 341. *Mentd.* *R. v. Stapleton* (1853), 22 L. J. M. C. 102.

81. — Other facts taken into consideration.]—Domicile does not depend on residence alone, but on a consideration of all the circumstances of the case.—*MOORE v. BUDD*, No. 127, *post*.

82. Necessity for animus manendi—Intention of abandoning former domicile.]—*DE BONNEVAL v. DE BONNEVAL*, No. 32, *ante*.

83. — —.]—*MOORHOUSE v. LORD*, No. 52, *ante*.

84. — —.]—The abandonment or change of a domicile is a proceeding of a very serious nature, and an intention to make such an abandonment must be proved by satisfactory evidence.

A person having a domicile of origin in England does not lose it and acquire a Scottish domicile by making his home in Scotland for many years, unless in the circumstances his doing so clearly shows his

75 i. — In New Zealand—Oral declarations.]—A. was born in E., but left E. for N.Z. in 1888, & started sheep-farming there. In 1891 he married a native of N.Z., & lived there with her until 1894, when, having got into money difficulties, he went to England,

his wife going with him, to endeavour to get his father to assist him with money. He left his furniture stored & insured, & his yearlings undisposed of, expressing his intention of returning to N.Z. His wife left him in 1895, & returned to N.Z. in 1896. A. did not

return to N.Z., but lived with his father in E. He had not entered into business there:—*Held*: there was no evidence of an intention on A.'s part to abandon his N.Z. domicile.—*MASON v. MASON* (1899), 18 N. Z. L. R. 700.—N.Z.

Sect. 3.—Change of domicile: Sub-sect. 2, B. (a)

intention to abandon his original domicile, and to adopt the status, etc.

Testator, whose domicile of origin was in England, had his chief residence or home in Scotland for thirty years prior to his death. During this time he retained his interests in England as partner in a bank, & proprietor of landed estates, & continued his tenancy of houses near Manchester and in London. He left large personal estate & a will in English form, made shortly before his death, in which he was designated as of Manchester. He had satisfied himself by enquiry of his lawyer that he was still an Englishman & also made wills in English & Scottish form. Apart from making his home in Scotland there was nothing in his conduct to suggest any intention of abandoning his English domicile:—*Held*: that he had not lost his English domicile.—**HUNTLY (MARCHIONESS) v. GASKELL**, [1906] A. C. 56; 75 L. J. P. C. 1; 94 L. T. 33; 22 T. L. R. 144, H. L.

Annotations:—*Refd.* *Re James, James v. James* (1908), 98 L. T. 438; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146.

85. ——— Whether implied from long residence.]—**STANLEY v. BERNES**, No. 40, *ante*.

86. ———.]—**HODGSON v. DE BEAUCHESNE** No. 51, *ante*.

87. ———.]—**R.**, a domiciled Englishman, had, after his appointment as Chief Justice of Ceylon, lived there with his wife & children until his death. His estate consisted of personalty in England & Ceylon:—*Held*: there being no evidence of intention to acquire another domicile, **R.** retained his domicile of origin.

The onus is on those who wish to establish a foreign domicile.

A residence adopted for a special and temporary purpose, and for a time which, though not definitely fixed, is not likely to be indefinitely prolonged, does not of itself create a domicile, though possibly a domicile may emanate from such a residence if protracted for a considerable time (**WILDE, B.**).—**A.-G. v. ROWE (LADY)** (1862), 1 H. & C. 31; 31 L. J. Ex. 314; 6 L. T. 438; 8 Jur. N. S. 823; 10 W. R. 718; 158 E. R. 789.

Annotation:—*Refd.* *Re Capdevielle* (1864), 2 H. & C. 985.

88. ———.]—**JOPP v. WOOD**, No. 18, *ante*.

89. ——— Residence originally temporary.]—**E.**, a Scotsman by birth, lived for the last twenty-four years of his life in Jersey, taking

occasional short excursions to Scotland. He caused his children who had died & been buried in France to be disinterred & buried in Jersey, & he contemplated burial in the same vault himself. Shortly before his death, when preparing a codicil to his will, his solr. advised him that the codicil would not be valid if he were domiciled in England, but would be if he were domiciled in Jersey, at the same time explaining that a man's domicile was the place which he had made his home. **E.** said nothing, but executed the codicil:—*Held*: these facts (particularly the length of residence) established **E.**'s domicile at his death to be in Jersey.

Domicile is distinct from naturalisation & allegiance, & in order to effect a change it is not necessary that a man should do all in his power to divest himself of his original nationality, it being sufficient that there be a change of residence of a permanent character voluntarily assumed. Residence originally temporary, & intended for a limited period, may afterwards become general & unlimited, & in such a case as soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established.—**HALDANE v. ECKFORD** (1869), L. R. 8 Eq. 631; 21 L. T. 87; 17 W. R. 1059.

Annotations:—*Consd.* *Douglas v. Douglas, Douglas v. Webster* (1871), L. R. 12 Eq. 617; *Doucet v. Geoghegan* (1878), 9 Ch. D. 441. *Refd.* *Winans v. A.-G.*, [1904] A. C. 287.

90. ———.]—**KING v. FOXWELL**, No. 45, *ante*.

91. ———.]—Mere residence, however long, does not constitute domicile unless coupled with an intention of permanent residence.

P. was born in Scotland, of Scottish parents. He entered the army & served abroad till he retired. From that time till his death he resided in lodgings, hotels, & boarding houses in England, dying intestate & a bachelor, in an hotel, leaving no real estate in England, & no property in Scotland. From the year 1810 till his death in 1882 he never revisited Scotland, and for the last twenty-two years of life never left the territorial limits of England:—*Held*: the domicile of the intestate at his death was Scottish.—*Re PATIENCE, PATIENCE v. MAIN* (1885), 29 Ch. D. 976; 54 L. J. Ch. 897; 52 L. T. 687; 33 W. R. 500; 1 T. L. R. 375.

Annotation:—*Refd.* *Re Craignish, Craignish v. Hewitt*, [1892] 3 Ch. 180.

———— Coupled with other acts.]—*See* Nos. 107, 163, *post*.

92. ——— Mere declaration of intention to

PART II. SECT. 3, SUB-SECT. 2.—B. (a).

82 i. Necessity for animus manendi.]—Residence alone is not sufficient for domicile. There must be the necessary *animus manendi*.—**ADAMS v. ADAMS** (1909), 11 W. L. R. 358.—**CAN.**

82 ii. ———.]—**SEIFERT v. SEIFERT** (1915), 7 O. W. N. 440; 32 O. L. R. 433; 23 D. L. R. 440.—**CAN.**

85 i. ——— Whether implied from long residence.]—Long residence abroad is in favour of the acquisition of a new domicile, but it may be rebutted by circumstances showing that there was no intention of acquiring a new domicile.—**GILLIS v. GILLIS** (1874), 8 L. R. Eq. 597.—**IR.**

85 ii. ———.]—Residence in a country does not of itself raise a presumption of domicile where the person previously has been domiciled elsewhere; but if the residence is long continued a change of domicile may be presumed.—**VAN STRAATEN v. VAN STRAATEN**, [1911] T. P. D. 686.—**S. AF.**

85 iii. ———.]—**A.** arrived in **N.** from **I.** in 1897 when he was 8 years of

age. Shortly afterwards his father, who was residing in **N.**, returned to **I.** on a temporary visit for the purpose of bringing back his wife, & living in **N.**; but he died in **I.** about 12 months after his return there. **A.** had been left in **N.** with a relative, & continued to reside there until 1911 when he was 22 years of age, when he went to **I.** with the object of seeking a wife there from among his own relations. Prior to leaving for **I.** he applied to the authorities for a certificate of domicile, but that certificate was illegally refused. Owing to unforeseen circumstances, his visit to **I.** was extended to a period of 4 years, & he eventually returned to **N.** in 1915:—*Held*: **A.**'s visit to **I.**, long as it was, might fairly be described as for a special or temporary purpose; that the home which he had made for himself in **N.** from 1897 to 1911, in the sense of its being a place of present permanent abode, prior to his departure for **I.**, continued to be his place of permanent abode throughout his visit to **I.**, in contradistinction to his special or temporary place of abode, & that he was domiciled in **N.**.—**KAJES v. IMMIGRANTS' APPEAL**

BOARD (1916), 37 N. L. R. 42.—**S. AF.**

a. Residence by compulsion.]—A prisoner retains during imprisonment the domicile which he possessed at its commencement.—**WHITEHOUSE v. WHITEHOUSE** (1900), 21 N. S. W. L. R. 16; 17 N. S. W. W. N. 123.—**AUS.**

b. ———.]—A resident of **O.** was expelled by the military authorities of a country which was then at war with **O.** He came to **C.**, where he was alleged to be carrying on some commercial business:—*Held*: such compulsory residence in **C.** did not constitute a domicile.—**EBERT & Co. v. GOLDMAN** (1900), 17 S. C. 530; 10 C. T. R. 741.—**S. AF.**

c. ———.]—Enforced residence elsewhere cannot affect domicile, whether of origin or of choice, in the absence of proof of an intention to change the domicile.—**OLWAGE v. BUNTMAN**, [1910] T. L. 44.—**S. AF.**

d. ——— Life prisoner.]—A man imprisoned for life acquires by the fact of such imprisonment a domicile in the country of his imprisonment.—**NEFLER v. NEFLER**, [1906] O. R. C. 7.—**S. AF.**

change residence—Without actual change.]—A Scotsman came to England at the age of sixteen & remained in the English naval service until his death in 1848 :—*Held* : he had not lost his domicile of origin though he removed all his goods from Scotland.

More declaration of intention to change a domicile, without actual change of residence, is inoperative to create a new domicile.

To constitute a new domicile, there must be not only the *factum* of residence in a place, but *animus*

—*BROWN v. SMITH* (1852), 15 Beav. 444 ; 21 L. J. Ch. 356 ; 51 E. R. 609.

Annotation :—*Consd. Re Mitchell, Ex p. Cunningham* (1884), 13 Q. B. D. 418.

93. — Preference for foreign residence.]—*LORD v. COLVIN*, No. 57, *ante*.

94. — Temporary residence insufficient.]—*LAUDERDALE PEERAGE*, No. 58, *ante*.

95. — Restrictions on residence imposed by government—Intention to return to country of domicile when able to.]—The father of bkpt. was formerly the Sovereign of the Punjaub, but in 1849 renounced his sovereignty & resided in England. Subsequently he left this country taking with him his wife & the bkpt., then a minor, with the avowed intention of returning to India, & on being prevented from so doing by the English Government resided on the Continent. Bkpt. while still a minor returned to England & lived at his father's expense up to & after his majority when he entered the English army as an officer. Bkpcy. proceedings were commenced in England :—*Held* : the father of the bkpt. had never abandoned his domicile of origin & the bkpt. followed the domicile of his father, there being no sufficient evidence to show that bkpt. after he attained his majority intended to take a domicile of choice in this country.—*Re DULEEP SINGH, Ex p. CROSS* (1890), 7 Morr. 228 ; 6 T. L. R. 385, C. A.

96. Necessity for residence de facto.]—Where in proceedings relating to a judgment registered against land in a West Indian island parties not resident in the island claimed domicile there by virtue of having been represented there by an agent :—*Held* : domicile must be *de facto* not *de jure*.—*BEAUCÉ v. MUTER* (1845), 5 Moo. P. C. C. 69 ; 13 E. R. 416, P. C.

(b) *In Public Service of State.*

97. Naval service—Previous foreign service.]—A. left Scotland in 1741, at the age of twelve, with a view to enter into the navy. From that time to his death he was in Scotland only four times : 1st, as captain of a frigate ; 2ndly, to introduce his wife to his friends, on which occasion he stayed about a year ; 3rdly, upon a visit ; 4thly, when, being appointed to a command upon the Halifax station, he went in the mail coach to Scotland, & died there, in 1789. He married in Holland, & had a sort of establishment there. He commanded the Russian navy for about a year, & was afterwards in the Dutch service. He had no fixed residence, in England, till 1776, when he took a house at Gosport, where he lived as his home, when on shore. That was the only residence he had in the British dominions. Whenever he went on service, he left his wife & family there ; & he always returned to that place. His third wife was a native of Gosport. In his will he spoke of his dwelling-house at Gosport :—*Held* : his original domicile having been abandoned, when he afterwards entered into the service of this country he became domiciled here, as a Russian or Dutchman would on entering into our service.—*OMMANEY*

v. BINGHAM (1796), cited in 5 Ves. 757 ; 31 E. R. 843, H. L.

Annotations :—*Distd. Bempde v. Johnstone* (1796), 3 Ves. 198. *Consd. Somerville v. Somerville* (1801), 5 Ves. 750 ; *De Beauchesne* (1858), 12 Moo. P. C. C. 286. *Refd. Brown v. Smith* (1852), 21 L. J. Ch. 356.

98. — Goods removed from domicile of origin.]—*BROWN v. SMITH*, No. 92, *ante*.

99. — Entered whilst under age.]—A. was born in England, & at the age of nine years accompanied his father to the island of Jersey, where he resided partly with his father, & at times with an uncle, for eleven years. He then, being still under age, entered the Royal Navy, & was borne on the books of some one of her Majesty's ships of war until he died. The father continued to live in the same island :—*Held* : at the time deceased went to sea his domicile was that of his father, namely, at Jersey, & as he never afterwards acquired a new one, that was his domicile when he died.—*In the Goods of PATTEN (DECEASED)* (1860), 24 J. P. 150 ; 6 Jur. N. S. 151.

100. Military service—In India—Distinguished from service in East India Company.]—(1) The law of the domicile of a testator or intestate decides whether his personal property is liable to legacy duty.

A British-born subject, an officer on service in her Majesty's army in India, died there intestate, leaving all his property situate in that country with the exception of a small sum of money due to him from the War Office in England. His widow took out letters of administration in India, & after paying the debts, etc., invested the rest of the estate in India, in her own name, for her own benefit & that of the next of kin. She afterwards took out letters of administration in England, for the purpose of obtaining the debt due from the War Office :—*Held* : as deceased was on duty in India in her Majesty's service, he did not acquire a domicile in that country, & the whole of his property, though chiefly situate abroad, was liable to legacy duty.

(2) An officer in the service of the East India Co., residing in the East Indies, does thereby acquire a domicile in that country.—*A.-G. v. NAPIER* (1851), 6 Exch. 217 ; 20 L. J. Ex. 173 ; 17 L. T. O. S. 28 ; 15 Jur. 253 ; 155 E. R. 520.

Annotations :—*Refd. Wallace v. A.-G., Jeyes v. Shadwell* (1865), 1 Ch. App. 1 ; *Re Tootal's Trusts* (1883), 23 Ch. D. 532. *Mentd. Blackwood v. R.* (1882), 8 App. Cas. 82 ; *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400 ; *Winans v. A.-G.*, [1910] A. C. 27 ; *Re Manchester, Ducannon v. Manchester*, [1912] 1 Ch. 540.

101. — Officer on half pay.]—Deceased died on or about the 16th June, 1848. At the time of his death he was residing in the island of Mauritius, & was a captain in her Majesty's service unattached, & as such in the receipt of half-pay. He left a testamentary paper all in his own handwriting & duly signed, which had, according to the practice & custom prevailing in the Mauritius, been deposited & registered in the office of a notary public at Port St. Louis, & the estate of deceased had been administered there according to his testamentary directions. This will, however, was attested but by one witness. There was an arrear of half-pay due to the deceased, which constituted the only property he possessed at his death in this country. To enable the exors. to receive this, probate of the will was sought. There being but one attesting witness, it would not be valid by the English law ; it was therefore contended that deceased was at his death domiciled in the island of Mauritius, by the law of which, as regulating testamentary documents, one witness would have been sufficient :—*Held* : deceased was not domiciled

Sect. 3.—Change of domicil: Sub-sect. 2, B. (b)

in the Mauritius.—*In the Goods of THATCHER* (1854), 23 L. T. O. S. 346.

102. — Foreign domicil of origin.]—YELVERTON v. YELVERTON, No. 895, *post*.

103. ——There is no presumption that a person having an English name & holding a commission in the British army is domiciled in England; for his domicil of origin might have been Scotch or Irish, which domicil would not be lost or changed into an English one by accepting a commission in the British army.—*Re MITCHELL, Ex p. CUNNINGHAM* (1884), 13 Q. B. D. 418; 53 L. J. Ch. 1067; 51 L. T. 447; 33 W. R. 22; 1 Morr. 137, C. A.

Annotations:—Reid. Casdagli v. Casdagli, [1919] A. C. 145. *Meatd. Re Barne, Ex p. Barne* (1886), 16 Q. B. D. 522; *Re Duleep Singh, Ex p. Cross* (1890), 7 Morr. 228; *Re Brown*, [1895] 2 Ch. 666.

104. — Foreign domicil of choice.]—(1) A wife's domicil is that of her husband, & her remedy for matrimonial wrongs must, as a general rule, be sought in the cts. of that domicil. It is not inconsistent with this principle that she may be allowed in some cases to obtain relief in the country in which she is resident though not domiciled.

A., a native of Barbadoes, was an officer in the English army. His son, B., was born in England. A. retired from the army, & went with his wife & children to Australia, where he resided till his death. B. lived with A. till the death of the latter, & remained in Australia for ten years longer, where he married C. He came with C. & his children to England, where he resided without establishing himself in a permanent home, & afterwards left England. After his departure, C. commenced a suit for restitution of conjugal rights, & B. appeared under protest:—*Held*: (2) A. having acquired an Australian domicil, & B. having as a minor acquired his father's domicil of choice & afterwards continued it, the domicil of the latter was Australia; (3) after B. had left England the ct. had no jurisdiction to entertain C.'s petition for restitution of conjugal rights.

(4) For the purposes of the jurisdiction of the Divorce Ct. the British colonies, as well as Scotland & Ireland, are deemed to be foreign countries.—*FIREBRACE v. FIREBRACE* (1878), 4 P. D. 63; 47 L. J. P. 41; 39 L. T. 94; 26 W. R. 617.

Annotations:—As to (1) Consd. Armytage v. Armytage, [1898] P. 178. *Apprvd. De Gasquet James v. Mecklenburg-Schwerin*, [1914] P. 53. *Reid. Niboyet v. Niboyet* (1878), 4 P. D. 1; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Bulst*, [1910] P. 271; *Perrin v. Perrin, Powell v. Powell* (1914), 83 L. J. P. 69. *As to (2) Apprvd. De Gasquet James v. Mecklenburg-Schwerin*, [1914] P. 53. *As to (4) Reid. Dicks v. Dicks*, [1899] P. 275.

105. — Entered whilst under age.]—Domicil of choice is not affected by service in the army, any more than domicil of origin.

A., born in England of English parents, acquired a Jersey domicil by being, at the age of four, taken there by his father for permanent residence. At the age of eighteen A. entered the British army, & from that time accompanied his regiment to different foreign & colonial stations till his death in Canada after nine years' service:—*Held*: A. had never lost his Jersey domicil.—*Re MACREIGHT*,

PAXTON v. MACREIGHT (1885), 30 Ch. D. 165; 55 L. J. Ch. 28; 33 W. R. 838; *sub nom. Re MACREIGHT, PRESTON v. MACREIGHT*, 53 L. T. 146.

106. — Fact showing intention to change domicil.]—A Scotsman, in 1853, when 18 years of age, left his home & enlisted in the Army. In 1879 he was married at Hounslow, & in 1884 he took his discharge from the Army, & became canteen steward to the 15th Hussars, then stationed at Hounslow. In 1895 he died while he was with the regiment in Dublin:—*Held*: though the evidence showed an intention to change his domicil, deceased man's Scotch domicil had not been in fact changed, & that his estate must be distributed according to the law of Scotland.—*Re SMITH (DECEASED)* (1896), 12 T. L. R. 223.

107. Civil service—Facts showing intention to settle abroad.]—Probate of a will & codicil signed but not witnessed had been granted at Mauritius of a native of Scotland, who held for some years to his death an official appointment at Mauritius. The Prerogative Ct. being well satisfied of the domicil, decreed probate.

D., colonial secretary in Mauritius, made oath that in the year 1812 he became intimately acquainted with deceased, & such intimacy continued until deceased's death; that deceased was a native of Scotland, & went to reside at Mauritius in the year 1812, in the capacity of clerk in the medical department, & in the year 1823 he was appointed assistant secretary to the Government, an office afterwards changed to assistant colonial secretary, which appointment deceased held until his death; & deceased in June 1837, married a native of the island, upon which occasion the marriage settlement was made & executed according to the laws of the said island, & formed connexions in, & adopted the habits & customs of, the colony, & was considered completely domiciled there; that the deponent never heard him intimate or express any intention of quitting Mauritius & returning to Gt. Britain, & the deponent verily believed the deceased had no such intention.—*In the Goods of SMITH (DECEASED)* (1850), 2 Rob. Eccl. 332; 16 L. T. O. S. 177; 14 Jur. 1100; 163 E. R. 1336.

108. — Colonial judge.]—A.-G. v. ROWE (LADY), No. 87, *ante*.

109. Foreign diplomatic service—Residence in England.]—In 1819 a Sardinian came to England, & became attached to the Sardinian Embassy. In 1821 he was dismissed, but he continued to reside ten years in England. He was then for three years chargé d'affaires in London, & for three years minister plenipotentiary to England, & retained this office until his death in 1846:—*Held*: upon the evidence of his declaration & acts, he was domiciled in England.—*HEATH v. SAMSON* (1851), 14 Beav. 441; 51 E. R. 356.

Annotation:—Consd. A.-G. v. Kent (1862), 1 H. & C. 12.

110. — Domicil acquired before appointment.]—The payment of legacy duty, or an immunity from such payment, depends entirely on the domicil of the party whose property is concerned.

The appointment of a foreigner, who has gained by residence an English domicil, to be an attaché to the legation of his own sovereign in this country,

PART II. SECT. 3, SUB-SECT. 2.—
B. (b).

102 i. Military service—Foreign domicil of origin.]—An Englishman by birth died in S., where he had resided as Governor of a Fort for 50 years, possessing a farm, & acting as J.P. during that period, & where he had contracted a marriage with a Scots-

woman:—*Held*: he was a domiciled Scotsman.—*CLARKE v. NEWMARSH* (1836), 14 Sh. (Ct. of Sess.) 488; 32 Fac. Coll. 395.—**SCOT.**

108 i. Civil service—Colonial judge.]—X., a native of S., on his retirement on half pay from the Navy, after residing for some time in J. was appointed a stipendiary magistrate at T., one of

the Virgin Islands, where he resided for 6 years except for one visit to S., when he married a S. lady & returned with her to T. He died at St. Kitts & received half pay till his death:—*Held*: X. had acquired a domicil at T.—*INLAND REVENUE COMRS. v. GORDON'S EXECUTOR* (1850), 12 Dunl. (Ct. of Sess.) 657.—**SCOT.**

does not put an end to his English domicile or confer upon him any right to revert to his domicile of origin, & consequently, on his death, his personal property in this country is liable to legacy duty.

The privilege of exemption from taxation & from the operation of the civil & criminal law, accorded to an ambassador, is a personal privilege founded on the sacredness of his person & the rule of international law, by which, though actually resident here, he is looked upon as being *extra territoriam* & residing within his own country; but no analogy arises, from such exemption, during his life, to exempt his personal property from legacy duty after his death, & supposing the exemption to apply after his death, which is not the case, it would still only extend to a certain class of property which is not the subject of this information, viz., to such movables as could not be interfered with without interfering with his personal comfort & dignity.—*A.-G. v. KENT* (1862), 1 H. & C. 12; 31 L. J. Ex. 391; 6 L. T. 864; 10 W. R. 722; 158 E. R. 782.

Annotations:—*Consd. A.-G. v. Rowe* (1862), 1 H. & C. 31. *Refd. Re Capdevielle* (1864), 11 L. T. 89.

111. Consular service—Residence abroad—Domicil acquired before appointment.—If a man at the time he attains his majority is of unsound mind & remains in that state continuously up to the time of his death, the incapacity of minority, never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicile for his son, & a change of domicile by the father will usually produce a similar change of domicile as regards the lunatic son. The mere residence as a consular officer in a foreign country gives rise to no inference of a domicile in that country. But, if one already domiciled & resident in such country accept an office in the consular service of another country, he does not thereby destroy his domicile.—*SHARPE v. CRISPIN* (1869), L. R. 1 P. & D. 611; 38 L. J. P. & M. 17; 20 L. T. 41; 17 W. R. 368.

Service in East India Company.—*See Sect. 4, post.*

(c) *In Country subject to Treaty or under Protectorate.*

112. Residence in foreign country—Treaty rights between England & foreign country—Turkey.—The law of domicile, as regulating cases of testacy & intestacy, considered in reference to the case of a British subject, a merchant, long resident & dying in Smyrna, having regard to the Treaty between England & the Ottoman Empire.

Assuming, that deceased died domiciled at Smyrna, the first point is, what is the law of Turkey as to British subjects dying domiciled there? This depends on the construction to be put on the treaties between Great Britain & the Porte. The leading object of these was to protect British subjects trading to Smyrna, & with this view to modify the law of Turkey so as to ensure them justice so far as could be attained. It is, I think, perfectly clear from the treaty, independently of all historical facts, that a residence in Smyrna by a British merchant was contemplated; & if the contracting parties have provided for the case of residence, it seems necessarily to follow, that they must have intended to provide for the case of domicile, if domicile in Turkey could be acquired by the same means as in other countries. Judge Story says, That place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom. If this be applicable to a domicile in Turkey, such a case must have occurred in the

course of trade, & therefore, I conceive it must, in legal contemplation, have been included when the parts of the treaty applicable to British subjects trading to Turkey came to be considered.

In construing these treaties, we ought to look at all the historical circumstances attending them, in order to ascertain what was the true intention of the contracting parties, & to give the widest scope to the language of the treaties, in order to embrace within it all the objects intended to be included.

The effect of the treaties is, that the law of Great Britain will operate on property left by a British merchant in the situation of the deceased, & I am not aware of any distinction even in the case of an individual having ceased to carry on trade (*per CUR.*).—*MALTASS v. MALTASS* (1844), 1 Rob. Eccl. 67; 3 Notes on Cases, 257; 8 Jur. 860; 163 E. R. 967.

Annotations:—*Consd. Casdagli v. Casdagli*, [1919] A. C. 145. *Refd. Croker v. Hertford* (1844), 4 Moo. P. C. C. 339; *Re Tootal's Trusts* (1883), 23 Ch. D. 532. *Mentd. McMullen v. Wadsworth* (1889), 14 App. Cas. 631.

113. ——— China.—There is no authority in English law supporting the proposition that a person can become domiciled as a member of a community which is not the community possessing the supreme or sovereign territorial power.

Notwithstanding the constitution of the Supreme Ct. of China & Japan, the personal estate of an English-born testator permanently residing at Shanghai, & whose will has been proved in the ct. at that place is liable to pay legacy duty.

An Anglo-Chinese domicile (so called by analogy to that called Anglo-Indian) cannot be acquired by a native of England by permanent residence in the Empire of China.—*Re TOOTAL'S TRUSTS* (1883), 23 Ch. D. 532; 52 L. J. Ch. 664; 48 L. T. 816; 31 W. R. 653.

Annotations:—*Distd. Re Vallance, Ex p. Limehouse Board of Works* (1883), 24 Ch. D. 177. *Apprvd. Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431. *Dbtd. The Eumaeus* (1915), 85 L. J. P. 130. *N.F. Casdagli v. Casdagli*, [1919] A. C. 145. *Refd. Re Manchester, Duncannon v. Manchester*, [1912] 1 Ch. 540.

114. ——— Under British protection—Egypt.—

(1) Testator, a member of the Chaldean Catholic community, having a Turkish domicile of origin, fixed his permanent residence in Cairo, where he acquired the status of a protected British subject:—*Held*: he died domiciled in the dominions of the Porte, & that the Consular Court of Constantinople, being bound by ss. 5 & 6 of the Order in Council of 1873 to follow the same principles which would have been observed by an English Ct. of Probate, was right in holding that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey be followed in considering the power of testacy of deceased & in distributing his effects.

(2) There is no such thing as domicile arising from society & not from connection with a locality; consequently, as Cairo was not a British possession governed by English law, testator's permanent abode therein under British protection did not attract to him an English or Anglo-Egyptian domicile.—*ABD-UL-MESSIH v. FARRA* (1888), 13 App. Cas. 431; 57 L. J. P. C. 88; 59 L. T. 106; 4 T. L. R. 407, P. C.

Annotations:—*N.F. Casdagli v. Casdagli*, [1919] A. C. 145. *Refd. Abdallah v. Rickards* (1888), 4 T. L. R. 622; *Re Johnson, Roberts v. A.-G.* (1903), 72 L. J. Ch. 682.

115. ——— ——— ———.]—Residence by a British subject in a foreign State as a privileged member of an ex-territorial community may effectually destroy a residential domicile elsewhere; & where there is evidence that such a person intends to adopt it as his domicile, the fact that he has been

Sect. 3.—Change of domicile: Sub-sect. 2, B. (c), (d),

registered at the British Consulate does not *per se* prevent his acquiring a new domicile of choice in such State. Where, therefore, a British subject, having his domicile of origin in England, migrated to Egypt & resided there as a British protected subject, & married in Egypt, & had since made his permanent home there without any intention of returning to England:—*Held*: he had acquired a new Egyptian domicile of choice & had lost his English domicile of origin & that the English Cts. had no jurisdiction to entertain his wife's suit for dissolution.—*CASDAGLI v. CASDAGLI*, [1919] A. C. 145; 88 L. J. P. 49; 120 L. T. 52; 35 T. L. R. 30; 63 Sol. Jo. 39, H. L.

(d) With Wife and Family.

116. General rule — Domicil of husband — Residence chosen & bought by wife.]—The rule that a man will be considered as domiciled in the place where his wife permanently resides, & in which he has fixed his establishment, is not affected by the circumstance that the choice of residence has been made in deference to the wishes of the wife, & that the house has been bought & furnished at her instance & with her money.—*AITCHISON v. DIXON* (1870), L. R. 10 Eq. 589; 39 L. J. Ch. 705; 23 L. T. 97; 18 W. R. 989.

Annotation:—*Consd. Douglas v. Douglas, Douglas v. Webster* (1871), L. R. 12 Eq. 617.

117. ———.]—*Re CRAIGNISH, CRAIGNISH v. HEWITT*, No. 205, *post*.

118. ———.]—Testator was born in Scotland in 1832 of Scotch parents; he came to London in 1848, & in 1855 he went to Calcutta, & became first a clerk, & then a partner in the firm of Jardine, Skinner & Co. In 1877 he retired from business, returned to England, & subsequently became a member of the Indian Council. He first took a house at Southampton for sixteen months, & lived there with his wife & family. In 1878 he took a five years' lease of a house at Surbiton, & lived there until 1883, when he took a lease of a house in London for seven, fourteen or twenty-one years, with an option of purchase at the end of two years, which option he did not exercise. He lived there until 1887, when he died. He made his will in Calcutta in English form, leaving his property, which consisted entirely of personalty in England, to his wife for life, with remainder to his four children equally. He had no property in Scotland.

Held: there was no indication of intention upon the part of testator upon his return from India to go back to Scotland, or to treat himself as a Scotsman. If he had intended to remain a Scotsman he would have made his will in Scottish form; because a man's personal property in any locality was governed by his domicile. The fact that he set

up his place of residence in successive houses in England with his wife & family, showed an intention of permanently residing in England, & was sufficient to fix him with an English domicile.—*Re BULLEN-SMITH, BERNERS v. BULLEN-SMITH* (1888), 58 L. T. 578; 4 T. L. R. 398.

Domicil of wife.]—*Re MARSLAND*, No. 46, *ante*.

See, also, No. 139, *post*.

Maintenance of more than one residence.]—*See* Sub-sect. 2, B. (j), *post*.

(e) For Reasons of Health.

120. General rule.]—(1) Although permanent residence abroad without intent to return may not operate as a change of domicile, if believed to be necessary for health's sake, the circumstance that such residence was occasioned by mere preference of climate, or by the opinion that the air or the habits of the country may be better suited to the health than those of the country which has been quitted, will not be sufficient to prevent such permanent residence from so operating.

This was a suit for the administration of the estate of M., who was born at Bath in 1778 of English parents, & after residing part of his life in England & part on the continent for the benefit of his health, died at Florence in 1850. While resident at Florence, he made a will in the Tuscan form in 1843, & a will in the English form in 1845, & probate of both these instruments had been granted by the Prerogative Ct. of Canterbury. The question now before the ct. was, whether the domicile of M. at the time of executing the two testamentary instruments & at his death, was England or Tuscany:—*Held*: testator had lost his English domicile & had acquired a Tuscan domicile.

(2) The domicile of origin, after it has been lost, revives more easily than an acquired domicile.—*HOSKINS v. MATTHEWS* (1856), 8 De G. M. & G. 13; 25 L. J. Ch. 689; 26 L. T. O. S. 210; 2 Jur. N. S. 196; 4 W. R. 216; 44 E. R. 294, L. J. J. *Annotations*:—*As to* (1) *Consd. Haldane v. Eckford* (1869), L. R. 8 Eq. 631. *Refd. A.-G. v. Winans* (1901), 85 L. T. 508.

121. Temporary residence abroad.]—An Irishman went to India, & was there resident in business for at least ten years. He then came to England, & lived there for nine years, having taken a house on lease & furnished it. Being in bad health he sold his lease & furniture, & went to Madeira, leaving his books & trunks in the care of a person living in London. He lived at Madeira two years, & there made his will, & then he went to Lisbon & died.

He had property in India; some Irish stock, some India stock, & some English stock; & he banked in London. He was proved to have expressed himself as intending ultimately to reside in Ireland.

Held: he abandoned his Indian domicile, & ac-

PART II. SECT. 3, SUB-SECT. 2.—**B. (d).**

116 i. General rule.—Domicil of husband.]—Where a man's wife & family & household reside, he not living apart from them except when attending to his business, there is his domicile.—*A.-G. v. McLEAN* (1876), 14 N. S. W. S. C. R. 72.—**AUS.**

116 ii ———.]—A. was married to pltf. in N.Y. in 1889. For seven or eight years before the marriage he had lived in O. After the marriage pltf. resided with her husband in O., although during several winters they went to different places in U.S. where each did something to earn money,

but they always came back to O. in the spring. Pltf. never at any time had any intention of changing permanently her residence or place of abode. A. went to reside in U.S. without his wife:—*Held*: A. had not abandoned his O. domicile.—*BONBRIGHT v. BONBRIGHT* (1901), 21 C. L. T. 339, 497; 1 O. L. R. 629; 2 O. L. R. 249.—**CAN.**

Ubi uxor

—*ROBERTS v. ROBERTS* (1903), 17 E. D. C. 132.—**S. AF.**

PART II. SECT. 3, SUB-SECT. 2.—**B. (e).**

e. Permanent residence abroad.]—B., a Scotsman married to a Scots-

woman, left S. in 1893 & went to A., his wife & children remaining in S. He did so on the suggestion of his wife & her relatives in consequence of his having fallen into drinking habits. Before he left S. a contract of separation was entered into between him & his wife. Thereafter he lived in various places in A. until his death in 1918. No communications passed between the husband & the wife & he did not contribute to her support or to that of their children. B. had stated that he did not intend to return to S.:—*Held*: B. had acquired a domicile in Australia.—*MACKINNON'S TRUSTEES v. INLAND REVENUE*, [1920] S. C. (H. L.) 171.—**SCOT.**

quired an English domicile, & he never changed the latter, either for India or Madeira or Ireland.—*A.-G. v. FITZGERALD* (1856), 3 Drew. 610; 25 L. J. Ch. 743; 27 L. T. O. S. 314; 4 W. R. 797; 61 E. R. 1036.

Annotation :—*Consd.* *Lyall v. Paton* (1856), 25 L. J. Ch. 746.

122. ———.]—*MOORHOUSE v. LORD*, No. 52, *ante*.

123. ———.]—*THE LAUDERDALE PEERAGE*, No. 58, *ante*.

124. ——— **Acquisition of estate—Retention of public offices in country of origin.**—*P'ANSON v. P'ANSON & OLDBURY* (1909), *Times*, Jan. 12.

Annotation :—*Mentd.* *Rayment v. Rayment & Stuart, Chapman v. Chapman & Bulst*, [1910] P. 271.

125. **Permanent residence—Retention of estate in country of origin.**—*J.*, who was born in Wales in 1853, lived there until the year 1891, in which year, being found to be suffering from consumption, he was medically advised, if his life was to be prolonged, to go to South Africa. Accordingly he went to Cape Colony & remained in South Africa, with the exception of a visit to England in 1902, being employed at the diamond mines, until his death in May in the year 1905. *J.* had on leaving England a small farm in Wales which he retained until his death, disposing of it by a will executed in 1904 in which he was described as late of a Welsh parish. There was evidence of statements by *J.* in conversation & in his letters speaking of going home & of his using similar expressions, pointing to an intention to end his days in Wales, but during his visit to England in 1902, he told his friends that it was his last visit, & his health being better in South Africa, he would permanently remain there.

Held : *J.* had no intention of abandoning the privileges & immunities which constituted his birth-right; the onus of showing that he had done so had not been discharged, & *J.* was a domiciled Englishman at the date of his death.—*Re JAMES, JAMES v. JAMES* (1908), 98 L. T. 438.

126. ——— **Residence where wife permanently resident.**—*AITCHISON v. DIXON*, No. 116, *ante*.

(*f*) *For*

127. **Permanent residence—Birth, education, & death in country of choice—Occasional claim to privileges of subject of country of origin.**—*Deceased*, the son of a British subject who resided for several years up to his death in Ireland, & had purchased property there, though he occasionally claimed the privileges of a British subject & visited England, was born, educated, established as a merchant, & died in Spain. Upon his death a will was found & the Spanish tribunal in proceedings taken to try its validity, declared deceased intestate :—*Held* : (1) deceased clearly was domiciled in Spain, (2) consequently the law of Spain governed the disposition of his property.

Cases of domicile do not depend on residence alone, but on a consideration of all the circumstances of the case.—*MOORE v. BUDD* (1832), 4 Hag. Ecc. 346; 162 E. R. 1472.

Annotation :—*Consd.* *Maltass v. Maltass* (1844), 1 Rob. Eccl. 67.

128. ——— **Marriage & bulk of property in country of choice.**—*In the Goods of POWELL* (1846), 7 L. T. O. S. 528.

129. ——— **Without naturalisation.**—*HAYNES v. HAYNES & SHELDON* (1896), *Times*, Nov. 3.

130. ——— **Residence in lodgings—Estate purchased in country of origin.**—Personal property may be subject to succession duty, although

exempt from legacy duty by reason of testator having a foreign domicile.

Testator, born in France, of French parents, became a merchant's clerk at Gibraltar, & in 1830 went to reside at Manchester, to purchase goods for his firm; & he subsequently became a shipping agent there until his death in 1859. He occupied weekly lodgings, & also paid a weekly sum for his board. He paid two visits to his native place, in 1835 & 1846, & in the latter year bought an estate there; & a solemn act was passed before a notary at his native place for the preservation of his co-hereditary right of succession over some landed property there. In this act testator was described as "merchant, of Manchester, in England, native of Montory," & his relatives, nephew & nieces, parties to the deed, declared in it that he had not forfeited his hereditary rights to the estate, & that he desired to maintain his right. During the whole time his intention was to return to France & die there, & he always deemed & considered himself a Frenchman, & not an Englishman; but he never fixed upon any period when his return should take place, & he lived at Manchester with the intention of remaining there for an indefinite period :—*Held* : (1) the domicile of testator was French, & his personal property in England was not liable to legacy duty; (2) testator's personal property was liable to succession duty.—*Re CAPDEVIELLE* (1864), 2 H. & C. 985; 5 New Rep. 15; 33 L. J. Ex. 306; 11 L. T. 89; 10 Jur. N. S. 1155; 12 W. R. 1110; 159 E. R. 408.

Annotations :—*As to* (1) *Consd.* *Haldane v. Eckford* (1869), L. R. 8 Eq. 631. *As to* (2) *Fold.* *A.-G. v. Blucher de Wahlstatt* (1864), 3 H. & C. 374; *Re Badart's Trusts* (1870), L. R. 10 Eq. 288.

131. ——— **Written expression of intention to return.**—*JOFF v. WOOD*, No. 18, *ante*.

132. ——— **Purchase of house & vault.**—*C.*, born in France, succeeded his uncle in business at Manchester, & purchased land & built a handsome house there, & also a vault in which he buried his uncle, wife & child, & going to Vichy for his health, died at the place of his birth. The evidence of intention was conflicting, & went chiefly to the impression of the witness, but it appeared that he preferred the French climate, & talked of taking his wife's body to France.

Held : the domicile of origin never was lost, & *C.* died a domiciled Frenchman.—*CAPDEVIELLE v. CAPDEVIELLE* (1869), 21 L. T. 660; 18 W. R. 107.

133. ——— **Partnership for life entered into.**—*A. & B.* were married in Ireland, the domicile of origin of each of them being Irish. *A.* afterwards abandoned his Irish domicile, & for several years lived with his wife at various places in the Cape Colony & Natal, where he engaged in various business enterprises, occasionally making short visits to England. He subsequently went to Australia with the intention of settling there, but soon after his arrival there he entered into an agreement with *S.* to carry on the business of ostrich-farming in the Cape Colony in partnership for life. *A.*, *B.*, & *S.* then went together to Natal, where *B.* left her husband & went with *S.* to Cape Colony, where they lived together as man & wife. *A.* afterwards obtained in the ct. of the Eastern District of the Cape of Good Hope a decree dissolving his marriage on the ground of his wife's adultery with *S.* *S. & B.* were married in the Cape Colony, & they shortly afterwards returned to England, where they intended to remain, & they

PART II. SECT. 3, SUB-SECT. 2.—B. (f).

133 i. **Permanent residence.**—*Primâ facie* a man who leaves his abode in E., & removes to A., & engages in mining pursuits, acquires a new domicile in A. where he takes up his abode.—*Re HARDMAN*, Mac. 984.—N.Z.

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were again married at a registrar's office in London. A. was believed to be still in South Africa, but there was no evidence as to whether he was still unmarried. By the Roman-Dutch law, which prevails in the Cape Colony & Natal, parties who have been guilty of adultery are incapable of contracting a valid marriage unless the injured party has married again, but a decree of divorce is an absolute dissolution of the marriage, & the Colonial Cts. have no power to dissolve a marriage between parties who are not domiciled within their jurisdiction:—*Held*: (1) it must be presumed that the Colonial Ct. had jurisdiction to dissolve the marriage between A. & B.; (2) B.'s disability to contract a valid marriage so long as A., remained unmarried ceased when she left the Cape Colony, & that therefore her marriage with S. in England was valid.

He entered into this partnership for life which shows that he had no intention of returning here (HANNEN, P.).—SCOTT v. A.-G. (1886), 11 P. D. 128; 55 L. J. P. 57; 56 L. T. 924; 50 J. P. 824.

Annotations:—As to (1) *Distd.* Ingham (falsely called Sachs) v. Sachs (1886), 56 L. T. 920; Warter v. Warter (1890), 15 P. D. 152. *Refd.* Ogden v. Ogden, [1908] P. 46.

134. — Illicit cohabitation, marriage & death in country of choice.—In the year 1734 T., a Swiss, twenty-two years of age, whose domicile of origin was Geneva, came to England, & carried on business & resided in England from that time until his death in 1779. Some time after his arrival he formed a connection with P., an Englishwoman, with whom he lived as man & wife. In 1744 he had a daughter by her, who was baptised as his child by the name of Sarah T. & who left issue. Between 1744 & 1747 he had two other illegitimate children by P. who were born respectively in 1745 & 1747 & left no issue. In 1749 he married another Englishwoman named W., and by her he had one child, who was the mother of the intestate in this administration action. W. died in 1752, & in 1755 T. married P. & had legitimate children by her, one of whom, S. M. T., had issue. By the law of Geneva illegitimate children are legitimated by the subsequent marriage of their putative father & their mother, notwithstanding an intermediate marriage of their father with another woman & the birth of a child by her. After the death of the intestate the descendants of Sarah T. (who was born before the marriage of T. & P.) & the descendants of S. M. T. (who was born after that marriage) set up conflicting claims in the action to be the next of kin of the intestate:—*Held*: a child born before the marriage of its father & mother cannot be legitimated by their subsequent marriage unless the father was domiciled in a country whose laws allowed such legitimation both at the time of the marriage which gave the child the status of legitimacy & at the time of the birth on which it took from its putative father the potentiality of being legitimated.

Acts, events, & declarations subsequent to the time at which a question of domicile arises are admissible in evidence upon that question when

they indicate what the intention was at the given time.—*Re* GROVE, VAUCHER v. TREASURY SOLICITOR (1888), 40 Ch. D. 216; 58 L. J. Ch. 57; 59 L. T. 587; 37 W. R. 1; 4 T. L. R. 762, C. A.

135. Temporary residence—Ten years.—A.-G. v. FITZGERALD, No. 121, *ante*.

136. — Until fortune made — Temporary return to country of origin.—Testator having a Scotch domicile of origin, went to India in 1840, where he purchased a coffee plantation, & continued to reside & carry on his trade till 1858; when, on account of ill health, he came over to this country, & resided here & in Scotland for eighteen months, after which he returned to his plantation in India, & lived there till his death, in 1860:—*Held*: testator had acquired an Anglo-Indian domicile, which was not changed at the time of his death, & his property was not liable to legacy duty.

Semble: the circumstance that a foreign fixed residence is adopted merely with the view to the acquisition of a fortune, & with an ulterior intention of returning home, is not sufficient to prevent the place of residence from becoming that of a domicile.—ALLARDICE v. ONSLOW (1864), 33 L. J. Ch. 434; 9 L. T. 674; 10 Jur. N. S. 352; 12 W. R. 397.

Annotation:—*Refd.* Jopp v. Wood (1864), 34 Beav. 88.

Sec, also, Nos. 71, 78, *ante*.

137. ——THE LAUDERDALE PEERAGE, No. 58, *ante*.

For Educational Reasons.

138. Education of children—Illegitimate child.—U.S.A. (PRESIDENT) v. DRUMMOND, No. 162, *post*.

139. — Wife to reside with children until education finished—Husband's intention to join wife & children.—The husband, whose domicile of origin was English, acquired a domicile of choice in Ceylon, & married there. He was in the Ceylon Civil Service, & being in ill-health, obtained leave of absence for the purpose of undergoing an operation in England. He broke up his home, sold his furniture, & brought with him to England his wife & three young children, with the view of having the children educated here. At the same time he also brought his household plate & linen, & some few articles which had not been included in the sale. Upon arrival in England, the parties & their children took furnished apartments in one of the suburbs of London. While the husband was in the hospital, his wife misconducted herself in London, & the husband, upon ascertaining this, instituted proceedings for a divorce, upon the ground of his wife's adultery with the co-respondent against whom he claimed damages. The wife & co-respondent both entered an absolute appearance, & filed answers denying the adultery alleged in the petition. The case came to trial, but the jury disagreed, & were discharged without giving a verdict. Some time after this the wife brought an action in the Q.'s B. Div. for the recovery of certain sums of money & other property, which her husband had received from her, & which she alleged were held in trust by him for her separate use. The husband, in his defence, alleged that his domicile was Cingalese, & that by the law of Ceylon the property in question had become his own

135 i. Temporary residence—Three years—Continuance after declaration of war.—Three years' residence with an intended uncertain continuance, though for a special purpose, with trade independent of that purpose, continued after the declaration of war, constitutes a domicile.—THE PATRIOT (1812), Stewart, art. 350.—CAN.

135 ii. — Eleven years—Oral expression of intention to return.—A.

was born & married in S., but had resided & worked for different firms in E. for eleven years. He stated that no doubt if he could obtain as good wages as he was obtaining there was no doubt he would return to S.:—*Held*: A. had not lost his domicile of origin.—HOOD v. HOOD (1897), 24 R. (Ct. of Sess.) 973; 34 Sc. L. R. 735; 5 S. L. T. 61.—SCOT.

135 iii. Ten years.—A. was born

in S. & had been married in S. Shortly after marriage A. & his wife went to U.S.A. where A. remained for 10 years, working as a compositor in various places. A. wrote a letter from U.S. to his sister, in which, after complaining of the state of trade in A., he wrote:—"I will be in S. in the spring of next year." *Held*:—A. had never lost his S. domicile.—ROSS v. ROSS (1899), 1 F. (Ct. of Sess.) 963; 36 Sc. L. R. 707; 7 S. L. T. 43.—SCOT.

absolutely. In the result, it was held that the husband's domicile was in fact as he alleged it to be, & that upon this ground the wife's claim to some substantial portions of the property in question was bad in law. Thereupon, the wife obtained leave to amend her answer to the divorce petition, by raising the question of jurisdiction; & she now pleaded that this ct. had no power to entertain the suit, by reason of her husband's Cingalese domicile. At the trial there was some conflict between the husband & wife as to what the intention of each of them was with reference to their place of residence & future movements after the date of their arrival in England, & upon this two questions were left to the jury, who found that the petitioner came to England & took rooms in July, 1890, with the intention that his children should be educated in England, & that his wife should remain with them in England in those rooms, or in some other home to be provided by the petitioner, until the children's education should be finished, & that the wife & children should so remain, even although he were obliged to return to Ceylon, & that the petitioner's intention was to ultimately rejoin his wife & children in England either on leave or after his retirement from the Ceylon Civil Service:—*Held*: the matrimonial home of the parties was in England.—*HURLEY v. HURLEY & MENZIES* (1892), 67 L. T. 384; 8 T. L. R. 416.

Residence with wife & family generally.]—See Sub-sect. 2, B. (d), *ante*.

(h) *In consequence of Revolution.*

140. Subsequent return to country of origin.]—DE BONNEVAL *v.* DE BONNEVAL, No. 32, *ante*.

141. —.]—A British subject went to reside in France in 1776, where he obtained letters of naturalisation, & purchased land. In 1791 he was obliged to quit the country, & his property was confiscated; he then came to England, & remained here till 1802, when he returned to France, & claimed the compensation for his lands. By his will, which confirmed a previous will made in England, he gave part of his property, including the expected compensation, to an Irish charity:—*Held*: testator being domiciled in France, & the property being in its essence French, & left by a will made in France, no legacy duty was payable upon the charitable bequest.—*CHARITABLE DONATIONS COMRS. v. DEVEREUX* (1842), 13 Sim. 14; 11 L. J. Ch. 362; 6 Jur. 616; 60 E. R. 6.

(i) *To avoid Creditors and Imprisonment.*

142. Avoidance of creditors—Wife left in country of origin.]—P., born in England, & second son of an English peer, being in debt, & to avoid his creditors, went to Scotland in 1854 & lived with a companion in shooting quarters, leaving his wife in England, who had declined to accompany him. In 1858 he took a lease of a Scotch shooting ground for six years & lived there with a few occasional exceptions of flying visits to England; he had lived in Scotland as a hiding-place from his creditors from 1854 to 1860. He kept up continued communications with his English solicitor, with a view to some arrangement with his creditors; at the same time, in his letters he often alluded to his Scotch shooting-box as his home:—*Held*: (1) there was no sufficient evidence of P. having abandoned his English domicile & acquired a Scottish domicile.

(2) *Seem*: where a husband goes to a foreign country without his wife, & resides temporarily, but does not acquire such a domicile there as would in the event of his death regulate the succession to his personal estate the foreign ct. has no jurisdiction to entertain a suit for divorce at his instance (LORD WESTBURY, C.).

Seem: where the husband does in such circumstances acquire such domicile in the foreign country, but leaving his wife in the native country which she never leaves, her domicile is not constructively his so as to enable the foreign ct. to entertain a suit by him to dissolve the marriage on the ground of her adultery (LORD WESTBURY, C.).—*PITT v. PITT* (1864), 10 L. T. 626; 10 Jur. N. S. 735; 12 W. R. 1089; 4 Macq. 627, H. L.

Annotations:—As to (2) *Consd.* *Harvey v. Farnie* (1882), 8 App. Cas. 43. *Refd.* *Law v. Gould* (1868), L. R. 3 H. L. 55; *Briggs v. Briggs* (1880), 5 P. D. 163; *Bonaparte v. Bonaparte*, [1892] P. 402; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146. *Generally, Consd.* *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

143. —.]—*Re* LANGWORTHY, *Ex p.* LANGWORTHY (1887), 3 T. L. R. 544, C. A.

144. Avoidance of heavy liability—Abandonment of domicile of choice.]—*Re* ROBERTSON (1885), 2 T. L. R. 178, C. A.

145. Avoidance of imprisonment—Return on expiration of liability for imprisonment.]—Where a woman has made a will before marriage, the effect of a marriage in England upon the will depends on the English view of the domicile of the husband at the time of the marriage. An unmarried Frenchwoman executed a holograph will while resident in England. Subsequently she married a Frenchman in England according to English law. The husband was resident in England at the time of the marriage on account of a sentence of imprisonment passed on him in France. According to the law of France his liability to undergo this sentence ceased at the expiration of twenty years, & soon after that time had expired the husband returned to France. The wife continued to reside in England until her death.

No settlement was made on the marriage. At the date of the marriage the wife was carrying on a laundry business & the husband afterwards joined her in doing so, & certain leases of the laundry house were granted to him, but before his return to France he assigned the leases to his wife.

Held: under the circumstances the domicile of the husband at the time of the marriage was English, & the validity of the wife's will therefore depended on English law, & was revoked by the marriage.—*Re* MARTIN, LOUSTALAN *v.* LOUSTALAN, [1900] P. 211; 69 L. J. P. 75; 82 L. T. 806; 48 W. R. 509; 16 T. L. R. 354; 44 Sol. Jo. 449, C. A.

(j) *Double Residence.*

146. House or apartments rented in another country—Family estate kept up.]—SOMERVILLE *v.* SOMERVILLE (LORD), No. 20, *ante*.

147. —.]—A Scottish gentleman of rank & fortune left Scotland in 1794 & came on a visit to London. In the course of that year he became acquainted with an English lady. In 1795 he took lodgings for her in London, where, in 1796, a child was born. He then took a house on lease & furnished it, & continued to reside in that house with her till 1801, unmarried. In Sept. of that year he married her in an English church. In 1802 he returned to Scotland, taking with him his

PART II. SECT. 3, SUB-SECT. 2.—
B (i).

142 i. Avoidance of creditors.]—A person who files a country to avoid being made a bkpt. does not thereby

change his domicile.—*STRIKE v. GLEICH* (1879), O. B. & F. 50.—N.Z.

142 ii. —.]—R. had acquired a domicile in B.I. to avoid execution, he

went temporarily to another country; he was about to return, but suddenly died:—*Held*: there had been no change of domicile.—*BRUCE v. HAMILTON* (1804), Hume, 762.—SCOT.

Sect. 3.—Change of domicile: Sub-sect. 2, B. (j)

wife & child, & settled himself in his patrimonial mansion. During the whole period of his residence in London he had been accustomed to write letters to Scotland, declaring from time to time his immediate intention to return, & desiring things to be done which could only be necessary on that account. *Held*: he had not lost his Scotch domicile, & therefore his marriage was in all respects a Scotch marriage, & his child capable of succeeding as his lawful heir to entailed estates.—*MUNRO v. MUNRO* (1840), 7 Cl. & Fin. 842; 7 E. R. 1288. H. L.

Annotations:—*Consd.* Doe d. Burtwhistle v. Vardill (1840), 6 Bing. N. C. 385; Anderson v. Laneville (1854), 2 Ecc. & Ad. 41; Forbes v. Forbes (1854), Kay, 341; Lyall v. Paton (1856), 27 L. T. O. S. 315; Re Trustee Relief Act, 10 & 11 Vict. c. 96, Re Wright's Trusts (1856), 27 L. T. O. S. 213; Re Steer (1858), 3 H. & N. 594; Udny v. Udny (1869), L. R. 1 Sc. & Div. 441. *Folld.* Harvey v. Farnie (1880), 5 P. D. 153. *Consd.* Re Patience, Patience v. Main (1885), 29 Ch. D. 976. *Refd.* Laneville v. Anderson (1853), 21 L. T. O. S. 209; M'Donnells v. M'Donnell (1853), 20 L. T. O. S. 144; Re Wright's Trusts (1856), 2 K. & J. 595; Re Don's Estate (1857), 4 Drew. 194; Hodgson v. De Beauchesne (1858), 12 Moo. P. C. C. 286; Crookenden v. Fuller (1859), Sea. & Sm. 3; The Lauderdale Peerage (1885), 10 App. Cas. 692; Re Grove, Vaucher v. Treasury Solicitor (1888), 40 Ch. D. 216; Winans v. A.-G., [1904] A. C. 287. *Mentd.* Fenton or Livingstone v. Livingstone (1856), 27 L. T. O. S. 18; Newton v. North West Provinces (Judges of the High Court) (1871), L. R. 4 P. C. 18.

148. ———.]—*LORD v. COLVIN*, No. 57, *ante*.

149. ———.]—*MOORHOUSE v. LORD*, No. 52, *ante*.

150. Residence in country of choice retained—*House bought in country of origin—Connections with country of choice continued.*—*M.*, born in Scotland, went while young to Wigan, where he entered into trade, married an English wife, became a member of the corp'n. & justice of the peace. His house was taken by a railway co., & after trying to get a suitable house in the neighbourhood he went to Scotland, where he bought a house & lived most of the year. He kept on a house at Wigan, which was his own, & was kept always ready for his reception. *M.* and his wife, though living chiefly in Scotland, paid regular visits to Wigan, & he often went there for some days at a time, was still locally connected with the borough, & retained his public offices:—*Held*: as *M.*'s domicile was in England before he returned to Scotland, & he kept up a residence there, & his local connections with the borough, his domicile was still English.

Where a domicile has been acquired, the onus of proof, to be deduced from all the facts & circumstances of the case, lies on the person who desires to show that that domicile has been changed.—*MAXWELL v. MACLURE* (1860), 2 L. T. 65; 6 Jur. N. S. 407; 8 W. R. 370, H. L.

Annotations:—*Consd.* Aikman v. Aikman (1861), 4 L. T. 374. *Refd.* Platt v. A.-G. of New South Wales (1878), 3 App. Cas. 336.

151. Residence acquired in domicile of origin—

PART II. SECT. 3, SUB-SECT. 2.—
B. (k).

156 i. *Residence in lodgings, hotels & boarding-houses.*—A native-born Chinaman came from C. to A. in 1898, leaving his wife behind him. He remained in A. about 6 years, not learning English, of which he acquired only an imperfect knowledge of a few words, & having no residence or house of his own. He went back to C. in 1904, remained there for 8 years, & came back to A. in 1912 without his wife:—*Held*: the evidence did not establish that he had gained an A. domicile before he went to C. in 1904.—*LONG PACK v. GLEESON* (1913), 15 C. L. R. 725.—*AUS.*

156 ii. ———.]—*C.* was born in L.C., & remained there until 16 years of age, after which he went to the N.W. Territories, where he resided at different posts of N.W. Co. for 30 years, & then returned to L.C.:—*Held*: *C.* had never acquired a domicile in N.W. Territories.—*CONNOLLY v. WOOLRICH & JOHNSON* (1867), 11 L. C. J. 197; C. L. J. N. S. 14.—*CAN.*

156 iii. ———.]—A lady born in I. & whose father, a Scotsman by birth, died in I., in service of the E.I. Co., came on her father's death, in her infancy, to S., with her mother, & resided there for 14 years. She then went with her mother to the continent, where she resided for a year, & after

House bought in another country.—*AIKMAN v. AIKMAN*, No. 34, *ante*.

152. Estates & residences in country of origin—*Favourite residence in another country.*—*HUNTLEY (MARCHIONESS) v. GASKELL*, No. 84, *ante*.

153. Residence of wife & family—*House built on family estate.*—*FORBES v. FORBES*, No. 21, *ante*.

154. ———. Residence in another colony.]—*M.* having abandoned his domicile of origin, which was in Scotland, acquired a new domicile in that portion of New South Wales which in 1859 was by proclamation separated therefrom & became the colony of Queensland. Thereafter he built in New South Wales a house suitable to his fortune, his wife & children residing there till his death, removing thereto from Queensland, he himself also residing there except at times when he was engaged upon his business or political duties in Queensland. He died, however, & was buried at his own wish in Queensland:—*Held*: whether or not at the moment of separation in 1859 the domicile of *M.* was transferred to & became a domicile in Queensland, or continued to be a domicile in New South Wales, from the time the house built therein was finished, & the establishment of *M.* removed thereto, his animus manendi in New South Wales must be inferred, and his domicile there determined.—*PLATT v. A.-G. OF NEW SOUTH WALES* (1878), 3 App. Cas. 336; 47 L. J. P. C. 26; 38 L. T. 74; 26 W. R. 516, P. C.

155. ———. Farm in another country.]—In proceedings for divorce it appeared that petitioner had been born in France of French parents. When he was ten years old his parents settled in England, & the father subsequently obtained letters of naturalisation as a British subject. Petitioner when eighteen years of age went to Canada, where he took up the business of farming, bought a farm, served in the Canadian volunteers, & discharged the duties of a citizen of Canada. In 1878 he married resp., who was a Canadian, & in 1883 he brought her with their children to this country, where he resided for some years with his father. He had occasion to return several times to Canada, as he alleged, to look after his farm, & from 1881 was only seven months in this country. Resp. remained in England until the date of the alleged adultery, when she visited France:—*Held*: petitioner had not lost his English domicile, the matrimonial home was in England, & the ct. had therefore jurisdiction over the proceedings.—*D'ETCHEGOYEN v. D'ETCHEGOYEN* (1888), 13 P. D. 132; 57 L. J. P. 104; 37 W. R. 64.

Annotation:—*Mentd.* D'Etchegoyen v. D'Etchegoyen (1908), 25 T. L. R. 85.

—.]—*See, also*, Nos. 116, 118, *ante*.

(k) Absence of Permanent Residence.

156. Residence in lodgings, hotels & boarding houses.]—*AIKMAN v. AIKMAN*, No. 34, *ante*.

that went to E., where she continued for 2 years. She returned to S. for a few months, & then went to E. a second time, where she resided till her death, 3 years afterwards. She never had any permanent residence after leaving S., but resided in furnished lodgings & hotels, & sometimes with friends, both when on the continent & in E.; & her mother retained, undisposed of, the furniture which she had in her home in S.:—*Held*: her S. domicile remained her domicile at her death.—*ARNOTT v. GROOM* (1846), 9 Dunl. (Ct. of Sess.) 142.—*SCOT.*

1. *Residing with relatives—Short lease of house.*—*J.* had, at the date of her father's death, a S. domicile of

157. ———.]—WHICKER v. HUME, No. 70, *ante*.

158. ———.]—*Re* PATIENCE, PATIENCE v. MAIN, No. 91, *ante*.

See, also, Nos. 101, 130, *ante*.

159. ——— Such mode of living not unusual—*In United States*.]—*Re* ESCHMANN (DECEASED), No. 71, *ante*.

C. Form and Contents of Will.

160. Form of will—Will in English form—By Englishman resident in France.]—BREMER v. FREEMAN, No. 69, *ante*.

161. ——— Copy executed according to law of France.]—*In the Goods of* WEST, No. 72, *ante*.

162. ———.]—Upon a claim, on the part of the Crown, for payment of legacy duty, treating testator as domiciled in England, it appeared that testator (whose name was English, but whose place of birth was unknown) had held a commission in the English army, but had sold out in 1810, & retired to France, where he resided until his death in 1820, placing an illegitimate son at a French school. His will, made at Paris in 1819, was in the English form. He left property in the French funds, & none in England:—*Held*: the presumption was against an English domicile, & in the absence of proof by the Crown of English domicile, legacy duty was not payable.—U.S.A. (PRESIDENT) v. DRUMMOND (1864), 33 Beav. 449; 4 New Rep. 7; 33 L. J. Ch. 501; 10 L. T. 321; 10 Jur. N. S. 533; 12 W. R. 701; 55 E. R. 412.

Annotations: *Consd.* Whicker v. Hume (1858), 7 H. L. Cas. 125. *Refd.* U.S.A. v. Wagner (1867), 2 Ch. App. 582. *Mentd.* Beaumont v. Oliveira (1869), 4 Ch. App. 309; *Re* Macduff, Macduff v. Macduff, [1896] 2 Ch. 451.

163. ———.]—Deceased was a daughter of a chemist in Oxford Street. She was born in England in 1818, & lived in the country until she was 56 years of age. In 1874, her father and mother being dead, she left England to travel on the Continent with her sister, who was in bad health. She never afterwards resided in this country & continued to travel on the Continent until her sister's death, which occurred in Paris, in 1883. She herself died in 1893 in Florence & was buried there. In November, 1891, the testatrix made her will. In June, 1892, she made a codicil thereto, & in April, 1893, she made a second codicil. All these documents were prepared for her in England by her English solr. They were all in English form, and obviously made with reference to English law. In her will which was executed in Paris she described herself in a similar manner. In her second codicil, she described herself as a British subject at present residing at Florence. The facts relied on in support of the French domicile were that the testatrix's residence was in Paris, that she had taken apartments on lease in Paris, that she had purchased a tomb or

origin. After her father's death, the house in which he had resided for a great many years in S. was sold. J. was resident abroad at the date of her father's death; but returned to S. on a short visit & then went to E. where some relatives resided & there she leased a house for 3 years. She paid visits to S. during which she looked about for a house there; but she died in E.:—*Held*: at the date of her death she had not abandoned her S. domicile.—FAIRBAIRN v. NEVILLE (1897), 25 R. (Ct. of Sess.) 192.—SCOT.

PART II. SECT. 3, SUB-SECT. 2.—C.

g. Form of will—Will in New Zealand form—By Italian resident in New Zealand.]—Testator's domicile of origin

was Italian. He went to N.Z. with money, which he invested in land & on mtge. there, & resided there until he died in 1892. Between 1881, when he first came to N.Z., & 1892 he visited Italy for a short time. In 1882 he discarded his Italian name & assumed an English one, & he executed a will, in which he stated that he had always resided & received his education in E., & was desirous of being a British subject. He married a British subject in N.Z. under his E. name. In 1890 he made his last will according to N.Z. form in N.Z. appointing two persons domiciled in N.Z. his exors. Testator frequently stated to one exor. that he intended to make N.Z. his permanent place of residence, & always avoided allusions to Italy:—

vault in a Paris cemetery, and that in her correspondence she made use of the term "home" in reference to Paris:—*Held*: deceased was still domiciled in England.—*Re* GARDEN (DECEASED), (1895), 11 T. L. R. 167.

164. ——— Express declaration of intention to retain domicile of origin.]—*Held*: testator had not abandoned his English domicile of origin nor acquired a new domicile abroad.—*Re* DE ALMEDA (BARON EMANUEL), SOURDIS v. KEYSER (1902), 18 T. L. R. 414, C. A.

165. ——— By Englishman resident in Germany—Express declaration of intention to retain domicile of origin.]—*Re* STEER, No. 67, *ante*.

166. ——— By Scotchman living in France.]—WHICKER v. HUME, No. 70, *ante*.

167. ——— By Frenchman resident in England.]—DOUCET v. GEORGEHAN, No. 78, *ante*.

168. ——— By Scotchman resident in England—After retirement from business in India.]—*Re* BULLEN-SMITH, BERNERS v. BULLEN-SMITH, No. 118, *ante*.

169. ——— By Scotchman with no permanent residence in England—To prevent mother obtaining custody of child.]—*Held*: the Scottish domicile of origin remained unchanged.—*Re* DUNBAR, DUNBAR v. WENTWORTH (1896), 12 T. L. R. 153.

170. Description of testator—As of country of origin.]—Legacy duty is not payable on legacies bequeathed by a foreign testator, & paid in this country by English exors. to English legatees.

Testator was born in Maryland, before the separation of the American colonies from Great Britain, of parents domiciled in America, & was sent to Scotland when under age, for his education. At the age of twenty-four, & after the treaty of 1783, he went to India, being described in the ship's books as an American, & remained in that country for thirty years, where he acquired a fortune, the greater part of which he left there, on returning to Europe. He then went to America to see his family, & to look after some property left him by his father; & having again visited different parts of England, Scotland, & the continent, finally returned to America, engaged in agricultural pursuits, commenced drawing his property to that country, & made a will, wherein he described himself as "late of Calcutta, & now of Richmond, in the country & state of New York," & appointed English exors. Shortly after, he died at New York:—*Held*: testator had made his election to become a subject of the United States, & was at his death domiciled in America; & consequently, the legacies paid in this country to English legatees, were not subject to the legacy duty.—*Re* BRUCE (1832), 2 Cr. & J. 436; 2 Tyr. 475; 1 L. J. Ex. 153; 149 E. R. 185.

Annotations:—*Foll.* Charitable Donations Comrs. v. Devereux (1842), 13 Sim. 14. *Consd.* Thompson v.

Held: he had at the time of his death abandoned his I. domicile of origin & acquired a N.Z. domicile.—SELLS v. RHODES (1905), 26 N. Z. L. R. 87.—N.Z.

170 i. Description of testator—As of country of origin.]—Testator described himself as of L. in I., at present at D. in G., where he died: the ct. assumed that I. was his domicile.—KENNEDY v. KELLY (1862), 14 Ir. Jur. 326.—IR.

170 ii. ———.]—BROOKS v. BROOKS' TRUSTEES (1902), 4 F. (Ct. of Sess.) 1014; 39 Sc. L. R. 816; 10 S. L. T. 217.—SCOT.

170 iii. ———.]—CORBRIDGE v. SOMERVILLE (1914), 51 Sc. L. R. 406.—SCOT.

Sect. 3.—Change of domicile: Sub-sect. 2, C., D.

Advocate General (1845), 12 Cl. & Fin. 1. **Refd.** *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656. **Mentd.** *Tyler v. Bell* (1836), Donnelly, 190; *Salkeld v. Johnston* (1842), 1 Hare, 196; *Re Stepney Election Petition*, *Isaacson v. Durant* (1886), 17 Q. B. D. 54.

171. ———.]—WHICKER *v.* HUME, No. 70, *ante*.

172. ———.]—STEVENSON *v.* MASSON, No. 75, *ante*.

D. Naturalisation.

173. May be evidence of change of intention.]—STANLEY *v.* BERNES, No. 40, *ante*.

174. Not essential.]—HALDANE *v.* ECKFORD, No. 89, *ante*.

175. ——— Nor conclusive.]—KING *v.* FOXWELL, No. 45, *ante*.

176. Refusal to be naturalised.]—A French subject, established himself in business in this country, married & continued to reside here for more than thirty years, making only occasional visits to France:—**Held:** to have lost his domicile of origin, & acquired an English domicile, notwithstanding his refusal to take out letters of naturalisation in this country, on the ground that he might return to France, & would not give up his status as a French citizen.—BRUNEL *v.* BRUNEL (1871), L. R. 12 Eq. 298; 25 L. T. 378; 19 W. R. 970. **Annotation:**—*Consd.* *Doucet v. Geoghegan* (1878), 9 Ch. D. 441.

Naturalisation generally.—See ALIENS, Vol. II., pp. 189, 190.

E. Acquisition and Disposal of Property.**(a) House or Estate.**

177. Purchase of paternal property—& residence there till death.]—CHIENE *v.* SYKES (1811), 5 Madd. 394; 56 E. R. 945.

178. ——— Subsequent travelling abroad.]—Testator P., the son of a Scottish landed proprietor, at the age of fifteen was apprenticed to a surgeon in his native place, & afterwards left the country & went to India in the capacity of a medical officer to the East India Co., where he resided for a period of forty-three years, having married, & accumulated a considerable fortune. In the year 1818 he retired from his profession & situation on a pension, & returned to his native country, Scotland, when he succeeded in purchasing his paternal property from the trustees of his father's creditors, & built a handsome mansion upon the estate, which he occupied up to the year 1825, when he took a tour to Switzerland, breaking up his establishment. During some time in the year following he went to Paris, & resided in lodgings on the Boulevards until the year 1829, when he again visited his mansion in Scotland, having spent a short time in London on his return. He then went to Edinburgh, where he instructed his solicitor to prepare his will, which he executed afterwards in London. Testator, in Nov. 1829, again took up his residence in Paris, having changed his place of abode from the Boulevards to the Place Vendome. In this part of Paris he lived until June, 1831, when, being in

a bad state of health, he set out for England, but died on June 10, at Beauvais, on his return to Scotland:—**Held:** the rule of law was perfectly clear in reference to a party's domicile, which remained until it was proved by good evidence that the party's intention really was that his domicile should be changed, & there was no design to change that domicile, & testator's domicile was in Scotland; for unless it could be shown by overwhelming evidence that it was otherwise, the rule of law had settled the question.—COCHRANE *v.* COCHRANE (1847), 9 L. T. O. S. 167.

Annotations:—**Mentd.** *Lord v. Colvin* (1853), 2 W. R. 134; *Lord v. Colvin* (1855), 3 Drew. 222; *Lord v. Colvin* (1860), 3 L. T. 228; *Moorhouse v. Lord* (1863), 10 H. L. Cas. 272.

179. Purchase of house or estate—In another country—Estate not made permanent residence—Travelling.]—A British subject domiciled & having real & personal estate in England, went abroad & purchased in 1828, the title, castle, & estate of R., in the Papal States. He hired Italian domestic servants, male & female, whom he kept at R. until his death. He expended large sums in repairing & improving the castle & grounds of R., which repairs & improvements were going on at the time of his death. He did not make R. his constant residence, but from 1828 to 1831 sometimes occupied it, sometimes lived in furnished lodgings in the towns adjacent, & at other times visited Rome, Florence, & other parts of Italy, residing in furnished lodgings. In 1831 he came to England, & resided in different parts of it until September, 1832. In March, 1832, he sent to R. several cases of plate, books & wearing apparel. In September, 1832, he made his will in London. In the same month he left England & went to Florence, where he remained two months, & thence to R., he then lived, sometimes in the castle of R., sometimes in furnished lodgings in the adjacent towns, till October, 1833, when he went to Rome & there lived in furnished lodgings until his death in Feb. 1834:—**Held:** there was no evidence of testator's having actually acquired a domicile at R., or elsewhere abroad, although they indicated an intention to make R. his domicile; his English domicile therefore remained, & legacy duty was consequently payable on the bequests contained in his will.—A.-G. *v.* DUNN (1840), 6 M. & W. 511; 151 E. R. 514.

Annotations:—**Consd.** *Thomson v. Advocate General* (1845), 12 Cl. & Fin. 1; *Lyall v. Paton* (1856), 25 L. J. Ch. 746. **Dbtd.** *United States President v. Drummond* (1864), 10 Jur. N. S. 533.

180. ——— To live with benefactor—So long as benefactor lived.]—ANDERSON *v.* LANEUVILLE, No. 50, *ante*.

181. ———.]—A.-G. *v.* FITZGERALD, No. 121, *ante*.

182. ———.]—STEVENSON *v.* MASSON, No. 75, *ante*.

183. Lease of house—In country of origin—House never occupied.]—*Re WILLS-SANDFORD*, *WILLS-SANDFORD v. WILLS-SANDFORD*, No. 76, *ante*.

(b) Ground for Burial.

184. Purchase of grave—In another country.]—BREMER *v.* FREEMAN, No. 69, *ante*.

PART II. SECT. 3, SUB-SECT. 2.—E. (a).

179 i. Purchase of house or estate—In another country—Estate not made permanent residence.]—HOPPER *v.* DUNSMUIR (1906), 3 W. L. R. 18.—CAN.

PART II. SECT. 3, SUB-SECT. 2.—E. (b).

184 i. Purchase of grave—In another

country.]—M., had a N.Z. domicile: he left N.Z. for E., after making over his business to two sons. He returned again 2 years after & shortly after left again for E., where he died. The bulk of his property was in N.Z. He made his will in N.Z. & executed a codicil shortly before leaving E. on his visit to N.Z., & in the codicil described himself as of N.Z., now residing in E. His exor. & trustee resided in N.Z., & his will was proved there.

During his last voyage to E. he sent a document to one son purporting to give him the use of a burial-lot in W. Cemetery in N.Z., but expressly reserving a place in it for himself should he die in N.Z. While in E. he stated that he intended to remain in E., & wished to be buried in C. Cemetery there, & that if he went to N.Z. it would be only on a visit; he spoke of settling down in E. & getting a cottage when he had finished travelling,

185. —.] — *Re* GARDEN (DECEASED), No. 163, *ante*.

186. — In country of origin.] — *Re* ALMEDA (BARON EMANUEL), SOURDIS *v.* KEYSER (1902), 18 T. L. R. 414, C. A.

187. Sale of grave—In country of origin.] — STEVENSON *v.* MASSON, No. 75, *ante*.

F. Taking Journey.

188. Being in itinere—To intended domicil.] — FORBES *v.* FORBES, No. 21, *ante*.

189. Dying in itinere.] — MUNROE *v.* DOUGLAS, No. 63, *ante*.

190. — From domicil of choice.] — Testator had a Scottish domicil of origin. In 1807 he sailed from England for the East Indies, was wrecked, taken prisoner, & confined at Verdun. On his release he went to Calcutta; & established a business. In 1835 he made his will, at Calcutta, & in it described himself as of that place. He gave legacies in Indian currency to pltf., his two sons, & appointed two gentlemen, resident at Calcutta, his exors. In 1836 he sailed for England, but died on the voyage. He left considerable property in India:—*Held*: dying in itinere did not alter the domicil which testator acquired in India.—LYALL *v.* PATON (1856), 25 L. J. Ch. 746; 27 L. T. O. S. 315; 4 W. R. 798.

Annotation:—*Refd.* A.-G. *v.* Pottinger (1861), 6 H. & N. 733.

191. — To domicil of origin.] — A Sardinian, who had settled in Brazil, died intestate on his way back to resume his domicil of origin at Genoa. An agreement had been come to between the Brazilian & Italian Govts., with respect to the administration of his property & the guardianship of his children (some of whom were in Genoa & others in Brazil), by which the Brazilian Govt. gave up to the Italian Govt. all claim to such administration & guardianship. The ct. revoked a grant of administration which had been made to the representative of the person entitled to it according to Brazilian law, & made a grant to the person entitled to it according to Italian law.—*In the Goods of* BIANCHI (1862), 3 Sw. & Tr. 16; 1 New Rep. 108; 8 L. T. 171; 11 W. R. 240; 164 E. R. 1177.

192. Beginning journey—Never completed—Through illness.] — B. left France, where she had an acquired domicil, with intention of residing in England; she went on board at Calais, but before leaving harbour was, through illness, obliged to land, and never sufficiently recovered to leave France:—*Held*: there was no sufficient act to give effect to the intention to resume the English domicil.—*In the Goods of* RAFFENEL (1863), 3 Sw. & Tr. 49; 1 New Rep. 569; 32 L. J. P. M. & A. 203; 8 L. T. 211; 9 Jur. N. S. 386; 11 W. R. 549; 164 E. R. 1190.

193. — — — —.] — Testatrix, who was born in France, her parents being French subjects, came with them, when she was of age, to England, & lived with them until their death, after which she resided with her brother till he gave up his house. She then left with the intention of living at her native town, but fell ill at Paris, whence she

returned to London for treatment, & remained there till her death. She had taken no lodgings, nor sent forward any funds to France. By her will, in English, she was described as of English residence:—*Held*: as she had merely an ultimate intention of living in France, her domicil was English.—A.-G. *v.* GASQUET (1877), 41 J. P. 487; 42 J. P. 346.

G. Other Cases.

194. Marriage.] — STANLEY *v.* BERNES, No. 40, *ante*.

195. Change of religion.] — STANLEY *v.* BERNES, No. 40, *ante*.

196. Investment with privileges acquired at place of residence.] — STANLEY *v.* BERNES, No. 40, *ante*.

197. Membership of clubs retained—Trusteeship of charity retained.] — *Re* DE ALMEDA (BARON EMANUEL), SOURDIS *v.* KEYSER (1902), 18 T. L. R. 414, C. A.

198. Agricultural pursuits entered into—Property from other countries drawn to country of residence.] — *Re* BRUCE, No. 170, *ante*.

SUB-SECT. 3. — BY PERSONS UNDER DISABILITY.

A. Infants.

199. Legitimate child—Change of domicil of father.] — *In the Goods of* PATTEN (DECEASED), No. 99, *ante*.

200. — — Lunatic at attainment of majority.] — SHARPE *v.* CRISPIN, No. 111, *ante*.

201. — — — —.] — FIREBRACE *v.* FIREBRACE, No. 104, *ante*.

202. — — — —.] — *Re* MACREIGHT, PAXTON *v.* MACREIGHT, No. 105, *ante*.

203. — — — —.] — D'ETCHEGOYEN *v.* D'ETCHEGOYEN, No. 155, *ante*.

204. — — — —.] — *Re* DULEEP SINGH, *Ex p.* CROSS, No. 95, *ante*.

205. — — — — Nature of infant's new domicil.]

(1) On the marriage of a Scotsman with an Englishwoman upon whom property has already been settled, an ante-nuptial contract confirming the wife in her rights according to English law is desirable so as to preclude the husband from setting up on his wife's death a claim *jure mariti* to her property under Scottish law.

(2) Where the domicil of birth is changed during infancy by a change of the domicil of the father, the changed domicil is not the domicil of origin of the infant.

(3) The pltf., whose domicil of origin was Scotch, served for many years in the Army abroad, & subsequently led a wandering life, making London his headquarters. He afterwards married & resided with his wife at a house in London, purchased by her, to which he always referred as his home. Pltf. subsequently lived apart from his wife, using his London clubs as before:—*Held*: pltf. had acquired an English domicil.—*Re* CRAIGNISH, CRAIGNISH *v.* HEWITT, [1892] 3 Ch. 180; 67 L. T. 689; 8 T. L. R. 451, C. A.

Annotations:—*Refd.* Winans *v.* A.-G., [1904] A. C. 287; Casdagli *v.* Casdagli, [1919] A. C. 145.

& about buying a grave-space in C. Cemetery in E., but he had not carried out either of those intentions. Finally, he said that he intended to live & die in E.:—*Held*: the evidence was insufficient to show that M. had changed his N.Z. domicil.—MUNT *v.* FINDLAY (1905), 25 N. Z. L. R. 488.—N.Z.

PART II. SECT. 3, SUB-SECT. 3.—A.

199 i. Legitimate child—Change of

domicil of father.] — P., a young Englishman, came to S. in 1845, having received a permanent appointment in G.P.O. In 1854 he married a Scotswoman, & entered into a Scottish form of marriage contract. Several children were born of the marriage of whom A. was born in 1863. In 1876 P. purchased the house in which he was residing, & in 1878 he retired from the postal service & continued to reside in his house until his death in 1895. Shortly before coming to S. he inherited

from his father, & retained during his life, property in E. He kept the greater part in his own hands, allowing his sisters to occupy the house on the property. In 1896 A. died. In a question raised as to her domicil of origin:—*Held*: P., prior to A.'s birth, had acquired a S. domicil & A.'s domicil of origin was S.—FAIRBAIRN *v.* SHEPHERD'S TRUSTEES (1897), 25 R. (Ct. of Sess.) 192; 35 Sc. L. R. 178; 5 S. L. T. 224.—SCOT.

Sect. 3.—Change of domicile: Sub-sect. 3, A., B. & C.]

206. Change of domicile of widowed mother.]—T. P., a native of England, domiciled in Guernsey, died intestate, leaving a widow, & infant children by her & also by a former wife. The widow, after his death, was appointed guardian of the children by the Royal Ct. of Guernsey, & in conjunction with another person, who was appointed guardian of the children by the former marriage, sold the property of the intestate & invested the produce in the English funds, after which she came to England with her children, & was domiciled there. On the death of some of the children under age, a question arose, whether their shares of the property had become distributable according to the law of England, or of Guernsey:—*Held*: the law of England should govern the succession, the domicile of the children being to follow the domicile of the surviving mother, where no fraudulent intention can be imputed. But fraud may be presumed, where no reasonable cause appears for the removal.—*POTINGER v. WIGHTMAN* (1817), 3 Mer. 67; 36 E. R. 26.

Annotations:—Expld. *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; *Re Beaumont*, [1893] 3 Ch. 490.

207. ——— Remarriage—Effect on infant's domicile.]—The change in the domicile of a fatherless infant which may follow from a change of domicile on the part of the mother is not to be regarded as the necessary consequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which in their interest she may abstain from exercising even when she changes her own domicile.

B., a widow with several infant children, all of whom had a Scotch domicile, married again in Scotland in Nov. 1834. In Jan. 1835, N., her second husband, went to reside permanently in England, & shortly afterwards Mrs. N. & all her children, except C. B., joined him in England & acquired an English domicile. C. B. remained in Scotland with an aunt, with whom she had lived since her father's death in 1821. C. B. attained twenty-one in May, 1840, & she died in Scotland in April, 1841.

Held: B. had abstained from exercising her power of changing C. B.'s domicile when she changed her own, & the domicile of C. B. at the time of her death was Scottish.—*Re Beaumont*, [1893] 3 Ch. 490; 62 L. J. Ch. 923; 42 W. R. 142; 37 Sol. Jo. 731; 8 R. 9.

208. Illegitimate child—Residence with putative father's relations.]—*URQUHART v. BUTTERFIELD*, No. 209, *post*.

B. Lunatics.

209. Lunacy after attainment of majority.]—

207 i. ——— Change of domicile of widowed mother—Remarriage—Effect on infant's domicile.]—*CRUMPTON'S JUDICIAL FACTOR v. FINCH-NOYSE*, [1918] S. C. 378.—**SCOT.**

h. Infant—Cannot change domicile.]—A male infant, though married, has no power to change his domicile.—*ROBERTSON v. ROBERTSON*, [1905] V. L. R. 546.—**AUS.**

j. ——— May change domicile—If trader.]—An infant, trading in a foreign country, may acquire a domicile there.—*STEPHENS v. McF LAND* (1845), 8 L. Eq. R. 414.—**IR.**

PART II. SECT. 3, SUB-SECT. 3.—C.

211 i. Acquisition of husband's domicile.]—During coverture the domicile of the husband is the domicile of

the wife.—*MCDONALD v. MCDONALD* (1859), 5 C. L. J. O. S. 66.—**CAN.**

211 ii. ———.]—*CUTLER v. CUTLER* (1914), 20 B. C. R. 34.—**CAN.**

211 iii. ———.]—A husband had acquired a domicile in A.:—*Held*: his wife also had acquired a domicile in A. derived from her husband, in respect that, so long as a marriage remains undissolved by divorce or unimpaired by judicial separation, the wife's domicile follows that of the husband, even though the conduct of the husband would have entitled the wife to obtain a decree of divorce, or separation had she applied for it.—*MACKINNON'S TRUSTEES v. INLAND REVENUE*, [1920] S. C. (H. L.) 171.—**SCOT.**

k. ——— Limitation of fiction.]—The true limitation of the legal fiction

Testator being the illegitimate son of a Portuguese woman, was sent to Scotland, when a child, & lived there till he was eighteen years of age under the control of his reputed father's relations there. He was sent to school in Scotland & for a short time in Germany. When eighteen he obtained employment in the English Customs Department & went to Yarmouth & thence to London, where he remained in the same employment till he was twenty-eight, when he returned to Scotland in ill-health, & soon after became a lunatic & died without recovering his reason. While living in London he went occasionally to Scotland, where he retained apartments, in which he left his books, etc. According to Scots Law an infant can choose his own domicile at the age of fourteen:—*Held*: whether the law applied to an infant who had a foreign domicile of origin or not, the evidence did not show that testator had adopted a Scottish domicile.—*URQUHART v. BUTTERFIELD* (1887), 37 Ch. D. 357; 57 L. J. Ch. 521; 58 L. T. 750; 36 W. R. 376, 385, n.; 4 T. L. R. 161, C. A.

210. Lunacy at attainment of majority—Subsequent change of domicile by father.]—*SHARPE v. CRISPIN*, No. 111, *ante*.

C. Married Women.

211. Acquisition of husband's domicile.]—The mere fact of staying at any place does not change the domicile of origin.

An Englishwoman married a Virginian resident in England:—*Held*: the instant she married her domicile became Virginian.—*MEINERTZHAGEN v. DAVIS* (1844), 1 Coll. 335; 13 L. J. Ch. 457; 3 L. T. O. S. 452; 8 Jur. 973; 63 E. R. 444.

Annotations:—Mentd. *Re Gilbert's Trust Estate* (1852), 16 Jur. 852; *Stones v. Rowton* (1853), 1 Eq. Rep. 427; *Hillman v. Westwood* (1854), 3 Eq. Rep. 142.

212. ———.]—Testatrix, born at Smyrna, of Dutch or Russian parents there residing, under the protection of the Dutch Consulate at Smyrna, married a British subject, & after his death, continuing to reside during the remainder of her life in the Levant, made a will, disposing of property in England, in the English form:—*Held*: her British domicile acquired by marriage had not been changed, nor had her domicile of birth reverted, & the protest to the jurisdiction of the ct. overruled.—*GOUT v. ZIMMERMANN* (1847), 5 Notes of Cases, 440; 9 L. T. O. S. 412.

213. ———.]—*HARVEY v. FARNIE*, No. 932, *post*.

214. ——— Marriage originally voidable—Parties living together.]—Petitioner, being a domiciled Englishwoman, in 1872 went through a form of marriage with an American citizen. She cohabited with him until February, 1879, in the United States, & in April, 1879, the Supreme Court of Columbia pronounced a decree dissolving the

that the wife must be deemed to follow her husband's domicile is that the rule must be understood to apply to such husbands as are not *vagabundi*—a *vagabundus* being one "*cui nec certum domicilium nec constans habitatio est*."—*MASON v. MASON* (1885), 4 E. D. C. 330.—**S. AF.**

l. Acquisition of independent domicile.]—A married woman living in S.A. cannot, save in exceptional circumstances, be a resident in S.A. within Constitution Act, s. 75 (iv), because of domicile if her husband is domiciled elsewhere.—*RENTON v. RENTON*, [1917] S. A. L. R. 277.—**AUS.**

m. ——— Separation from husband—Because of husband's conduct.]—*CHAISSON v. CHAISSON* (1920), 53 D. L. R. 360.—**CAN.**

marriage on the ground of the husband's incapacity. She then returned to this country, & in 1886 presented a petition to this ct. praying for a declaration of nullity of marriage:—*Held*: as the marriage was voidable & not void petitioner had acquired an American domicil, & the American ct. had jurisdiction to dissolve the marriage, & there being no longer a marriage in existence this ct. had no jurisdiction.—*TURNER v. THOMPSON* (1888), 13 P. D. 37; 58 L. T. 387; 52 J. P. 151; 36 W. R. 702; 4 T. L. R. 243.

215. ———.] — *Re* MARTIN, LOUSTALAN v.
LOUSTALAN, No. 145, *ante*.

216. Acquisition of supposed husband's domicile—Wife going abroad with supposed husband—First husband believed to be dead.]—*Re COOKE'S TRUSTS*, No. 48, *ante*.

217. Acquisition of independent domicile—Dissolution of marriage—Death of husband—No act done to acquire domicile.]—GOUT v. ZIMMERMANN, No. 212, *ante*.

218. — **Separation from husband—By agreement.**]—A Scotsman domiciled in Scotland was married in England to an Englishwoman, & by marriage contract secured to her a jointure on his Scottish estates. They went to Scotland after their marriage, & resided there a short time, when they returned to England. They afterwards agreed to a separation, & articles of agreement were executed, by which the husband secured a separate maintenance to the wife during the separation. From the time of the separation, the wife resided abroad, & the husband continued to be domiciled in Scotland, where he raised an action of divorce against her, on the head of adultery, alleged to have been committed abroad after the separation:—*Held*: (1) the wife's legal domicile was in Scotland, where the husband's was, & she was amenable to the jurisdiction of the Scottish Ct.; (2) an edictal citation, with actual intimation by serving a copy of the summons personally, was a good citation; (3) it was competent to the Scottish Cts. to entertain a suit to dissolve a marriage contracted in England.—**WARRENDER v. WARRENDER** (1835), 2 Cl. & Fin. 488; 9 Bli. N. S. 89; 6 E. R. 1239, H. L.

Annotations:—*As to* (1) **Expld.** Munro v. Munro (1840), 7 Cl. & Fin. 842; *Whitecomb v. Whitecomb* (1840), 2 Curt. 351. **Consd.** Harvey v. Farnie (1880), 6 P. D. 35; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146. **Refd.** Forbes v. Forbes (1854), Kay, 341; *Brook v. Brook* (1858), 3 Sm. & G. 481; *Dolphin v. Robins* (1859), 7 H. L. Cas. 390; *Yelverton v. Yelverton* (1859), Sea. & Sm. 49; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Re Bullen-Smith, Berners v. Bullen-Smith* (1888), 58 L. T. 578; *Re Beaumont*, [1893] 3 Ch. 490; *Le Mesurier v. Le Mesurier* (1895), 11 R. 527. *As to* (2) **Consd.** Collett v. Collett (1843), 3 Curt. 726. *As to* (3) **Expld.** Munro v. Munro (1840), 7 Cl. & Fin. 842. **Consd.** Brook v. Brook (1861), 9 H. L. Cas. 193; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Le Sueur v. Le Sueur* (1876), 1 P. D. 139. **Distd.** Niboyet v. Niboyet (1878), 4 P. D. 1. **Consd.** Harvey v. Farnie (1882), 8 App. Cas. 43. **Refd.** Geils v. Geils (1852), 20 L. T. O. S. 145; *Shaw v. A.-G.* (1870), L. R. 2 P. & D. 156; *Firebrace v. Firebrace* (1878), 26 W. R. 617; *Ogden v. Ogden*, [1908] P. 46; *R. v. Hammer-smith Superintendent Registrar of Marriages, Ex p. Mir Anwaruddin*, [1917] 1 K. B. 634; *Koyes v. Koyes & Gray*, [1921] P. 204. **Generally, Refd.** Armytage v. Armytage, [1898] P. 178. **Mentd.** Scaver v. Scaver (1846), 2 Sw. & Tr. 665; *Re Daly's Settltmt.* (1858), 25 Beav. 456; *Hyde v. Hyde & Woodmansee* (1866), L. R. 1 P. & D. 130; *Re Bethell, Bethell v. Hildyard* (1888), 38 Ch. D. 220; *Raymond v. Raymond & Stuart, Chapman v. Chapman & [1910] 1 P. 271.*

219. .]—A feme covert, living apart from her husband, has no power to change her domicil.

A feme covert had a power to appoint by her will, notwithstanding her coverture, & as if she were sole & unmarried. She lived in France thirty years, apart from her husband, who was

domiciled in England:—*Held*: her will, which was valid, in respect of formalities, by the French law, but invalid as regarded the English law, was not a due execution of the power.—*Re DALY'S SETTLEMENT* (1858), 25 Beav. 456; 27 L. J. Ch. 751; 31 L. T. O. S. 278; 4 Jur. N. S. 525; 6 W. R. 533; 53 E. R. 711.

220. ——— ——— ———.]—A foreign ct. cannot dissolve the bonds of an English marriage, where the parties are not *bonâ fide* domiciled in the foreign country.

A. & B. were married in England in 1822 ; they lived together till 1839, when they separated. In Feb. 1854, the husband went to Scotland, & resided there, with some very short intervals, till July, 1854. In June, 1854, his wife, who had followed him to Scotland, sued out, in the Scottish cts., a process for dissolution of marriage, on account of adultery committed by him in Scotland. In July a decree for divorce *a vinculo* was pronounced. In Sept. she married a Frenchman (according to the forms required by Scottish & by French law), & went with him to his domicile in France. While in England she had executed an English will, in pursuance of a power reserved to her, & in accordance with the terms of that power. After having resided nearly two years in France, she executed, in June, 1856, a holograph will (valid according to the laws of that country) revoking all previous wills :—

Held: (1) there had not been any change of domicile by the husband; (2) the domicile of B., the wife, was that of her husband; (3) the Scottish decree of divorce had no effect, she continued to be a married woman & a domiciled Englishwoman, & consequently her will of 1854 was properly admitted to probate, & the revoking paper of June, 1856, was a nullity.

(4) *Scemle* : an agreement to live separate is not equivalent in its legal effects to a judicial sentence of separation. (5) *Qu.* : whether, after a decree for judicial separation, a wife can acquire a domicile different from the husband.—*DOLPHIN v. ROBINS* (1859), 7 H. L. Cas. 390 ; 29 L. J. P. & M. 11 ; 34 L. T. O. S. 48 ; 23 J. P. 725 ; 5 Jur. N. S. 1271 ; 7 W. R. 674 ; 3 Macq. 563 ; 11 E. R. 156, H. L. ; *affg.* S. C. *sub nom.* *ROBINS v. DOLPHIN* (1858), 1 Sw. & Tr. 37 ; *subsequent proceedings, sub nom.* *ROBINS v. DOLPHIN* (1860), 1 Sw. & Tr. 518.

Annotations:—As to (2) **Consd.** *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146. **Refd.** *Yelverton v. Yelverton* (1859), *Sea. & Sm.* 49; *Le Sueur v. Le Sueur* (1876), 1 P. D. 139. As to (3) **Expld.** *Shaw v. Gould* (1868), L. R. 3 H. L. 55. **Consd.** *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146. **Refd.** *Harvey v. Farnie* (1882), 8 App. Cas. 43.

221. -- Subsequent bigamous marriage by husband.] A Scotsman domiciled in Scotland married a Scotswoman, & resided with her in Scotland. After some years he went to Australia, with his wife's consent, & resided in Australia for twenty-five years up to his death. He never communicated with his wife after he left Scotland, & never expressed any intention or wish to return there. About sixteen years before his death he contracted a bigamous marriage in Australia. When this came to the knowledge of his wife she instituted proceedings for divorce in the Scottish cts.; but she died before the case came on for hearing, leaving her husband surviving:--*Held*: (1) the husband's domicile was in Australia; (2) there was nothing in the circumstances of the case to take it out of the ordinary rule that a wife's domicile is that of her husband, & therefore the wife's domicile was in

**Sect. 4.—Anglo-Indian domicil. Sects. 5 & 6:
Sub-sects. 1 & 2, A.]**

death in the East India Company's service, & had while in England expressed his intention on account of domestic circumstances to return to reside in India.—*A.-G. v. PORTINGER* (1861), 6 H. & N. 733; 30 L. J. Ex. 284; 4 L. T. 368; 7 Jur. N. S. 470; 9 W. R. 578; 158 E. R. 303.

Annotations:—*Refd.* *A.-G. v. Kent* (1862), 1 H. & C. 12; *Winans v. A.-G.*, [1904] A. C. 287; *Casdagli v. Casdagli*, [1919] A. C. 145.

242. — Distinguished from service in army in India.—*A.-G. v. NAPIER*, No. 100, *ante*.

243. ——*FORBES v. FORBES*, No. 21, *ante*.

244. Establishment of business in India—Naval officer on half-pay.—Testator, an English-born subject & an officer in the royal navy on half-pay, in 1829 obtained leave of absence for the purpose of going to India, where he established a business. In 1830 he married, & had three children, born in Calcutta. He continued to receive his half-pay & to obtain renewals of leave until 1839. In that year he made his will, & died at Calcutta without having at any time returned to England:—*Held*: at his death testator's domicil was Indian.—*COCKRELL v. COCKRELL* (1856), 25 L. J. Ch. 730; 27 L. T. O. S. 303; 2 Jur. N. S. 727; 4 W. R. 730.

Annotations:—*Consd.* *A.-G. v. Fitzgerald* (1856), 25 L. J. Ch. 743. *Refd.* *Re Grove, Vaucher v. Treasury Solicitor* (1888), 40 Ch. D. 216; *Casdagli v. Casdagli*, [1918] P. 89. *Mentd.* *Lyall v. Paton* (1856), 25 L. J. Ch. 746.

245. ——*LYALL v. PATON*, No. 190, *ante*.

246. ——*ALLARDICE v. ONSLOW*, No. 136, *ante*.

247. — Evidence of intention to return.—*JOPP v. WOOD*, No. 18, *ante*.

**SECT. 5.—DOMICIL NOT RECOGNISED BY
FOREIGN LAW.**

248. Domicil of choice in country not recognising domicil—Domicil of origin unaffected.—Where a British subject, whose domicil of origin is colonial, acquires according to English law a domicil of choice in a country whose laws do not recognise domicil, but distribute the movables of a foreigner dying within their jurisdiction according to the law of his nationality, & dies there, the English cts. will distribute his movables according to the law of his domicil of origin.—*Re JOHNSON, ROBERTS v. A.-G.*, [1903] 1 Ch. 821; 72 L. J. Ch. 682; 88 L. T. 161; 51 W. R. 444; 19 T. L. R. 309.

Annotations:—*Folld.* *Re Bowes, Bates v. Wengel* (1906), 22 T. L. R. 711; *Gavin, Gibson v. Gibson*, [1913] 3 K. B. 379. *Refd.* *Casdagli v. Casdagli*, [1918] P. 89.

249. ——*A British subject, born in England, lived permanently in France so as to be in fact domiciled there, though he had not acquired a legal domicil there in the manner prescribed by French law, which recognised only a legal domicil. He died in France, having made his will:—Held*: both as to construction & administration the will was governed by English law.—*Re BOWES, BATES v. WENGEL* (1906), 22 T. L. R. 711.

Annotation:—*Refd.* *Casdagli v. Casdagli*, [1918] P. 89.

See, further, Part VI., post.

250. Domicil of choice in country regulating acquisition of domicil—Whether de facto domicil acquired—Code Napoleon art. 13.—*BREMER v. FREEMAN*, No. 69, *ante*.

251. ——*HAMILTON v. DALLAS*, No. 59, *ante*.

SECT. 6.—COMMERCIAL DOMICIL.

SUB-SECT. 1.—MEANING OF.

252. Test of enemy or neutral character.—The nationality of a person taken in war is determined primarily by the locality of his domicil.—*LE THEODORE* (1779), Marr. 256.

253. Party may have more than one commercial domicil—Businesses in different countries.—A man having a house of trade in the enemy's country as well as in a neutral country, is not to be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belonged to his belligerent domicil. A man having connection at an enemy's port, either as a partner in a house of trade or as a sole trader, is not liable to be considered as an enemy merchant in respect to a transaction originating with another house, & having no connection with such enemy port. The consequence of the transaction must be limited to the transaction at such port, & his other trade must be exonerated.

A partner in a firm trading at N., had left N. & was trading at W. The great bulk of his trade from W. went to N. & several N. fishing boats continued to be owned by him:—*Held*: he had still an interest in the partnership at N. inasmuch as his name still continued first in the firm name.—*THE PORTLAND* (1800), 3 Ch. Rob. 41.

Annotations:—*Consd.* *The Lützow*, [1918] A. C. 435. *Mentd.* *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484; *Rodriguez v. Speyer*, [1919] A. C. 59.

254. ——*A man may have mercantile concerns in two countries; if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries. When great commercial concerns were carried on in coffee-houses, the fact that a man had no fixed counting-house in the enemy's country was not decisive. A counting-house or fixed establishment is not necessary to make a man a merchant of any place. If he is there himself, & acts as a merchant of that place it is sufficient; & the mere want of a fixed counting-house there will make no breach in the mercantile character, which may well exist without it.—THE JONGE KLASSINA* (1804), Ch. Rob. 297.

Annotations:—*Consd.* *The Hypatia*, 1917] P. 36. *Refd.* *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484; *The Lützow*, [1918] A. C. 435; *Casdagli*, [1919] A. C. 145. *Mentd.* *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *Rodriguez v. Speyer*, [1919] A. C. 59.

SUB-SECT. 2.—ACQUISITION OF.

A. Residence and Trading.

255. Nominal residence—Burgher's certificate.—Nominal residence, although accompanied by a magistrate's certificate, cannot entitle a person to be considered as a citizen of a town. The residence which the ct. requires, must be taken up honestly, with a *bonâ fide* intention of making it the place of habitation.—*THE ENDRAUGHT* (1798), 1 Ch. Rob. 22.

Annotation:—*Mentd.* *The Jonge Margaretha* (1799), 1 Ch. Rob. 189.

256. — Disposal of house—Landed estate retained.—(1) G., a native of Great Britain, had settled in America, where he resided & carried on an extensive trade till 1798, when he came to Europe, to England & France, to look after his debts & to reclaim some property captured by the French, & also with an intention of carrying back with him his wife & family, who had been residing

in England for the education of his children. He was requested, by the President of the United States, to take the command of an armed ship against the French; but, on declining that offer, he was persuaded to accept the office of consul-general for Scotland. In such capacity he had not acted further than to appoint deputies:—*Held*: if there were any deputies acting under his appointment it would be a strong circumstance to affect him with a British residence, as long as there were persons acting in an official station in the British Isles & deriving their authority from him.

(2) G. went to France, in 1800, for the purpose of recovering payment of some debts. He continued in France from Feb. till July, & having succeeded in the recovery of some part of his money, which he had no opportunity of remitting directly, he invested it in the purchase of several prize vessels, which he sent to England, some in ballast, & others loaded with provisions:—*Held*: such a transaction conducted *bonâ fide* with that view, & directed only to the removal of property, which the accidents of war might have lodged in the belligerent country, were entitled to be treated with some indulgence.

(3) Subsequently he went again to France, in the following year, to collect outstanding debts. Part of the money which he received was invested in a speculation of sending a cargo of butter to Lisbon, because that port afforded a favourable market:—*Held*: this was a voluntary mercantile speculation in the enemy's trade, & was not the case of a man withdrawing his property to England, but engaging in new speculations, & standing on same footing as any other merchant in the country of the enemy.

(4) G. having ceased to act as a general merchant in America, & having confined himself to the shipment of the produce of his own landed estate:—*Seem*: he ceased to be a merchant of America, because a person confining himself to the shipment of the produce of his own estate does not stand on the same footing as a general merchant, retaining a mercantile domicile by his house of trade.

G. had disposed of his house, & had nothing left in America but his landed estate:—*Held*: (5) that alone was not sufficient to constitute domicile, or fix the national character of the possessor not personally resident upon it; (6) whether G.'s character was that of a French or a British merchant, he did not stand in the character of a neutral American merchant, & he was not entitled to restitution.—*THE DREE GEBROEDERS* (1802), 4 Ch. Rob. 232.

ns:—*As to* (5) *Consd.* *Forbes v. Forbes* (1854), Kay, 341. *Refd.* *Jopp v. Wood* (1861), 11 L. T. 406. *Generally, Mentd.* *The Zamora*, [1916] 1 P. 27.

257. Residence & trading in same country.]—

(1) The property of an English merchant resident in Holland, taken in a Danish ship taken on a voyage from a Spanish port to Guernsey, condemned.

(2) An Englishman residing & trading in Holland is just as much a Dutch merchant as a Swede or a Dane would be.—*THE CITRO* (1800), 3 Ch. Rob. 38.

258. ——— Length of residence—*Animus manendi*.]—(1) Time is the grand ingredient in constituting domicile. In most cases it is unavoidably conclusive. Suppose a man comes into a belligerent country at or before the begin-

ning of a war; it is reasonable not to bind him too soon to an acquired character, & to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, & other means, to the strength of that country, he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud & abuses of masked, pretended, original, & sole purposes of a long continued residence. Time is the great agent; it is to be taken in a compound ratio, of the time & the occupation, with a great preponderance on the article of time. Be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicile.

B., being born in England, went out very early, destined to settle in America in his childhood; the intention having been fully entertained & decided, at the time of the declaration of independence, & nothing but his extreme youth, or rather childhood, having prevented his migration. He went out in 1784:—*Held*: (2) he was equitably entitled to the American character, & was not a British subject trading with France, the belligerent; (3) although the firm of which he was a partner, carried on business there, & he had a wife & family residing in America, inasmuch as he came over to France on the firm's business, & it appeared that he intended to remain there to carry on the firm's business in France, he was French in character, even although he intended returning to America for a short time, if in fact he intended after such visit to America to return definitely & permanently to France.

(4) If a house of trade sends a partner to France with an intention even of not mixing in any other trade than the business of that house, such a circumstance, connected with a permanent residence in France, would impress a national character upon him.—*THE HARMONY* (1800), 2 Ch. Rob. 322. *Annotations*:—*As to* (1) *Consd.* *Tingley v. Müller*, [1917] 2 Ch. 114. *Refd.* *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730; *A.-G. v. Kent* (1862), 1 H. & C. 12; *Re Grove, Vaucher v. Treasury Solicitor* (1888), 40 Ch. D. 216. *Generally, Mentd.* *Oddy v. Bovill* (1802), 2 East, 473.

259. ——— Whether general merchant immaterial.]—(1) J. was born in America, but left that country & settled as a merchant, in 1771, in England. During the American war in 1778, he left England, & settled in France as one of a house of trade, reserving to himself in the articles of partnership the liberty of returning to America when he thought proper. In 1785, J. returned again to England, & continued in England as a merchant till September 1797; during the latter part of that period, from 1790, he acted as American consul. The American Govt. considered him as an American subject, & declared him so to be by an Act of the Govt. The voyage began in Mar. 1795, & the capture did not take place till Nov. 1797. In Sept. 1797, J. left England:—*Held*: J. was an American, & as the national character of J. as a British merchant was founded in residence only, acquired by residence, & rested on that circumstance alone, from the moment he turned his back on the country where he had resided on his way to his own country, he was in the act of resuming his original character, & was to be considered as an American.

(2) The vessel sailed as an American ship with

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257 l. *Residence & trading in same country*.]—On Nov. 5, 1914, war was declared between Great Britain & Turkey. On Nov. 13, 1914, the

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SS. *Karadeniz* was captured as an enemy vessel under Govt. orders. A. claimed the ship on the ground that he was a Persian subject & had purchased the ship on Aug. 15, 1914,

from a Turkish co. at Constantinople where he resided & carried on business:—*Held*: claimant had a commercial domicile in Turkey.—*THE KARADENIZ* (1919), 1 L. R. 44 Bom. 61.—IND.

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an American pass, & all American documents:—*Held*: if the owner really resided in England such papers could not protect his vessel, for, if the owner was resident in England, & the voyage was such as an English merchant could not engage in, an American, resident in England, & carrying on trade, could not protect his ship merely by putting American documents on board, & his interest must stand or fall according to the determination which the ct. could make on the national character of such a person.

(3) If a person goes into another country & engages in trade, & resides there, he is by the law of nations to be considered as a merchant of that country. It is illegal in any person owing an allegiance, though temporary, to trade with the public enemy. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, *bonâ fide* to quit the country, *sine animo revertendi*.

(4) The character of consul does not protect that of merchant united in same person. Whether he is a general merchant, or not is totally immaterial, if it be his first adventure he must be taken as a merchant, & can be considered in no other character.—*THE INDIAN CHIEF* (1801), 3 Ch. Rob. 12; 1 Eng. Pr. Cas. 251.

Annotations:—*As to* (1) *Consd.* *The Flamenco*, *The Orduna* (1915), 32 T. L. R. 53. *Refd.* *R. v. Bjornsen* (1865), 10 Cox, C. C. 74. *As to* (3) *Consd.* *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 441; *The Hypatia*, [1917] P. 36; *Tingley v. Müller*, [1917] 2 Ch. 141; *Casdagli v. Casdagli*, [1919] A. C. 145. *Refd.* *Re Tootal's Trusts* (1883), 23 Ch. D. 532; *The Eumacus* (1915), 85 L. J. P. 130; *Rodríguez v. Speyer*, [1919] A. C. 59. *As to* (4) *Distd.* *The San Spiridione* (1856), 28 L. T. O. S. 205. *Generally*, *Mentd.* *Advocate-General of Bengal v. Rancee Sur. Dossee* (1863), 2 Moo. P. C. C. N. S. 22; *The Laconia* (1863), 33 L. J. P. M. & A. 11; *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358.

260. —Persons residing in this country, reaping the advantages of the trade of this country, & contributing to the well-being of this country, must for the purposes of trade be considered as belonging to the country. By the law of nations, therefore, the property of such a person is liable to capture by belligerents, on the ground of such property belonging to a subject of this country (*LORD KENYON*, Ch. J.).—*TABBS v. BENDELACK* (1801), 3 Bos. & P. 207, n.; 4 Esp. 108; 127 E. R. 114, N. P.

Annotation:—*Refd.* *R. v. Bjornsen* (1865), 13 W. R. 664.

261. **Fugitive visits to place of birth.**—A ship was claimed for T describing himself as resident at Hooze:—*Held* (1) if he had a house of trade at Hooze, from which a trade was carried on to other ports of the north, his employment in Dutch navigation would not necessarily affect that particular & distinct commerce; but it would spread its consequences over his affairs generally, & on such of his property as might be employed in a course of trade that had no distinct national character belonging to itself; (2) it was not fugitive visits to the place of his birth that would entitle him to retain the benefit of a neutral character, in opposition to a regular course of employment in the enemy's country & trade, & such a pretention would be utterly inconsistent with the rules which the ct. was obliged to lay down, in ascertaining questions of domicile (*SIR W. SCOTT*).—*THE VRIENDSCHAP* (1802), 4 Ch. Rob. 167.

262. —**Withdrawal of property from enemy country—Subsequent investment in enemy's trade.**—*THE DREE (GEBROEDERS)*, No. 256, *ante*.

263. **Recent establishment—Intention to make permanent residence established.**—Mere recency of establishment would not avail, if the intention of making a permanent residence there was fully fixed upon the party (*SIR W. SCOTT*).—*THE DIANA* (1803), 5 Ch. Rob. 60.

Annotation:—*Mentd.* *The Roland* (1915), 84 L. J. P. 127.

264. —**Fixed counting-house not necessary.**—*THE JONGE KLASSINA*, No. 254, *ante*.

265. —**Master of ship trading from American port—Acquisition of American citizenship.**—A British-born subject may, by his employment & residence in a foreign country, acquire a new national character for commercial purposes.

The ship *Ann* sailing under American colours was seized in Aug. 1812, in the Thames. The master, who was sole owner, described himself as a British subject & claimed the ship. He was a native of Scotland, where his wife & family resided, but had himself been admitted as an American citizen about 16 years before, upon taking an oath that he had been sailing out of an American port for two years; from 1799 till 1805 he had been connected with a house of trade at Glasgow, which had an establishment at N. Y. & another at Charlestown, & had occasionally resided at each of the last-mentioned places; he had purchased the vessel at public auction in America & had made three voyages in her, the first two from Charlestown to Kingston in Jamaica, returning each time in ballast; & the last from Charlestown to the Thames:—*Held*: in regard to the ship he was to be considered as an American subject.—*THE ANN* (1813), 1 Dods. 221.

266. **Residence in one country—Business visits to another country.**—Question respecting the national character of a fishing adventure, carried on by a native Dutchman who had become by domicile a subject of Prussia, & had purchased the vessel, formerly a Dutch vessel, in Feb., at Emden. He had since been employed in fishing off the Dutch coast, having sold his cargoes to English ships, & having once or twice resorted to Dutch ports, not for the purpose of selling his cargoes, but merely to procure bait.

Held: his domicile was Prussian.—*THE LIESBET VAN DEN TOLL* (1804), 5 Ch. Rob. 283.

Annotation:—*Refd.* *The Berlin*, [1914] P. 265.

267. —**Business in another country—Enemy subject.**—The Crown can claim condemnation of goods seized in transit of an enemy subject having a house of business in a neutral country or in British territory, but who himself resides in an enemy country. Such enemy subject, resident at Hamburg, cannot set up his commercial domicile in a neutral country at Khartoum against the claim of the Crown for condemnation of goods belonging to the firm of which the said enemy subject was a partner, shipped from Khartoum & seized by the Crown at Liverpool. Although a person carrying on business in an enemy country has his commercial domicile there, the converse of the rule does not extend to the case of a merchant residing in a hostile country, & having his house of trade in a neutral country.—*THE CLAN GRANT (PART CARGO EX)* (1915), 31 T. L. R. 321; 59 Sol. Jo. 430.

268. — — — — —*After the outbreak of war with Germany certain goods belonging to a partnership firm at Buenos Aires, & shipped before the war on a British ship, were seized as a prize. All the partners of the firm were Germans resident at Antwerp, who had been expelled from Belgium as enemy subjects shortly after the outbreak of war:—*

Held: although a subject of a belligerent State can acquire a commercial domicile in a neutral

State which will protect his goods captured at sea from condemnation residence in the neutral State is an essential condition of such domicile; &, as none of the enemy partners of the firm were resident in the Argentine Republic at the time of seizure, the goods must be regarded as enemy property & subject to condemnation.—*THE HYPATIA*, [1917] P. 36; 86 L. J. P. 44; 116 L. T. 25; 13 Asp. M. L. C. 574.

269. British & German firm trading in China—Firm registered at German consulate—British partners resident in China—German partners resident elsewhere.]—A firm consisting of two British & two German subjects carrying on business at Shanghai was registered at the German Consulate as a German firm in accordance with the regulations whereby the European communities, to which China has granted extraterritorial privileges, are governed by the laws of their respective countries. The two British partners, who resided in Shanghai, were also registered as British subjects at the British Consulate. Neither of the German partners resided at Shanghai. Goods belonging to the firm having been seized as prize, they were claimed as being the property of the firm as neutrals, & alternatively as the individual property of the partners as neutral and British subjects:—*Held*: (1) the firm could not be treated as a neutral house of trade, & for all purposes of prize it must be regarded as a German firm carrying on business in a German colony; (2) none of the partners had acquired, or could acquire, a neutral commercial domicile, & the shares in the proceeds of the goods attributable to the German partners must be condemned; (3) as regards the shares of the British partners, the case must be adjourned for further evidence as to what measures, if any, were taken by them to sever their connection with the firm on the outbreak of war.—*THE EUMAEUS* (1915), 85 L. J. P. 130; 114 L. T. 190; 32 T. L. R. 125; 60 Sol. Jo. 122; 13 App. M. L. C. 228.

Annotation:—As to (2) *Refd.* *Casdagli v. Casdagli*, [1919] A. C. 115.

270. Partner in business wherever resident.]—Where at the outbreak of war a neutral, wherever resident, was a partner in a house of business trading in or from an enemy country, he has a commercial domicile in that enemy country, & is to be deemed an enemy in respect of his property or interest in such business, unless he has within a reasonable interval after the outbreak of war discontinued or taken steps to dissociate himself from the business, & this theory of commercial domicile is not subject to an exception in a case where goods in which such partner has an interest have been shipped during peace, although if the goods were at sea at the outbreak of war, & have been captured before such reasonable interval has elapsed, the Ct. will in a proper case take notice of a discontinuance or dissociation after the capture or may even adjourn proceedings in the Prize Ct. in order to give an opportunity for such discontinuance or dissociation.—*THE ANGLO-MEXICAN*, [1918] A. C. 422; 87 L. J. P. 33; 118 L. T. 260; 34 T. L. R. 149; 14 Asp. M. L. C. 227, P. C.; *reversg.*, [1916] P. 112.

Annotations:—*Refd.* *The Asturian*, [1916] P. 150; *The Lutzow* (1917), 87 L. J. P. C. 52.

B. By Masters of Ships.

271. Determined by employment.]—A master's national character is taken from his employment.

Where a single man, Prussian by birth, who has established no domicile by family connections, & in his own person has been employed constantly for ten years in trading from Amsterdam to Green-

land; he is by such an occupation divested of his national character, & becomes by adoption, a Dutchman.—*THE EMBDEN* (1798), 1 Ch. Rob. 16.

272. —.]—*THE VRIENDSCHAP*, No. 261, *ante*.

273. Master being owner—Residence with family.]—A *bonâ fide* residing of the master (owner) & family, though subject to periodical interruption on his part, occasioned by the nature of his professional avocations, decisive as to national character.—*THE JUNGE RUITER* (1809), 1 Act. 116; 12 E. R. 44.

See, also, No. 265, *ante*.

C. Merchants acting as Consuls.

274. General rule.]—The character of consul does not protect that of merchant united in the same person.—*THE CONCORDIA* (1782), unreported, cited in 3 Ch. Rob. 27.

Annotation:—*Consd.* *The Indian Chief* (1801), 3 Ch. Rob. 12.

275. —.]—*THE HET HUYB BRADENBURG* (1784), cited in 3 Rob. Adm. R. 27.

Annotation:—*Consd.* *The Indian Chief* (1801), 3 Ch. Rob. 12.

276. —.]—*THE INDIAN CHIEF*, No. 250, *ante*.

277. Residence in enemy country—Neutral character not retained.]—A neutral, resident as merchant & consul in an enemy's country, loses his neutral character during such residence.—*THE AINA* (1854), 1 Ecc. & Ad. 313; Spinks, 8; 7 L. T. 340; 18 Jur. 681; 164 E. R. 181; *subsequent proceedings*, 1 Ecc. & Ad. 316.

Annotations:—*Refd.* *Tingley v. Müller*, [1917] 2 Ch. 144. *Mentd.* *The Marie Glaeser*, [1914] P. 218; *The Odessa*, *The Woolston*, [1916] 1 A. C. 145.

278. —.]—If a neutral acting as consul for his own country continues, for the purposes of trade, in the country of a belligerent, after declaration of war, he loses his character of a neutral, every person, in time of war, being considered "as belonging to that nation where he is resident & carries on his trade."—*THE ABO* (1854), Spinks, 42; 1 Ecc. & Ad. 347; 7 L. T. 340; 18 Jur. 965; 164 E. R. 200.

Annotation:—*Mentd.* *The Miramichi*, [1915] P. 71.

279. —.]—A merchant obtains a new national character, when he first takes steps *animo removendi* to abandon his former domicile & *animo manendi* to acquire a new one.

S., a Dane by birth, was Danish Consul at Libau, but was long settled there as a merchant. His son was born there:—*Held*: (1) until the son acquired another mercantile national character he had, being resident at Libau, inherited that of his father & was Russian until he came to England: subsequently he became a British merchant. Later he wound up his affairs in England, took a counting-house in Altona & lodgings in Hamburg:—*Held*: (2) residence there was equivalent to residence in Altona.—*THE BALTICA* (1855), Spinks, 264; 1 Jur. N. S. 1025; 164 E. R. 440; *reversd.* on other grounds, *sub nom.* *SORENSEN v. R.*, *THE BALTICA* (1857), 11 Moo. P. C. C. 141.

Annotations:—As to (1) *Refd.* *The Benedict* (1855), Spinks, 314. *Generally, Mentd.* *The Ariel* (1857), 29 L. T. O. S. 133; *Baltazzi v. Ryder*, *The Panaghia Rhomba* (1858), 12 Moo. P. C. C. 168; *The Toumi*, *The Rothersand*, [1914] P. 251; *The Southfield* (1915), 85 L. J. P. 78; *The Kronprinzessan Margareta*, *The Thal*, [1917] P. 114; *The United States*, [1917] P. 30; *The Dirigo*, *The Hallingdale*, [1919] P. 204; *The Noordam*, [1919] P. 255; *The Hilding* (Part Cargo Ex) (1920), 37 T. L. R. 199; *The Naxos* (1920), 123 L. T. 556; *The Edna*, [1921] 1 A. C. 735; *The Kronprinzessan Margareta*, *The Parana*, [1921] 1 A. C. 486; *The Vesta*, [1921] 1 A. C. 774.

SUB-SECT. 3.—LOSS OF.

280. General rule—Revival of national character.]—National character of a native Frenchman,

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an asserted American subject, but personally present in St. Domingo, shipping goods for France, & described in the evidence as a French merchant:—*Held*: the native character reverted.

The native character easily reverts, & it requires fewer circumstances to constitute domicile in the case of a native subject than to impress the national character on one who is originally of another country.—*LA VIRGINIE* (1804), 5 Ch. Rob. 98.

Annotations:—*Consd.* *Aikman v. Aikman* (1861), 4 L. T. 374. *Refd.* *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 441; *The Flamenco* (Part Cargo Ex), *The Orduna* (Part Cargo Ex) (1915), 32 T. L. R. 53; *Tingley v. Müller*, [1917] 2 Ch. 144.

281. National character by occupation may be more easily changed than that by birth; but the change must be *bonâ fide*, and cannot be effected by a mere money payment.—*THE ERNST MERCK* (1854), 2 Ecc. & Ad. 87; *Spinks*, 98; 7 L. T. 340; 1 Jur. N. S. 119. 161 E. R. 322.

282. ———.]—*THE BALTICA*, No. 279, *ante*.

283. Departure from trading residence—Interest in business retained.]—*THE PORTLAND*, No. 253, *ante*.

284. To another country—Revesting of original domicile.]—Two consignments of copper belonging to H., a German subject carrying on trade in Chile, were shipped from that country to Liverpool & seized as prize. H. had left Chile before the seizure, & he appeared to have been in Switzerland not long after it:—*Held*: although the country to which H. appeared to have betaken himself was, equally with Chile, a neutral country, yet he had, by leaving Chile, lost the neutral trade domicile which he had acquired by residence there, & had thereby revested himself with his original

character as an enemy.—*THE FLAMENCO* (PART CARGO EX), *THE ORDUNA* (PART CARGO EX) (1915), 32 T. L. R. 53; 60 Sol. Jo. 107.

285. Intention to depart from trading residence—No overt act.]—A ship taken on a voyage from the Cape of Good Hope to Europe was claimed for E. as a subject of America. He had been a British-born subject, who had gone to the Cape of Good Hope & been employed as American consul at that place. He had been for many years settled at the Cape, with an established house of trade, & as a merchant of that place. It was alleged that he had intended to remove to Philadelphia:—*Held*: insufficient without some overt act; he must be taken as a subject & merchant of the enemy's country.—*THE PRESIDENT* (1804), 5 Ch. Rob. 277. *Annotation*:—*Consd.* *Tingley v. Müller*, [1917] 2 Ch. 144.

286. ——— Overt act—Dissolution of partnership—Detention on outbreak of war.]—F., a British-born subject, had been settled as a merchant in Flushing, but on the appearance of approaching hostilities, had taken means to remove himself, & return to England. He had dissolved his partnership; & had continued to reside in Holland after the war, only under the detention applied to all Englishmen resident in the country of the enemy at the breaking out of hostilities.

Held: he was entitled to restitution as a British subject, having taken what steps he could to remove from enemy jurisdiction.—*THE OCEAN* (1804), 5 Ch. Rob. 90.

287. ——— Must be *bonâ fide*.]—*THE ERNST MERCK*, No. 281, *ante*.

288. Ceasing to act as merchant—Shipment of produce of own estate only.]—*THE DREE GEBROEDERS*, No. 256, *ante*.

289. ——— Within reasonable time—Shipment of goods after outbreak of war.]—*THE ANGLO-MEXICAN*, No. 270, *ante*.

Part III.—Nature of Property.

SECT. 1.—IN GENERAL.

290. “Movable” & “immovable” explained.]—Testator who died in 1888, domiciled in England, bequeathed property, which included mtges. on freehold in Ontario, for charitable purposes. The mtges. contained covenants to pay the money thereby secured. At the date of testator's death the Charitable Uses Act, 1735, then in force, extended to Ontario, & would admittedly have invalidated the bequest of the mtges. had testator been domiciled there:—*Held*: mtges. on land are deemed to be immovables & not movables, & governed by the *lex rei sitæ*, & therefore the bequest of the mtges. was a gift of impure personalty & was invalid.

The terms “movable” & “immovable” are not technical terms in English law, though they are often used, & conveniently used, in considering questions between English law & foreign systems which differ from that law (COZENS-HARDY, M.R.).

The division into movable & immovable property is no part of the law either of England or of Canada, & is only called into operation in England when the English Cts. have to determine rights between domiciled Englishmen and persons domiciled in countries which do not adopt the

English division into real & personal property (FARWELL, L.J.).—*Re HOYLES*, *ROW v. JAGG*, [1911] 1 Ch. 179; 80 L. J. Ch. 274; 103 L. T. 817; 27 T. L. R. 131; 55 Sol. Jo. 169, C. A.

SECT. 2.—HOW DETERMINED.

291. Immovable—Scottish heritable bond—By Scottish law.]—Though the personal estate of a Scotsman dying domiciled in England, must be distributed according to the law of England, yet that shall not affect or interfere with the succession to his real estate in Scotland. Therefore, where for securing a sum of money borrowed, a heritable bond is granted, by which the land in Scotland is rendered liable as the principal debtor there, & the heir pays the bond by sale of part of the estate, being at the same time one of the next of kin and administrator, he shall not come for relief upon the personal funds in England, as primarily applicable to the payment of such a debt.—*DRUMMOND v. DRUMMOND* (1799), 6 Bro. Parl. Cas. 601; 2 E. R. 1293, H. L.

Annotations:—*Consd.* *Brodie v. Barry* (1813), 2 Ves. & B. 127; *Allen v. Anderson* (1846), 5 Hare, 163; *Cust v. Goring* (1854), 18 Beav. 383. *Expld. & Distd.* *Maxwell v.*

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a. General rule.]—The character of funds situated in a foreign country as heritable or movable, is to be determined by the law of that country.

—*NEWLANDS T. CHALMERS' TRUSTEES* (1832), 11 Sh. (Ct. of Sess.) 65.—*SCOT.* *p. Immovable*—*Mineral claim*—*By Canadian law.*]—Mineral claims are immovable property, & governed as

to their disposition by the *lex loci rei sitæ*, & not by the law of a foreign country.—*BARINDS v. GREEN* (1911), 16 B. C. R. 433.—*CAN.*

Maxwell (1870), L. R. 4 H. L. 506. **Refd.** *Winchelsea v. Garrett* (1838), 2 Keen, 293.

292. ————.]—**Held:** heritable bonds, given as security for money advanced, did not pass under general words in a will, but descended to testator's heir-at-law.—**JOHNSTONE v. BAKER** (1817), 4 Madd. 474, n.; 56 E. R. 780.

Annotations:—**Distd.** *Cust v. Goring* (1854), 18 Beav. 383.

Refd. *Buccleuch v. Hoare* (1819), 4 Madd. 467; *Allen v. Anderson* (1846), 5 Hare, 163; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

293. ————.]—Heritable bonds, together with English securities, were given on a loan of money, to a domiciled Englishman:—**Held:** a will, disposing of the money due on such securities was effectual, & the heir-at-law of testator had no claim in respect of the heritable bonds.—**BUCCLEUCH (DUTCHESS DOWAGER) v. HOARE** (1819), 4 Madd. 467; 56 E. R. 777.

Annotations:—**Distd.** *Duffield v. Elwes* (1823), 1 Sim. & St. 239. **Consd.** *Jerningham v. Herbert* (1828), 4 Russ. 388; *Cust v. Goring* (1854), 18 Beav. 383; *Lamb v. Lamb* (1857), 29 L. T. O. S. 372. **Refd.** *Allen v. Anderson* (1846), 5 Hare, 163.

294. ————.]—A will must be construed according to the law of the country where it is made, & testator is domiciled.

The will of a subject of Great Britain made in India must be construed according to the laws of England.

Money vested in heritable bonds becomes real estate, & where upon the construction of the will no clear intention can be collected to pass real estate, the heir-at-law taking a benefit under the will is not put to his election, but may take the real estate as heir, & also personal estate under the will.

A will by which testator recites that he considers it his duty, while in health, to execute a settlement of all his estate & effects, appointing exors. in England & in India, & directing that the residue of his estate in India should be remitted to his exors. in Scotland, & that they should divide that residue, & the whole of his property in Europe, equally between his brothers & sisters:—**Held:** not to pass the heritable bonds.—**TROTTER v. TROTTER** (1828), 4 Bli. N. S. 502; 5 E. R. 179, H. L.

Annotations:—**Consd.** *Boyes v. Bedale* (1863), 1 Hem. & M. 798. **Refd.** *Dundas v. Dundas* (1830), 2 Dow & Cl. 319; *Price v. Dewhurst* (1837), Donnelly, 264; *Martin v. Lee* (1860), 14 Moo. P. C. C. 142; *Enohin v. Wylie* (1862), 10 H. L. Cas. 1; *Studd v. Cook* (1883), 8 App. Cas. 577. **Mentd.** *Pitman v. Crum Ewing*, [1911] A. C. 217.

295. ————.]—**Although containing personal obligation to pay.**—A Scottish heritable bond, although it contains a personal obligation to pay the debt, does not lose its heritable quality & will not pass by an English will, but descends to the heir-at-law.—**JERNINGHAM v. HERBERT** (1829), Tambl. 103; 4 Russ. 388; 6 L. J. O. S. Ch. 131; 48 E. R. 42.

Annotations:—**Consd.** *Allen v. Anderson* (1846), 5 Hare, 163. **Distd.** *Cust v. Goring* (1854), 18 Beav. 383. **Refd.** *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *Re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179. **Mentd.** *Gill v. Bagshaw* (1866), L. R. 2 Eq. 746; *Willoughby v. Storer* (1870), 22 L. T. 896.

296. ————.]—A Scottish heritable bond descends to the heir, & not to his exor., notwithstanding testator may have resided & died in England, & taken the security for an English debt; & although the heir takes a beneficial interest in other parts of testator's property under his will, he will not be put to his election, unless testator has indicated an intention in his will to devise the heritable bond.—**ALLEN v. ANDERSON** (1846), 5 Hare, 163; 15 L. J. Ch. 178; 6 L. T. O. S. 430; 10 Jur. 196; 67 E. R. 870.

Annotations:—**Consd.** *Maxwell v. Maxwell* (1852), 16 Beav. 106; *Cust v. Goring* (1854), 18 Beav. 383. **Refd.** *Baring*

v. Ashburton (1886), 54 L. T. 463; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573. **Mentd.** *Orrell v. Orrell* (1871), 19 W. R. 370.

297. ————.]—The rule that the law of the matrimonial domicile applies to a contract in consideration of marriage will yield to an express stipulation that some other law shall apply, or to other sufficient indications that the parties contracted with reference to some other law.

Scottish "heritable bonds" must be regarded by an English ct. as immovable property & therefore governed by Scots law.

When it is said that a contract, valid by the law of the country in which it is made, cannot be enforced in England because it is contrary to public policy or the policy of English law, it is meant that the contract conflicts with what are deemed in England to be essential public or moral interests—not merely that it would be invalid under English law.

On the marriage in Scotland of a domiciled Englishman with a domiciled Scotswoman the wife's property, which consisted mainly of Scottish heritable bonds, was settled by a marriage contract executed in Scotland in Scottish form. By this contract the trustees, most of whom were domiciled Englishmen, & who were also the trustees of a contemporaneous settlement of the husband's property in English form, were to hold the wife's property upon trust, in case the husband should survive the wife, to pay the income to him during his life, declaring that all payments to him "shall be strictly alimentary, & shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors." The husband survived the wife, having mtged. his life interest under the Scotch contract to mtgees. in England. He had always retained his English domicile.

By the law of Scotland such a restricted life interest, so far as it does not exceed in amount a reasonable provision, is valid as against creditors, other than alimentary creditors, & in such a case, if the husband fails to maintain the children of the marriage, they are entitled to attach the alimentary provision made for them.

Upon a summons by the trustees to determine the rights of the mtgees. as against the husband & the only child of the marriage.

Held: having regard to all the circumstances & particularly the nature of the limitations in the Scotch contract, it must be taken to have been the intention of the parties that that contract should be governed, not by the law of the English matrimonial domicile but by Scots law, & the alimentary provision to the husband, being valid by that law, must be treated as valid by the English cts., & consequently valid as against the husband's mtgees., there being nothing in the provision contrary to the policy of English law in the proper sense of that term.—**Re FITZGERALD, SURMAN v. FITZGERALD**, [1904] 1 Ch. 573; 73 L. J. Ch. 436; 90 L. T. 266; 52 W. R. 432; 20 T. L. R. 332; 48 Sol. Jo. 349, C. A.

Annotations:—**Refd.** *Re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179. **Mentd.** *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 351; *Knill v. Dumergue* (1911), 105 L. T. 178; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Re Hewitt's Settlement*, *Hewitt v. Hewitt*, [1915] 1 Ch. 228.

298. ———— **Slaves in Antigua** — By law of Antigua.]—By the laws of Antigua, slaves were declared to be inheritance, & affixed to the freehold; & by 59 Geo. 3 (c. 120), s. 9, no deed or instrument conveying any interest in slaves was valid, unless the registered names & descriptions of the slaves were set forth in the instrument, or in some schedule thereof. The bkpts. deposited with R. as security for a loan of money, a deed of conveyance to the

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bkpts. of a plantation & slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names & descriptions of the slaves, but they were wholly omitted in the memorandum of the deposit:—*Held*: (1) this was nevertheless a good equitable mtge. of the slaves mentioned in the deed; (2) the slaves, being real property in the island of Antigua, could not be considered as within the order & disposition of the bkpts. at the time of their bkpcy.—*Re RUCKER, Ex p. RUCKER* (1834), 3 Deac. & Ch. 704; 1 Mont. & A. 481; 3 L. J. Bcy. 104.

299. — English leaseholds—By English law.]—Testator, a French subject, having his domicile of origin in France, & at the respective dates of his will & death, domiciled in France, made, in 1800 in France, a holograph will in the French form & language, whereby he appointed B. his universal legatee, upon condition that he satisfied certain legacies therein mentioned, & settled the testator's debts. Among the legacies comprised in the will was a specific bequest to C. of testator's beneficial interest in a leasehold house in England. The will was not attested by any witness, but was valid according to the law of France.

Testator died in 1895, & in 1897 letters of administration, with the will, or a translation thereof, annexed, were granted by the Probate Division to B.

Held: although a leasehold interest in land was a chattel interest, yet for the purposes of testamentary disposition a chattel interest in land must be treated as immovable property, & as governed by the law of the country in which it was situated; & the property in the present case was consequently not disposed of by the unattested will.—*PEPIN v. BRUYÈRE*, [1902] 1 Ch. 24; 71 L. J. Ch. 39; 85 L. T. 461; 50 W. R. 34; 46 Sol. Jo. 29, C. A.

300. — Rent-charge issuing out of English lands—By English law.]—Testator gave a rent-charge, to issue out of lands in England, to A. for life, & directed that after her death it should be continued, & equally divided between B., C. & D. during their lives & the life of the longest liver. B. died domiciled abroad, leaving an English will, by which she disposed of her personal estate. On the death of A., who was survived by C. & D., the Crown claimed from B.'s exors. legacy duty in respect of B.'s third share of the rent-charge:—*Held*: such duty was payable, for that the interest in the rent-charge which passed to B.'s exors. was, by the Wills Act, 1837, an estate *pur autre vie*, applicable by law in the same manner as personal estate, & therefore fell within the Legacy Duty Act, 1796, & it was not exempt from duty by reason of B.'s foreign domicile, inasmuch as, although it was by law applicable in the same manner as personal estate, it was not by any of the statutes made personal estate, but was realty not following the person.—*CHATFIELD v. BERCHTOLDT* (1872), 7 Ch. App. 192; 41 L. J. Ch. 255; 26 L. T. 267; 20 W. R. 401, L. JJ.

301. — Mortgage on colonial land — By

302 i. Movable—Bonds bearing interest in Jamaica—By law of Jamaica.]—Bonds bearing interest in Jamaica, being by the law of that island movable, are personal property in Scottish law.—*NEWLANDS v. CHALMERS' TRUSTEES* (1832), 11 Sh. (Cl. of Sess.) 65.—**SCOT.**

q. — Mortgage on foreign land—By domestic law.]—Testatrix domiciled in I., possessed mortgages

on freehold property situate in V. & in S.:—*Held*: the mortgages were movable property.—*LAWSON v. INLAND REVENUE COMRS.*, [1896] 2 I. R. 418.—**IR.**

r. — Mortgage on English land—By English law.]—Mortgages over land in England, being personal by the law of that country, are to be taken into account in computing legitim.—

colonial law—Same as English law.]—Re HOYLES, Row v. JAGG, No. 290, ante.

302. Movable—Cattle & stock on plantation in Jamaica—By law of Jamaica.]—A., by bond, in consideration & contemplation of marriage, bound himself in a certain sum, for the purposes of his intended marriage settlement, to mortgage certain estates & properties & the lands thereto belonging, & their respective appurtenances in the Island of Jamaica, of which he was seised in fee, & to raise a certain sum by way of settlement. By a mtge. by way of settlement, in pursuance of such bond, A. mtged., *inter alia*, the estates & pennis, & appurtenances, & all & every the cattle, stock, & plantation implements.

Held: cattle & stock upon the estate & pennis were not included in the bond, & though the mtge. deed, made in pursuance of such bond, was by way of marriage settlement, yet it could not enlarge the provisions of the bond.

Cattle & stock upon a plantation or penn in Jamaica are, by the law of the Island, personal estate, & not affixed to the freehold.—*TURNER v. BARCLAY* (1854), 9 Moo. P. C. C. 264; 14 E. R. 297, P. C.

303. — Interest in proceeds of sale of English freeholds—By English law.]—An interest in the proceeds of sale of real estate settled upon a trust for sale which has not been executed is personal estate within the meaning of Wills Act, 1861, s. 1.—*Re LYNE'S SETTLEMENT TRUSTS, Re GIBBS, LYNE v. GIBBS*, [1919] 1 Ch. 80; 88 L. J. Ch. 1; 120 L. T. 81; 35 T. L. R. 44; 63 Sol. Jo. 53, C. A.

SECT. 3.—PROCEEDS OF SALE OF FOREIGN IMMOVABLES.

304. General rule—Governed by lex situs—Proceeds charged with payment of debts—Sale of immovables on death.]—Testator dies in England, domiciled here, & dies seised of lands in a foreign country, which, by the law of that country, & also by the will, are charged with his debts; the assets being insufficient for the payment of his simple contract debts, the produce of those lands must be applied among the simple contract creditors, according to the priorities recognised by the law of the country where the lands are situate.—*HANSON v. WALKER* (1829), 7 L. J. O. S. Ch. 135.

305. — Proceeds in specie removed from locus rei sitæ.]—Whether the ct. will enforce against defts., having in their hands proceeds of the sale of land situated out of the jurisdiction, the equities to which such proceeds would have been subject if the land had been situated within the jurisdiction, depends upon the question whether the contract which is sought to be enforced was or was not, by the *lex loci rei sitæ*, capable of being fulfilled.

If a contract relating to land situated out of the jurisdiction be one which the *lex loci rei sitæ* renders incapable of fulfilment, the ct. will not enforce the contract against the proceeds of a sale of such land coming to the possession of parties within the jurisdiction, though they take such proceeds bound

MONTEITH v. MONTEITH'S TRUSTEES (1882), 9 R. (Cl. of Sess.) 982.—**SCOT.**

PART III. SECT. 3.

305 i. General rule—Governed by lex situs—Proceeds in specie removed from locus rei sitæ.]—A domiciled Irishman died intestate in Ireland, possessed of lands in Victoria, which by the law of the Colony were regarded & devolved

by the same equities as affected the party to the contract under whom they claim.

The rights of the parties interested in the proceeds of the sale of land situated out of the jurisdiction do not cease to be governed by the *lex loci rei sitæ* by the circumstance of such proceeds being brought in *specie* within the jurisdiction.

A law permitting alienation of land, only upon the terms of the proceeds being applied in a particular manner, is a restraint upon alienation; & restraints upon the alienation of land are always governed by the *lex loci rei sitæ*.—*WATERHOUSE v. STANSFIELD* (1851), 9 Hare, 234; 21 L. J. Ch. 881; 68 E. R. 489; *subsequent proceedings* (1852), 10 Hare, 254.

306. ——— Proceeds not subject to Mortmain Acts.]—The Royal Geographical Society & the Royal Society being corpns., the one for the improvement & diffusion of geographical knowledge, & the other for improving natural knowledge, are charities as defined by 43 Eliz. (c. 4), & are within the Statute of Mortmain.

Testator bequeathed legacies to the societies, & other undoubted charities, & after directing that all the charitable legacies should be paid out of his pure personal estate, he gave the residue of his real & personal estate to his exors., the plffs. His property consisted of pure personalty, leaseholds, in this country, & a small real estate in Madeira, which was sold after his death. The pure personalty was insufficient to pay in full the charitable legacies.

Held: (1) the charities were not entitled to the pure personalty in priority to the debts, funeral & testamentary expenses, & costs of suit; these were first payable ratably out of the pure & mixed personalty; & the charities would then take the residue of pure personalty; (2) the proceeds of sale of the Madeira estate were not pure personalty; but, inasmuch as it was foreign realty, it was not subject to the Mortmain Act, & the charitable legacies were entitled to a claim upon it for so much of their legacies as should remain unpaid after the above application of the pure personalty. — *BEAUMONT v. OLIVEIRA* (1869), 4 Ch. App. 309; 38 L. J. Ch. 239; 20 L. T. 53; 33 J. P. 391; 17 W. R. 269, L. J.J.

Annotations:—As to (1) *Consd. Re Pitt, Lacy v. Stone* (1885), 53 L. T. 113; *Re Arnold, Ravenscroft v. Workman* (1888), 37 Ch. D. 637; *Re Delevingne, Layton v. Royal Earlswood Institution for Mental Defectives*, [1916] W. N. 235. *Refd. Re Royal Soc. of London & Thompson* (1881), 50 L. J. Ch. 344. As to (2) *Consd. Re Arnold, Ravenscroft v. Workman* (1888), 37 Ch. D. 637.

307. ——— Immovable sold under special legislation—Rights of curator ad bona of foreign lunatic.]—A fund of upwards of £13,000 Consols, representing the proceeds of sale of real estate, the absolute property of a foreign lunatic, which had been sold by order of the ct. under the powers of the Partition Act, 1868, stood in ct. to the credit of the lunatic. The *curator ad bona* of the lunatic, duly appointed according to the law of the country in which the lunatic resided, who according to that law had the fullest powers & control over the lunatic's real & personal estate, petitioned for the transfer of the fund to him:—*Held*: the fund, as representative of real estate sold under special legislation, was subject to the laws of this country relative to real estate, & must remain in ct. as a fund which might devolve upon the heir-at-law of the lunatic, & the *curator ad bona* was only entitled to receipt of the dividends.—*GRIMWOOD v. BARTELS* (1877), 46 L. J. Ch. 788; 25 W. R. 843.

as personal estate. Administration was taken out in Ireland, & in Victoria by a person appointed for the purpose,

who sold the lands, & remitted the net proceeds to the Irish admor.:—*Held*: the proceeds of sale of such lands

were to be taken as personal estate.—*Re REA, REA v. REA*, [1902] 1 I. R. 451, 461.—IR.

——— **Claim statute-barred.]**—See Part IV., Sect. 4, *post*.

308. Exceptions—Foreign immovable forming part of partnership assets—Proceeds treated as personalty.]—A member of a partnership carrying on business at Bombay died domiciled in England. Part of the partnership assets at the time of his death consisted of real estate in Bombay.

Held: the real estate, being partnership assets, was converted into personalty in equity, & the proceeds were therefore liable to legacy duty.—*FORBES v. STEVEN, MACKENZIE v. FORBES* (1870), L. R. 10 Eq. 178; 39 L. J. Ch. 485; 22 L. T. 703; 18 W. R. 686.

Annotations:—*Apld. Re Stokes, Stokes v. Ducroz* (1890), 62 L. T. 176. *Refd. In the Goods of Ewing* (1881), 6 P. D. 19. *Mentd. A.-G. v. Lomas* (1873), L. R. 9 Exch. 29; *A.-G. v. Hubbuck* (1884), 13 Q. B. D. 275; *A.-G. v. Allesbury* (1887), 12 App. Cas. 672.

309. ——— ———.]—S., testator in this action, who died in Sept. 1880, domiciled in England, for many years previous to his death carried on the business of sheep-breeding in partnership with his brother R. in New Zealand. Part of the partnership property consisted of a freehold estate of 29,000 acres in New Zealand known as the Milbourne estate. By articles of partnership dated Feb. 14, 1879, made between S. & R., it was agreed that the Milbourne estate should be forthwith sold in the manner which the parties should mutually agree upon, & the articles contained provisions for the case of no agreement & for carrying on the partnership until sale. R. died in Jan. 1880. S. was entitled to four-sevenths of the partnership property. No sale of the estate was made in R.'s lifetime or in that of S. By his will S. gave his four-sevenths shares in the Milbourne estate to trustees upon trust to sell, with powers of management till sale, & subject to the payment of an annuity, & of the income of one-seventh to the widow of R. during her life, to divide the proceeds & the produce till sale among thirteen charities. An administration action was commenced in 1881. The New Zealand property had never been sold, but the income had from time to time been paid into ct. Under an order made in Apr. 1888, the funds then in ct. had been divided, & legacy duty had been paid upon the moneys arising from the New Zealand estate. The duty had been paid under an arrangement that it should be repaid if it was ultimately decided not to be payable. The Governors of the London Hospital, who had been appointed to represent the other charities, presented a petition asking for distribution of the fund which had accumulated in ct. since Apr. 1888, without payment of legacy duty, on the ground that being proceeds of real estate in New Zealand, it was not subject to English legacy duty:—*Held*: S.'s interest in the property whether regarded as a share in land agreed to be sold by the articles of partnership or as a share in partnership property, was personal & movable property, & therefore subject to legacy duty according to the law of testator's domicil. —*Re STOKES, STOKES v. DUCROZ* (1890), 62 L. T. 176; 38 W. R. 535; 6 T. L. R. 154.

310. ——— Foreign immovable sold under agreement for sale—Proceeds treated as personalty.]—*Re STOKES, STOKES v. DUCROZ*, No. 309, *ante*.

311. ——— Foreign immovable sold under trust for sale—Proceeds held on trusts declared by will—Although invalid by *lex rei sitæ*.]—An English testator, who owned some land in Sardinia, by his

Sect. 3.—Proceeds of sale of foreign immovables**Sect. 4. Part IV. Sect. 1: Sub-sect. 1.]**

will gave all his real & personal estate to trustees upon trust for sale, & conversion, upon certain trusts *inter alia* for his children for their respective lives, with remainders to their respective issue. These trusts were as the ct. held on the evidence to a great extent invalid under Italian law as regarded land in Italy, the result being that the tenants for life took their shares absolutely. Part of the land in Sardinia had been sold by the trustees:—*Held*: (1) whether the trustees or the children took the land, as heirs according to the Italian law, the trustees had power under that law, & it was their duty to sell the land, & the proceeds of sale must be held by them upon the trusts declared by the will; (2) the rents of the unsold land until sale would devolve according to Italian law, but that it was competent to & legal for the children to elect that those rents should be applied as if they had been income resulting from the proceeds of the sale.—*Re* **PIERCY, WHITWHAM v. PIERCY**, [1895] 1 Ch. 83; 64 L. J. Ch. 249; 71 L. T. 745; 43 W. R. 134; 11 T. L. R. 21; 39 Sol. Jo. 43; 13 R. 106.

312. — Interest of proceeds—Treated as personalty.—A portion of an entailed estate was sold by the heir in possession for the redemption of the land-tax, & the surplus-money was invested in terms of the statute. The heir of entail next entitled sold for valuable consideration his reversionary & contingent right to the interest of this fund, & assigned it to the purchaser by a deed prepared in the English form, & executed in England, where the parties were domiciled, but without the solemnities required by the law of Scotland.

Held: the interest of the money was movable, & was well assigned by the English deed, *comitate gentium*.—*SCOTT v. ALLNUTT* (1831), 2 Dow & Cl. 404; 6 E. R. 778, H. L.

Annotation:—*Re* **Fitzgerald, Surman v. Fitzgerald**, [1904] 1 Ch. 573.

SECT. 4.—SHARES IN COMPANIES OWNING FOREIGN IMMOVABLES.

313. Whether immovable—So as to attach incidents of *lex loci rei sitæ*.—The bkpt. on borrowing money from his sister, petitioner, deposited with her some certificates of shares in a German mining co., undertaking to complete the transfer when required. These she sealed up, & left in his iron chest for safety. Some time before his bkptcy. he told one of the directors of the co. that he had so deposited the shares & the director told the board the circumstance, on the morning of Dec. 7. On the evening of the same day, the act of bkptcy. was committed:—

Held: the shares were neither in the reputed ownership nor in the order & disposition of the bkpt.

Semble: shares in a commercial co., possessing lands in a foreign country, are not real property so as to attach to them the incidents of the law of the country in which the property is situated.—*Re* **RICHARDSON, Ex p. RICHARDSON** (1839), 3 Deac. 496; Mont. & Ch. 43; 8 L. J. Bey. 27, Ct. of R.

Annotations:—*Mentd.* *Re* **Worcester, Ex p. Agra Bank** (1868), 3 Ch. App. 555; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426.

Foreign companies.—See COMPANIES.

Part IV.—Immovables.**SECT. 1.—GENERAL PRINCIPLES OF JURISDICTION.****SUB-SECT. 1.—TITLE TO FOREIGN IMMOVABLES DIRECTLY IN ISSUE.**

314. General rule—Application of foreign law.—The incidents to real estate, the right of alienating or limiting it, & the course of succession to it, depend entirely on the law of the country where the estate is situated.

An estate in Sicily was granted to an English subject, which he disposed of by his will upon certain trusts:—*Held*: as he could not subject his successor to a course of succession different from that which accorded with the grant & the law of Sicily, so neither could he subject the successor, as such, to any duties or obligations different from the duties & obligations which by the grant & the law of Sicily were annexed to his holding.—**NELSON (EARL) v. BRIDPORT (LORD)** (1846), 8 Beav. 547; 9 L. T. O. S. 471; 10 Jur. 1043; 50 E. R. 215.

315. — Colonial land.—Statute of Mortmain, 9 Geo. 2 (cap. 36) does not extend to the island of Grenada, in the West Indies; the object of the statute being wholly political; it having grown out of local circumstances, & being intended to have only a local operation.

PART IV. SECT. 1, SUB-SECT. 1.

314 i. General rule—Application of ex loci rei sitæ.—Land in Upper C. was held in common by J. & E. & three others. E. became a nun in I., by which, according to Lower C. law, she became civilly dead as regarded her property; she afterwards

died there:—*Held*: E. had not lost her share of the land by becoming a nun.—**STUART v. PRENTISS** (1861), 20 U. C. R. 513.—**CAN.**

314 ii. — — — — —.—Immovable property is governed by *lex loci rei sitæ*.—**BARINDS v. GREEN** (1911), 16 B. C. R.

Donations *inter vivos* in Mortmain are not prohibited by the statute, but regulated; the statute requiring enrolment in the Ct. of Ch.; by which is meant the Ct. of Ch., in England, where there is an ancient office for the enrolment of deeds, & there being no enrolment offices annexed to the Cts. of Ch. in the colonies.

Regularly, all questions of title to land in the colonies are to be decided, in the first instance, by cts. of local judicature, from which an appeal lies to the King in Council.—*A.-G. v. STEWART* (1817), 2 Mer. 143; 35 E. R. 895.

Annotations:—*Consd.* *A.-G. v. Giles* (1835), 5 L. J. Ch. 44; *Whicker v. Hume* (1852), 1 De G. M. & G. 506. *Apprvd.* *Jex v. McKinney* (1889), 14 App. Cas. 77. *Re* **Lyons Corp. v. East India Co.** (1836), 1 Moo. P. C. C. 175; *Santos v. Illidge* (1860), 8 C. B. N. S. 861; *Yeap Cheap Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381; *Canterbury Corp. v. Wyburn & Melbourne Hospital*, [1895] A. C. 89. *Mentd.* *Jephson v. Riera* (1835), 3 Knapp, 130.

316. Dispossession—Claim for damages for—Foreign land.—Pltf. brought an action against deft. for assault, robbing him of a ship & goods & dispossessing him of a house & plantation, also of an island called Barella in the East Indies forming part of the dominions of a foreign prince:—*Held*: the ct. had no jurisdiction to grant relief to pltf. for being dispossessed of his house &

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314 iii. — — — — —.—All rights over immovable property are governed by the law of the country where the property is situate, this principle being universally recognised.—**BONNAUD v. CHARRIOL** (1905), 1 L. R. 32 Cal. 631.—**IND.**

island, but awarded him damages for the assault & loss of ship & goods.—**SKINNER v. EAST INDIA Co.** (1866), 6 State Tr. 710.

Annotations :—**Consd.** *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. **Refd.** *Mostyn v. Fabrigas* (1774), 1 Cowp. 161.

317. ——— House in East Indies.]—Seizing a house in the East Indies is not triable here.—**SHELLING v. FARMER** (1725), 1 Stra. 646; 93 E. R. 756.

Annotations :—**Refd.** *Anon.* (1774), Loft, 752; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602.

318. ——— Claim for possession—Colonial land.]—This ct. has no jurisdiction over lands at St. Christopher's, & a demurrer will lie to a bill brought here, for delivery of possession of lands there. Lands in the plantations are no more under the jurisdiction of this ct., than lands in Scotland. Demurring for want of jurisdiction is informal and improper; a deft. should plead to the jurisdiction.—**ROBERDEAU v. ROUS** (1738), 1 Atk. 543; 26 E. R. 342, L. C.

Annotation :—**Mentd.** *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658.

319. ——— ———.]—Where land in a colony is vested in the Queen by a Colonial Act for the public purposes of the colony the Petitions of Right Act, 1860, does not give jurisdiction to the Ct. of Ch. to entertain proceedings against the Crown as a trustee of such land present within the jurisdiction of the Ct.

By a Canal Act of the Provincial Legislature of Canada, land taken for a canal was vested in the Queen. By a second Provincial Act the land so taken was vested in the officers of Her Majesty's Ordnance; & it was enacted that so much of the land taken as had not been used for the canal should be restored to the owners. By a third Provincial Act the lands were re-vested in the Queen for the purposes of the colony, & subject to future colonial legislation.

To a petition of right by suppliants claiming the restoration of certain lands taken for the canal from their predecessors in title, but not used, a demurrer was allowed on the ground that the cts. of this country had no jurisdiction.—*Re HOLMES* (1861), 2 John & H. 527; 31 L. J. Ch. 58; 5 L. T. 518; 8 Jur. N. S. 76; 10 W. R. 39; 70 E. R. 1167.

Annotations :—**Refd.** *Reiner v. Salisbury* (1876), 2 Ch. D. 378; *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358. **Mentd.** *Doss v. Secretary of State for India in Council* (1875), L. R. 19 Eq. 509.

320. ——— ——— Discovery—Land in India.]—Pltf. filed a bill of discovery to obtain inspection of documents in deft.'s possession in England, in aid of proceedings about to be taken for the recovery of land in India :—

Held : the property claimed being in India, & deft. being capable of being sued in India, an English ct. was not the proper tribunal to decide upon pltf.'s claim, & a bill of discovery could not be maintained in aid of such a claim.—**REINER v. SALISBURY (MARQUIS)** (1876), 2 Ch. D. 378, 24 W. R. 843.

Annotation :—**Refd.** *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358.

322 i. Partition—Foreign land.]—The ct. has no power to order division of immovable property in a joint estate situated beyond its jurisdiction.—**MURPHY v. MURPHY**, [1902] T. S. 179.—**S. AF.**

ii. Determination of title—Foreign land.]—The cts. in O. have no jurisdiction to entertain an action for determining the title to lands in the N.W. Territories, even though the parties

be resident in O.—**ROSS v. ROSS** (1892), 23 O. R. 43.—**CAN.**

t. ——— ———.]—**GUINN v. HARPER** (1901), 21 C. L. T. 552; 2 O. L. R. 611; 30 O. R. 650.—**CAN.**

u. Trespass to land—Injury to premises attached to foreign soil.]—Pltf. complained to a ct. of O. that defts., by negligent use of their ry, allowed fire to spread from their right of way to pltf.'s premises, whereby

321. Sale of land—Action to recover share of proceeds—Foreign land.]—*Re HAWTHORNE, GRAHAM v. MASSEY*, No. 377, *post*.

322. Partition—Land in Ireland.]—C. exhibited a bill against P.; they were joint tenants of lands in Ireland; pltf. prayed an account of the profits, & a partition of the lands.

Held : as to the profits the bill was good, the person being in England, for they were in the personalty; but as to the partition, which was in the realty, he could not here proceed, for a commission could not be awarded into Ireland: & the bill for a partition was in the nature of a writ of partition at the Common Law, which lieth not in England for lands in Ireland.—**CARTWRIGHT v. PETTUS** (1676), 2 Cas. in Ch. 214; 22 E. R. 916; *sub nom.* **CARTERET v. PETTIE**, Cas. temp. Finch, 242; 2 Swan. 323, n., L. C.

Annotation :—**Mentd.** *Leake v. Cordeaux* (1856), 4 W. R. 806.

323. Settlement of boundaries—Colonial land—Jamaica.]—The cts. of this country, in dealing with real property in Jamaica, will be guided by the law of evidence in Jamaica.

A Ct. of Equity in England will entertain a bill to settle the boundaries of real estates in Jamaica.—**TULLOCH v. HARTLEY** (1841), 1 Y. & C. Ch. Cas. 114; 62 E. R. 814.

Annotation :—**Mentd.** *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358.

——— **Foreign land—America.]—***See* BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 270, No. 39.

324. Sequestration of land—Land in Ireland.]—The Ct. of Ch. will not grant a sequestration of lands in Ireland.—**FRYAR v. VERNON** (1724), Cas. temp. King, 5; 9 Mod. Rep. 124; 25 E. R. 191.

325. ——— ——— Prior sequestration taken out in England—Nulla bona returned.]—The Ct. of Ch. in England may grant a sequestration against deft. in Ireland, but it must be after a sequestration taken out here & *nulla bona* returned.—**FRYER v. BERNARD** (1724), 2 P. Wms. 261; 24 E. R. 722, L. C.

Annotation :—**Refd.** *Portarlington v. Soulby* (1834), 3 My. & K. 104.

326. Devise of land—Determination of validity of will—Land in Pennsylvania.]—Bill by an heir-at-law, for an issue to try the validity of a will made in England, dismissed, partly on the ground of his acquiescence, both in the ecclesiastical ct., & upon a bill to perpetuate testimony, but principally because the lands lay in Pennsylvania.—**PIKE v. HOARE** (1763), Amb. 428; 2 Eden 182; 28 E. R. 867, L. C.

Annotation :—**Refd.** *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358.

327. ——— ——— Land in Ireland.]—Testator being seised of real estate in England & Ireland, by his will devised all his real estates to A. in fee. The heir-at-law instituted a suit in Ireland for the purpose of setting aside the will & upon an issue *devisavit vel non* directed out of the Ct. of Ch. in Ireland, a verdict was found against the will. An application for a new trial was refused, & a decree made declaring the invalidity of the will, from which decree A. appealed to the House of Lords, & that

his house was burnt. The house was in M. :—*Held* : the action could not be entertained.—**BRERETON v. CANADIAN PACIFIC RY. Co.** (1897), 29 O. R. 57.—**CAN.**

w. Valuation & sale of land—Foreign land.]—An action was raised concluding for a valuation & sale of an estate situated in J. :—*Held* : action must be dismissed as incompetent to the ct.—**FINDLATER v. DUNMORE & Co.** (1809), 16 Fac. Coll. 129, n.—**SCOT.**

Sect. 1.—General principles of jurisdiction: Sub-sects. 1 & 2.

appeal was still pending. A. then filed her bill in the Ct. of Ch. here, for the purpose of having the will established so far as it related to the real estates in England:—*Held*: the decree of the Irish Ct. of Ch. was no bar to such a suit, that Ct. having no jurisdiction to declare the validity or invalidity of the will generally, but only so far as it affected estates in Ireland.—*BOYSE v. COLCLOUGH* (1854), 1 K. & J. 124; 3 Eq. Rep. 78; 24 L. J. Ch. 7; 24 L. T. O. S. 89; 3 W. R. 8; 69 E. R. 390; *subsequent proceedings* (1855), 1 K. & J. 502.

328. Contract relating to land—Land in Ireland—Sale—Claim for delivery up of deeds.—A contract was entered into at Boulogne, where pltf. was resident, between him & defts., who were resident in Ireland, for the sale of some land in Ireland. A receiver had been appointed by the Ct. of Ch. in Ireland. A bill was now filed in this country asking that certain deeds relating to the property might be ordered to be given up. A plea by defts. that the ct. had no jurisdiction allowed.—*BLAKE v. BLAKE* (1870), 18 W. R. 944.

Annotations:—*Consd.* *Matthaei v. Galitzin* (1874), L. R. 18 Eq. 340. *Refd.* *Doss v. Secretary of State for India in Council* (1875), L. R. 19 Eq. 509; *Reiner v. Salisbury* (1876), 2 Ch. D. 378; *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358.

329. Foreign mine—Injunction to restrain payment away of profits.—Bill filed by a foreigner against another foreigner, & against an English co. formed for working a Russian mine, to restrain the English co. from paying to a foreigner part of the profits of the mine which were claimed by pltf. by way of commission, & also for an account of profits against the co. Demurrer allowed.—*MATTHAEI v. GALITZIN* (1874), L. R. 18 Eq. 340; 43 L. J. Ch. 536; 30 L. T. 455; 22 W. R. 700.

Annotations:—*Refd.* *Doss v. Secretary of State for India in Council* (1875), L. R. 19 Eq. 509; *Reiner v. Salisbury* (1876), 2 Ch. D. 378; *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358.

330. — Bond charged on revenues of Indian State.—Pltfs., who represented certain creditors of the King of Oudh in respect of a debt contracted in 1794, sued the Secretary of State for India, claiming to be entitled to a charge upon the revenue of the territory of Oudh:—*Held*: (1) as the debt was one which there were no means of enforcing against the King of Oudh before the annexation in 1856, neither could it have been enforced after the annexation against the East India Co.; (2) the annexation of Oudh having been a sovereign act of state by the East India Co. as trustees for the British Government that act could not be reviewed by any municipal ct., & the bill was therefore not sustainable; (3) pltfs. being natives of India, the subject-matter being in India, & deft. being capable of being sued in India, an English Ct. of Equity was not the proper tribunal to try the question between the parties; (4) the staleness of the demand & the impracticability of giving effect to any declaration of right were grounds for allowing the demurrer.—*DOSS v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1875), L. R. 19 Eq. 509; 32 L. T. 294; 23 W. R. 773.

Annotations:—*As to* (3) *Refd.* *Reiner v. Salisbury* (1876), 2 Ch. D. 378; *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358. *Generally*, *Mentd.* *Cook v. Sprigg*, [1899] A. C. 572; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391.

PART IV. SECT. 1, SUB-SECT. 2.

y Right to personalty—Depending

on title to land in foreign country.—*McLAREN v. RYAN* (1875), 36 U. C. R. 307.—**CAN.**

— **Equitable jurisdiction.**—See Sect. 2, sub-sect. 4, *post*.

331. Rent-charge—Action to recover—Colonial land.—An action of debt having been brought for arrears of a rent-charge upon lands in Australia prior to the commencement of the Jud. Act:—*Held*: the venue in such action was local, & it could not therefore be maintained in this country.—*WHITAKER v. FORBES* (1875), 1 C. P. D. 51; 45 L. J. Q. B. 140; 33 L. T. 582; 40 J. P. 436; 24 W. R. 241, C. A.

Annotations:—*Refd.* *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. *Mentd.* *Re Blackburn & District Benefit Bldg. Soc., Ex p. Graham* (1889), 42 Ch. D. 343.

332. Trespass to land—Colonial land.—Trespass will not lie in this country for entering a house in Canada.—*DOULSON v. MATTHEWS* (1792), 4 Term Rep. 503; 100 E. R. 1143.

Annotations:—*Consd.* *Whitaker v. Forbes* (1875), L. R. 10 C. P. 583; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. *Refd.* *Phillips v. Eyre* (1870), 10 B. & S. 1004. *Mentd.* *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239.

333. — Injury to pier attached to foreign soil.—The question of the liability of a shipowner, proceeded against in the English Admty. Ct., for an injury done by his ship to a pier projecting into the sea, but attached to the soil of a foreign country is governed by the *lex loci*, & not by English law.

Where an English ship, by the negligence of her master & crew, ran into & damaged a pier on the coast of Spain, & the owners of the pier proceeded against the ship for the damage in the Admty. Ct., & the shipowner pleaded that by the law of Spain a shipowner is not responsible for the damage occasioned by the negligence of his master & crew.

Held: the plea was a good defence to the action.—*THE M. MOXHAM* (1876), 1 P. D. 107; 46 L. J. P. 17; 34 L. T. 559; 24 W. R. 650; 3 Asp. M. L. C. 191, C. A.

Annotations:—*Distd.* *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521. *Appld.* *Machado v. Fontes*, [1897] 2 Q. B. 231. *Refd.* *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Carr v. Francis Times*, [1902] A. C. 176. *Mentd.* *British Wagon Co. v. Gray*, [1896] 1 Q. B. 35.

334. — Land situate abroad.—The Supreme Ct. of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad; the rules of procedure under the Jud. Acts with regard to local venue (Order xxxvi. r. 1) did not confer any new jurisdiction.—*BRITISH SOUTH AFRICA CO. v. COMPANHIA DE MOCAMBIQUE*, [1893] A. C. 602; 63 L. J. Q. B. 70; 69 L. T. 604; 10 T. L. R. 7; 37 Sol. Jo. 756; 6 R. 1, H. L.; *reversg.* *S. C. sub nom. COMPANHIA DE MOCAMBIQUE v. BRITISH SOUTH AFRICA CO., DE SOUSA v. SAME*, [1892] 2 Q. B. 358.

Annotations:—*Refd.* *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132. *Mentd.* *Adam v. British & Foreign S.S. Co.*, [1898] 2 Q. B. 430; *The Duc D'Aumale* (1902), 87 L. T. 674; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Huist*, [1910] 1 P. 271; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

SUB-SECT. 2.—TITLE TO FOREIGN IMMOVABLES NOT DIRECTLY IN ISSUE.

335. Contract relating to land—Covenant to pay rent—Land in Ireland.—Action of covenant cannot be brought in England for rent reserved on a lease of lands in Ireland.—*BARKER v. DAMER*

— title to personalty in a foreign State depended upon the right to land in the foreign

(1691), Carth. 183; 3 Mod. Rep. 336; 1 Salk. 80; 1 Show. 192; 91 E. R. 76.

Annotations:—**Consd.** Wey v. Rally (1704), 6 Mod. Rep. 194; Lichfield Corpn. v. Slater (1743), Willes, 431; Vincent v. Godson (1854), 4 De G. M. & G. 546. **Refd.** London Corpn. v. Cole (1798), 7 Term Rep. 583; Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co., [1892] 2 Q. B. 358. **Mentd.** Tovey v. Pitcher (1690), 2 Vent. 234; Stevenson v. Lambard (1802), 2 East, 575.

336. — Agreement to contribute to cost of works—Foreign land.—Claim stating that plffs. & defts. were each of them limited cos., with registered offices in London, that the action was brought for rent of a railway station in Buenos Ayres, into possession of which the defts. were put by the plffs., & for part of the cost of constructing lines of railway & approaches to the station. Defence, that the plff. & deft. cos. were domiciled in the Argentine Republic, & carried on business there; that the premises in question were constructed on land which was the property of the republic, & that plffs. and defts. were joint concessionaires under the republic of certain easements appurtenant thereto; that the construction of the premises was directed by the government of the republic, & was for the benefit & convenience of the citizens of Buenos Ayres, & that by the laws of the republic powers of adjusting all rights arising out of the construction, & applicable to the claim of the plffs. were vested in the government, & that the contract (if any) as to the cost of the construction was made at Buenos Ayres, & was subject to the law of the place of contract, & that the republic had assumed jurisdiction over the plffs.' claim:—**Held**: the defence was bad, as both parties to the action were within the jurisdiction of the English cts., & the facts alleged did not show that the Argentine Republic had exclusive jurisdiction over the claim.—**BUENOS AYRES & ENSENADA PORT RY. Co. v. NORTHERN RY. Co. OF BUENOS AYRES** (1877), 2 Q. B. D. 210; 46 L. J. Q. B. 224; 36 L. T. 148; 25 W. R. 367.

337. — Implied contract or obligation—Damages for waste—Foreign land.—The possessor of Austrian entailed estates died domiciled in & left property in England. By the law of Austria the possessor is under an obligation to hand over the property to the successor in as good a state as when he received it, & is liable for deterioration, whether voluntary or permissive, unless it occurs without any fault of his, & he is entitled to compensation for improvements made by him. The successor brought a creditor's action in England against the English executrix, in which it was admitted by the parties that there was some deterioration, & also that some improvements had been made. **NORTH, J.**, made a decree for administration with liberty to plff. to take proceedings, in the cts. of the countries in which the estates were situate, to establish the amount of his claim:—**Held**: the objection that the plff.'s claim was for a tort analogous to waste, & therefore, according to English law, died with the person, & could not be enforced in an English ct., was not sustainable, for the deteriorations were not to be regarded as torts but as breaches of an obligation in the nature of an implied contract. But the accounts in an administration suit ought not to be directed till it was ascertained that a sum was due to the plff.—**BATHYANY v. WALFORD** (1887), 36 Ch. D. 269; 56 L. J. Ch. 881; 57 L. T. 206; 35 W. R. 814, C. A.

Annotation:—**Refd.** *Re Piercy*, Whitwham v. Piercy (1894), 64 L. J. Ch. 249.

State: an action was brought in the domestic ct. for trespass to the person-
alty:—**Held**: the ct. had a right, in

a suit against a party subject to its jurisdiction, to try incidentally the question of title to the land for the

Equitable jurisdiction.—See Sect. 2, sub-
sect. 4, *post*.

SECT. 2. —EQUITABLE JURISDICTION IN PERSONAM.

SUB-SECT. 1.—IN GENERAL.

338. General rule—Colonial land.—This ct. having jurisdiction *in personam* upon equity arising out of transactions concerning lands abroad, particularly if in the British dominions, a purchase of an estate in the West Indies by a creditor under his own execution was upon the circumstances held only a security for the debt, the expenses of the proceeding & incumbrances paid by him, with interest; & subject thereto a reconveyance was decreed.—**CRANSTOWN (LORD) v. JOHNSTON** (1796), 3 Ves. 170; 30 E. R. 952.

Annotations:—**Consd.** White v. Hall (1806), 12 Ves. 321; Norton v. Florence Land & Public Works Co. (1877), 7 Ch. D. 332; Mercantile Investment & General Trust Co. v. River Plate Trust Loan & Agency Co., [1892] 2 Ch. 303; Black Point Syndicate v. Eastern Concessions (1898), 79 L. T. 658; British South Africa Co. v. De Beers Consolidated Mines, [1910] 2 Ch. 502. **Refd.** Houlditch v. Donegall (1834), 2 Cl. & Fin. 470; *Re Courtney*, *Ex p.* Pollard (1840), 4 Deac. 27; Liverpool Marine Credit Co. v. Hunter (1868), 3 Ch. App. 479; *Re Hawthorne*, Graham v. Massey (1883), 23 Ch. D. 743; British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602; Duder v. Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132; Bank of Africa v. Cohen, [1909] 2 Ch. 129.

339. ——As a general rule an English ct. will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction of that ct.; & the exceptions to this rule depend on the existence between the parties to the suit in England of some personal obligation arising out of contract or implied contract, fiduciary relation, or fraud, or other conduct which in the view of an English Ct. of Equity would be unconscionable, & do not depend for their existence on the law of the locus of the immovable property. In 1831 D. entered into a marriage contract with T. in France, both of them being domiciled French subjects. Plff., the only son of this marriage, alleged that according to French law T. thereby became entitled to one-half of the after-acquired property of D. & to a life interest in the other half of the property. In 1836 D. went to India, & in 1839 went through a form of marriage with X., on whom & on others he by a settlement made in 1865, of which defts. were trustees, conferred interests in immovable property in Madras. D. died in 1885 & T. died in 1890. In 1893 an official in Madras, who was not a party to the English action mentioned below, took out letters of administration in India of the estate of T. which vested all her movable & immovable property in Madras in him. In 1907 plff. took out letters of administration of the estate of T. in England. Plff. & defts. being all in England, plff. in an English action sought to impeach the settlement of 1865 as being contrary to the law of France & in contravention of his rights thereunder:—**Held**: the action ought not to be entertained.—**DESCHAMPS v. MILLER**, [1908] 1 Ch. 856; 77 L. J. Ch. 416; 98 L. T. 564.

340. — Land in Scotland.—(1) The principles which govern the Ch. Ct. upon questions of jurisdiction are analogous to those of the civil law, & the ct., therefore, has power to entertain a suit if the domicile of deft. is within the territorial jurisdiction of the ct., or if the subject-matter of the suit is situate within the territorial

purpose of determining the right to the person-
alty.—**SAYA LOO v. NGA PAW LOO** (1866), 6 W. R. 4.—**IND.**

Sect. 2.—Equitable jurisdiction in personam: Sub-sects. 1, 2 & 3:

jurisdiction of the ct., or if the contract sought to be enforced was entered into within the territorial jurisdiction of the ct., but if neither of these circumstances exist, the ct. has no jurisdiction.

In a suit where the subject was immovable property situate in Scotland, & the contract sought to be enforced was entered into & to be performed in Scotland, & defts. were domiciled in Scotland:—*Held*: the ct. had no jurisdiction to entertain the suit; (2) upon questions of jurisdiction, Scotland is a foreign country; (3) the statutory power of serving a debt. out of the jurisdiction, & proceeding in his absence, did not give the ct. extended jurisdiction so as to enable it to determine the subject-matter of the suit; (4) where debt. had been served with a *subpoena* out of the jurisdiction, he was entitled to demur for want of jurisdiction, instead of moving to discharge the order for personal service abroad.—*COOKNEY v. ANDERSON* (1863), 1 De G. J. & Sm. 365; 2 New Rep. 140; 32 L. J. Ch. 427; 8 L. T. 295; 9 Jur. N. S. 736; 11 W. R. 628; 46 E. R. 146, L. C.

Annotations:—As to (1) *Folld.* *Blake v. Blake* (1870), 18 W. R. 944. *Consd.* *Mathaei v. Galitzin* (1874), L. R. 18 Eq. 340; *Re Morton, Ex p. Robertson* (1875), L. R. 20 Eq. 733; *Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358. *Refd.* *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Dobson v. Festi, Rasini*, [1891] 2 Q. B. 92; *Turnbull v. Walker* (1892), 67 L. T. 767. As to (3) *Consd.* *National Insee. & Investment Assocn. v. Carstairs* (1863), 2 New Rep. 348; *Steele v. Stuart* (1863), 1 Hem. & M. 793; *Norris v. Cotterill* (1861), 5 New Rep. 215. *Folld.* *Foley v. Maillardet* (1864), 1 De G. J. & Sm. 389; *Samuel v. Rogers* (1864), 1 De G. J. & Sm. 396. *Consd. & N.F.* *Drummond v. Drummond* (1866), 2 Ch. App. 32. *Consd.* *Gibson v. Fisher* (1867), L. R. 5 Eq. 51. *Refd.* *Curtiss v. Grant* (1863), 9 Jur. N. S. 766; *Baille v. Blanchet* (1861), 4 New Rep. 48; *Turner v. Sowdon* (1864), 10 L. T. 60; *Central Railroad & Banking Co. of Georgia v. Mitchell* (1865), 2 Hem. & M. 452; *Henderson v. Campbell* (1865), 13 W. R. 704; *Re Busfield, Whaley v. Busfield* (1886), 32 Ch. D. 123. *Generally, Mentd.* *Re Herefordshire Banking Co.* (1867), L. R. 4 Eq. 250.

341. Against third party—No privity of contract—Third party with notice—Specific performance.—(1) A suit, by a pltf. in England, against defts., also residing in England, to enforce a lien on real estate in Prussia, can only be sustained by special circumstances arising out of the dealings between the parties; but where no privity exists between pltf. & defts., & where the principal parties are foreigners, & not amenable to the jurisdiction of the ct., the bill will be dismissed.

(2) If a pltf. in this ct. makes out a case which entitles him to a declaration of lien upon the real estate of a debt. out of the jurisdiction, this ct. will make it, & in some cases will grant a receiver; but it will leave pltf. to make it available or not, as he can, by means of the foreign tribunals.

(3) The cts. of this country will assist foreign tribunals to unravel complications; & they will, so far as the law allows, & so far as their jurisdiction extends, carry into effect the judgments of foreign cts. when legally brought under their cognisance.—*NORRIS v. CHAMBRES* (1861), 3 De G. F. & J. 583; 4 L. T. 345; 7 Jur. N. S. 689; 9 W. R. 794; 45 E. R. 1004, L. C.

Annotations:—As to (1) *Consd.* *Cookney v. Anderson* (1862), 31 Beav. 452; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *Doschamps v. Miller*, [1908] 1 Ch. 856. *Refd.* *Cood v. Cood* (1863), 3 New Rep. 275; *Mathaei v. Galitzin* (1874), L. R. 18 Eq. 340; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Companhia de Mocam-*

bique v. British South Africa Co., De Sousa v. British South Africa Co., [1892] 2 Q. B. 358; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129. *Generally, Mentd.* *Whitaker v. Forbes* (1875), L. R. 10 C. P. 583.

342. ——— Good title acquired by foreign law.—Indian Registration Act XX. of 1866, makes void all instruments relating to real estate in India which ought to have been registered under the Indian Registration Act, XVI. of 1864, but were not so registered, & destroys all equities arising out of them. A. being resident at Madras, in 1865 executed a deed by which he conveyed land in India to pltf. & covenanted for further assurance. The deed was not registered under the Indian Registration Act, 1864, which provides that if such a deed be not registered it shall not be received in evidence in any ct. in India. In 1866 A. mtgd. the same land to defts., who had notice of pltf.' conveyance, & defts. registered the mtge. deed under the Indian Registration Act, 1866. Pltf. filed a bill to enforce the covenant for further assurance against defts.:—*Held*: pltf. had no equity against defts., & the bill was dismissed.—*Semble*: independently of the operation of the Indian Registration Act, 1866, as pltf.' deed was forbidden by the Indian Registration Act, 1864, to be received in evidence in India, it could not be sued on in England either as a deed of conveyance or as a deed of covenant for further assurance.—*HICKS v. POWELL* (1869), 4 Ch. App. 741; 17 W. R. 449, L. C.

Annotation:—*Refd.* *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354.

343. To order sale of land outside jurisdiction.—In a suit by applts., being mtgees. of a division of 180 miles of respts.' railway & of its revenues subject to working expenses, for a sale of the division & for a receiver & other relief:—

Held: this division of 180 miles was by the law of Canada applicable to the railway a section capable of sale in its entirety, but that the provincial ct. had no power to order a sale, part of the section being within & part without its jurisdiction.—*GREY v. MANITOBA & NORTH WESTERN RY. CO. OF CANADA*, [1897] A. C. 254; 66 L. J. P. C. 66, P. C.

To restrain proceedings in foreign courts.—*See* Part XVI., Sect. 5, *post*.

344. Service of writ outside jurisdiction—Effect of—Jurisdiction not extended.—*COOKNEY v. ANDERSON*, No. 340, *ante*.

345. ——— ——— ———.—Since the ct. has the same jurisdiction with regard to any contract made, or equity between, persons in this country, respecting lands or assets in a foreign country, as it has where the lands or property are situate in England, to allow service of the writ out of the jurisdiction in a case within the terms of Order xi., r. 1 (g), is not to extend the jurisdiction, but to enable the old jurisdiction to be exercised in cases where formerly this jurisdiction could not have been exercised by reason of defective rules of procedure.

In an action against (1) a Dutch corpn., trustees of a debenture deed, (2) the receivers appointed under this deed, resident in England, & (3) an English co. having property & assets in Brazil, to enforce an alleged prior equitable charge, made in England, upon property & assets in Brazil, & now vested in the first debt.:—

Held: as first defts. were necessary & proper parties to the action, within the terms of Order xi., r. 1 (g), & as the ct. had jurisdiction to grant

PART IV. SECT. 2, SUB-SECT. 1.

343 i. To order sale of land out of jurisdiction—Enforcement of mechanic's lien.—Where lands are out of the jurisdiction, the ct. cannot affect them otherwise than by proceedings

in personam, & cannot enforce a mechanic's lien by sale of land out of the jurisdiction.—*CHADWICK v. HUNTER* (1884), 1 Man. L. R. 363.—**CAN.**

343 ii. ———.—The ct. will not order a sale of land over which it has not

territorial jurisdiction, not being able to supervise or deal effectually with the many matters which are usual & ordinary incidents of a sale.—*STRANOR v. RADFORD* (1888), 15 O. R. 145.—**CAN.**

the relief asked, service of the writ on first debt, ought to be allowed; &, on the application of plffs., a receiver of the assets in the debenture deed was also appointed.—*DUDER v. AMSTERDAMSCH TRUSTEES KANTOOR*, [1902] 2 Ch. 132; 71 L. J. Ch. 618; 87 L. T. 22; 50 W. R. 551.

Annotation:—*Distd. Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

— **When allowed.**—*See PRACTICE AND PROCEDURE.*

SUB-SECT. 2.—TRUSTS RELATING TO FOREIGN IMMOVABLES.

346. To decide existence of trust.—Testator domiciled in a British Colony left real & personal property in the colony. In an action instituted in England by the heir-at-law & next of kin of testator against persons who had taken possession of the personal & real estate in the colony of testator, all parties to the action being resident in England.

Held: the English ct. had jurisdiction in the action to determine (1) as to the title to the real estate as well as the personalty situate in the colony, the two being so mixed together under the will that they could not be dealt with separately, (2) as to whether a trust of the real estate had been created by the will or not.—*Re CLINTON, CLINTON v. CLINTON* (1903), 88 L. T. 17; 51 W. R. 316; 19 T. L. R. 181; 47 Sol. Jo. 436.

347. To enforce trust.—After two verdicts & judgments in Ireland touching the matters of a bill now brought in England to enforce a trust of lands in Ireland.

Held: the ct. had jurisdiction & the judges in England were proper expositors of the Irish law.—*KILDARE (LORD) v. EUSTACE* (1686), 2 Cas. in Ch. 188; 1 Eq. Cas. Abr. 133; 1 Vern. 437; 22 E. R. 905, L. C.

Annotations:—*Refd. Cranstown v. Johnston* (1796), 3 Ves. 170; *Holmes v. R.* (1861), 5 L. T. 548; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

348. — Colonial land. In an action to enforce against real estate in Trinidad the trusts of a creditor's deed (which had been established by a former suit in the Ct. of Ch.), defts. were persons in whom the legal estate was outstanding, one of them being a British subject resident in Trinidad. The other defts. resided in England. An opinion was given by a barrister practising in Trinidad that the beneficial interest in the real estate there was bound by the deed. The writ had been served on those defts. who were in England:—

Held: leave could be given to serve the writ on the deft. who was in Trinidad.—*JENNEY v. MACKINTOSH* (1886), 33 Ch. D. 595; 55 L. T. 733; 35 W. R. 181; *subsequent proceedings* (1889), 61 L. T. 108, C. A.

PART IV. SECT. 2, SUB-SECT. 2.

347 i. To enforce trust—Foreign land.—Pltf. sued in a ct. in B.I., to establish his right to a share in the income derived from land situate outside B.I., but received by deft. within the jurisdiction of B.I. ct.:—*Held*: the suit was within the jurisdiction of the Court, there being no dispute as to title.—*KASHINATH GOVIND v. ANANT SITARAMBOA* (1899), 1 L. R. 24 Bom. 407.—**IND.**

a. — Impossibility of surrender for trust purposes.—Testator died domiciled in S., leaving heritable & movable property there, & movable & immovable property in A. His will contemplated a sale of his A. immovables by his trustees. The

A cts., applying the A. law, which did not recognise trusts with reference to immovable property in A., declared testator's will null & void in so far as it dealt with his A. immovables, & his children each took an equal share of A. estate as his necessary heirs under A. law. One daughter claimed legitim in S., which did not affect the right of her children to the fee of her share, & was paid her legitim out of testator's movable estate, in addition to her share of the A. immovable property taken by her as one of the necessary heirs. The other children of testator claimed the provisions in their favour under his testamentary writings, but maintained that they were not bound to make available for the purpose of fixing the share of the testator's

349. —.]—Testator domiciled in Scotland, & possessed of a large personal & some heritable property in Scotland & of a comparatively small personal property in England, by will made in Scotch form appointed several persons to be exors. & trustees, some of whom resided in England & some in Scotland. The trustees obtained a confirmation of the will in Scotland, & the confirmation was sealed by the English Court of Probate under Confirmation of Exors. (Scotland) Act, 1858. An infant legatee resident in England brought by his next friend an action here to administer the estate, & the writ was served upon some of the trustees in England, & (under an order) upon the Scotch trustees in Scotland. The trustees appeared without protest & took no steps to discharge the order, but obtained an order of reference to inquire whether the further prosecution of the action would be for the benefit of infant pltf.; upon which an order (not appealed from) was made for the further prosecution of the action. The trustees removed all the English personalty into Scotland before the action came on for trial:—*Held*: the English ct. had jurisdiction to administer the trusts of the will as to the whole estate, both Scotch & English; & as no proceedings were pending in a Scotch ct. (if such were possible) by which the interests of infant pltf. could have been equally protected, the jurisdiction was not discretionary, but the decree was a matter of course.—*EWING v. ORR EWING* (1883), 9 App. Cas. 34; 53 L. J. Ch. 435; 50 L. T. 401; 32 W. R. 573, H. L.; *affg. S. C. sub nom. Re ORR EWING, ORR EWING v. ORR EWING* (1882), 22 Ch. D. 456, C. A.; *subsequent proceedings* (1885), 10 App. Cas. 453, H. L.

Annotations:—*Consd. Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Re Lane, Lane v. Robin* (1886), 55 L. T. 149; *Re Artola Hermanos, Ex p. André Châle* (1890), 24 Q. B. D. 610. *Refd. Re Matheson* (1884), 51 L. T. 111; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *A.-G. v. Johnson*, [1907] 2 K. B. 885.

350. — Land in Scotland—Devise to English trustees—Necessity for application to Scottish court.—As the Scottish Trusts Acts do not apply to English trusts, it is necessary to invoke the "*nobile officium*" of the Ct. of Session in order to confer formal authority upon English trustees to deal with land situate in Scotland.—*Re FORREST, FORREST v. FORREST* (1910), 54 Sol. Jo. 737.

351. To impeach settlement—Colonial land.—*DIESCHAMPS v. MILLER*, No. 339, *ante*.

To appoint trustees—Compound settlements.—*See SETTLEMENTS.*

To make vesting orders—In respect of land in Scotland, Ireland & Colonies.—*See TRUSTS AND TRUSTEES.*

SUB-SECT. 3.—MORTGAGES OF FOREIGN IMMOVABLES.

See, also, Sect. 3, post.

352. Action for foreclosure—In England—

estate left in fee to his grand-children the shares of the A. immovable estate taken by them as necessary heirs:—*Held*: they, being unfettered owners of such shares taken by them as necessary heirs, & being able to make those shares available for the purpose of testator's testamentary writings, could not claim the bequests in their favour unless they made available their shares of the A. property for the purpose of the testator's testamentary writings.—*BROWN v. GREGSON* (1919), 56 Sc. L. R. 333.—**SCOT.**

PART IV. SECT. 2, SUB-SECT. 3.

352 i. Action for foreclosure—In domestic court—Mortgage of foreign land.—In an action on a mortgage of

CONFLICT OF LAWS.

Sect. 2.—Equitable jurisdiction in personam: Sub-sects. 3 & 4.]

Mortgage of Island of Sark.]—Bill that deft. might redeem a mtge. of the island of Sark, or be foreclosed. Deft. pleaded to the jurisdiction of the ct., that the island was part of the Duchy of Normandy, & had laws of their own, & were under the jurisdiction of the cts. of Guernsey. Plea overruled, because the mtge. was of the whole island, & for that deft. was served here, for *equitas agit in personam*.—*TOLLER v. CARTERET* (1705), 2 Vern. 494; 1 Eq. Cas. Abr. 134, pl. 5; 23 E. R. 916.

Annotations:—Consd. Derby v. Athol (1749), 1 Ves. Sen. 202. *Refd. Houlditch v. Donegal* (1834), 8 BH. N. S. 301; *Portarlington v. Soulbey* (1834), 3 My. & K. 104; *Paget v. Ede* (1874), L. R. 18 Eq. 118; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *British South Africa Co. v. De Beers Consolidated Mines* (1910), 80 L. J. Ch. 65.

353. ——— Charge on or mortgage of colonial land.]—A foreclosure decree being a decree *in personam* depriving the mtgor. of his personal right to redeem, the ct. has jurisdiction to make such a decree in respect of a mtge., between an English mtgor. & mtgee., of land in one of the colonies.—*PAGET v. EDE* (1874), L. R. 18 Eq. 118; 43 L. J. Ch. 571; 30 L. T. 228; 22 W. R. 625.

Annotations:—Consd. British South Africa Co. v. De Beers Consolidated Mines (1910), 80 L. J. Ch. 65. *Refd. Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743.

354. ——— Land grant mortgage bond.]—*BAWTREE v. GREAT NORTH-WEST CENTRAL RY. CO.* (1898), 14 T. L. R. 448, C. A.

Annotation:—Consd. Duder v. Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132.

355. ——— In colonial court—Prior redemption action in England—Injunction.]—Injunction (on terms) granted to restrain mtgees. of a West India estate from proceeding on a bill of foreclosure in the colonial ct., filed after a decree made in this ct., which directed an inquiry to ascertain the amount of the mtge. debt, on a bill to redeem; all parties being in this country.—*BECKFORD v. KEMBLE* (1822), 1 Sim. & St. 7; 57 E. R. 3.

Annotations:—Expld. Carron Iron Co. v. Maclaren (1855), 5 H. L. Cas. 416. *Refd. Esdaile v. Kynaston* (1836), Donnelly, 52. *Mentd. Bunbury v. Bunbury* (1839), 1 Beav. 318.

Restraint of foreign proceedings generally.]—See Part XVI., Sect. 5, sub-sect. 2, *post*.

356. Payment of mortgage debt—Out of proceeds of sale—Mortgage not complying with *lex loci rei sitæ*—Mortgage completed in England.]—Bkpts. deposited with a creditor the title deeds of a real estate in Scotland, accompanied with a written agreement to secure the payment of the general balance; both parties being resident in England, where the transaction itself took place. By the law of Scotland, no lien or equitable mtge. on real property is created by such a deposit:—*Held*: nevertheless, the contract being made in England, by contracting parties domiciled in this country, which was also the domicile of the assignees under the bkey., the estate was charged, with the equitable mtge., & the assignees were bound to pay to the creditor the amount of the proceeds of the sale of the estate.—*Re COURTNEY, Ex p. POLLARD* (1840), 4 Deac. 27; Mont. & Ch. 239, L. C.; *revsg.* (1837), 2 Deac. 307; *subsequent*

lands situate out of O., judgment of foreclosure will be granted against a deft. residing therein, such judgment merely operating *in personam* as an extinguishment of a personal right.—*STRANGE v. RADFORD* (1888), 15 O. R. 145.—CAN.

b. Payment of mortgage debt—Mortgagor in default to make conveyance of foreign lands.]—Where in a suit

on a mortgage covering lands in O., & also in Q., mortgagor waived his right to claim a sale of the property & elected to have a decree of foreclosure pronounced, the domestic ct. ordered, on default being made in payment, that deft. should execute to pltf. such conveyance as would vest in him all the estate or interest of deft. in the lands in Q.—*BRYSON v. HUNTINGTON* (1877), 25 Gr. 265.—CAN.

proceedings (1840), 1 Mont. D. & De G. 204, Ct. of R.

Annotations:—Expld. Re Richardson, Ex p. Richardson (1839), 3 Deac. 496. *Distd. Waterhouse v. Stansfield* (1851), 9 Hare, 234. *Expld. Norton v. Florence Land & Public Works Co.* (1877), 38 L. T. 377. *Distd. Re Hart, Ex p. Fletcher* (1878), 26 W. R. 843. *Consd. Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129. *Refd. Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; *Brown v. Gregson*, [1920] A. C. 860.

357. ———.]—S. & Co., who were merchants in London & Shanghai, applied to the applts., who were merchants in Prussia, to open a credit on their behalf for £5,000, & offered to deposit with them as a security the title-deeds of a house at Shanghai. The negotiations were commenced verbally, when all parties were in Prussia, but were concluded, after some correspondence, by a letter written by S. & Co. to the applts. from London, inclosing the title-deeds of the house in Shanghai. Applts. accordingly accepted bills drawn by S. & Co. & payable in London. S. & Co. shortly afterwards became liquidating debtors, a considerable sum being then due to the applts. on the bills. No conveyance or memorandum of the deposit was made at the British Consulate at Shanghai, but the house remained registered in the name of S. & Co. Applts. accordingly applied for an order that the trustee in liquidation should convey the house to them. Evidence was adduced that, according to the law of Prussia, the contract was binding personally on S. & Co., but that, as the necessary formalities for perfecting the security at Shanghai had not been gone through, applts. had no mtge. or lien on the house:—*Held*: the contract must be governed by English law, & applts. had a good security on the house by the deposit of the deeds (MELLISH, L.J.):—*Held*: whether the contract was governed by English or by Prussian law, the contract was personally binding on S. & Co., & could be enforced against their trustee in liquidation; and the Ct. made an order to sell the house & pay the proceeds to applts. (MELLISH & JAMES, L.J.J.).—*Re SCHEIBLER, Ex p. HOLTHAUSEN* (1874), 9 Ch. App. 722; 44 L. J. Bcy. 26; 31 L. T. 13, L. J.J.

Annotations:—Refd. Bank of Africa v. Cohen, [1909] 2 Ch. 129; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354. *Mentd. Mercer v. Vans Colina* (1897), 4 Mans. 363; *Powell v. Marshall, Parkes*, [1899] 1 Q. B. 710; *Re Bastable, Ex p. Trustee*, [1901] 2 K. B. 518.

358. ——— Obligation of mortgagee to produce securities for inspection—Mortgage of colonial land.]—Bill by the owner of an estate in Demerara, against an incumbrancer thereon, to restrain him from enforcing payment in this country of notes which had been given for part of the debt, on the ground that the encumbrancer could not deliver up the gross copy of the acts of hypothecation, which it was alleged was necessary to a valid discharge. The common injunction was obtained. The answer admitted that the incumbrancer had no gross copy in his possession, & that a second gross copy would not be issued by the ct. without indemnity; but it did not state for what purpose or in whose favour the indemnity was required, or that gross copies had not been actually taken out

c. Action for redemption—In domestic court—Mortgage of foreign lands.]—A creditor who has recovered judgment in M., & who has a lien on the lands of the judgment debtor there, cannot maintain in O. an action for redemption of a mtge. on such lands in M. as are subject to the lien.—*HENDERSON v. BANK OF HAMILTON* (1893), 20 A. R. 646; 23 S. C. R. 716.—CAN.

in respect of the charges which deft. had upon the estate, or that any inquiries or searches had been made in reference to these questions, or that any cancellation or discharge had been entered in ct. in respect of the previous payments on account of the debt. Pltfs. & deft. had both acted with regard to the estate, in their previous dealings concerning it, without requiring the production of the grosses. The ct. dissolved the injunction upon the incumbrancer giving security to indemnify the pltfs. from any consequences arising from the absence of the grosses.

The cts. of this country will apply the general law of this country, being abstractedly just, and not exclusively founded upon any peculiar or technical rule, to questions relating to lands in a colony, where a different system of jurisprudence prevails, unless it is suggested or shown that the laws of the colony are different on the point in question; & therefore the mtgee. of an estate in Demerara was held not to be bound to produce his securities for inspection before payment.—*BENTINCK v. WILLINK* (1842), 2 Hare, 1; 67 E. R. 1.

Annotations:—*Refd.* *Sichel v. Raphael* (1864), 3 New Rep. 662. *Mentd.* *Owen v. Homan* (1851), 3 Mac. & G. 378; *Beardmore v. Gregory* (1865), 12 L. T. 264.

359. Against subsequent assignee with notice—“Obligations” payable to bearer—Action pending in local court.—A company with an office in London, & having house property at Florence, raised, under powers in their articles, a sum of money by the issue of obligations payable to bearer, whereby they purported to bind themselves, their successors & assigns, & all their estate, property & effects, reserving the right to redeem a certain part of the obligations (to be determined by drawings) in each of eight successive years. Subsequently, by a mtge. in the Italian form, registered at Florence, the co. mtged. the property to a bank with a London office, who had notice of the obligations. The bank having taken proceedings in the tribunal at Florence to enforce their mtge., an action was brought on behalf of the holders of the obligations against the company & the bank, claiming to be mtgees. of the Florence property in priority to the bank. On motion to restrain the sale of the property:—*Held*: if the obligations created a charge on the co.’s property, they could not be enforced as against the bank claiming under a registered mtge. at Florence, & the matter being already before the tribunal of the country where the property was situated, this ct. would not interfere.—*NORTON v. FLORENCE LAND & PUBLIC WORKS CO.* (1877), 7 Ch. D. 332; 38 L. T. 377; 26 W. R. 123.

Annotations:—*Expld.* *Re Florence Land & Public Works Co., Ex p. Moor* (1878), 10 Ch. D. 530. *Refd.* *Re Maudslay, Sons & Field, Maudslay v. Maudslay, Sons & Field*, [1900] 1 Ch. 602. *Mentd.* *British India Steam Navigation Co. v. I. R. Comrs.* (1881), 50 L. J. Q. B. 517.

360. ——— Express obligation to satisfy claim of incumbrancer.—*MERCANTILE, INVESTMENT & GENERAL TRUST CO. v. RIVER PLATE TRUST, LOAN & AGENCY CO.*, No. 379, *post*.

361. Contract to give legal mortgage—On foreign land—Treated as English mortgage.—(1) An English contract to give a mtge. on foreign land, although the mtge. has to be perfected according to the *lex situs*, is a contract to give a mtge., which, *inter partes*, is to be treated as an English mtge. subject to such rights of redemption & other equities as the law of England regards as necessarily incident to a mtge.

(2) The equitable rule against clogging the equity of redemption of a mtge. applies to an English contract for an issue of debentures to

secure a loan, & will be enforced against a contracting party in the jurisdiction although the floating security to be created by the debentures comprises foreign land where the clog doctrine is possibly not recognised.—*BRITISH SOUTH AFRICA CO. v. DE BEERS CONSOLIDATED MINES, LTD.*, [1910] 2 Ch. 502; 80 L. J. Ch. 65; 103 L. T. 4; 26 T. L. R. 591; 54 Sol. Jo. 679, C. A.; *reversd.* on other grounds, *sub nom.* *DE BEERS CONSOLIDATED MINES, LTD. v. BRITISH SOUTH AFRICA CO.*, [1912] A. C. 52, H. L.

Annotations:—*Folld.* *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Re Smith, Lawrence v. Kitson*, [1916] 2 Ch. 206. *Mentd.* *Kreglinger v. New Patagonia Meat & Cold Storage Co.*, [1914] A. C. 25; *Jenkin v. Pharmaceutical Soc. of Great Britain*, [1921] 1 Ch. 392.

362. ——— Right to execution of legal mortgage.—By a deed of Oct. 9, 1907, a testator, in consideration of £1,000, then expressed to be owing by him to his two sisters, charged all his share & interest in an estate in the island of Dominica, West Indies, to secure the repayment of this sum, & of such further sums as should thereafter be advanced by his sisters, & he agreed to execute a legal mtge. of the property to them to secure all such principal money & interest whenever required to do so. On July 18, 1912, a further charge for £1,000 on the same property was indorsed upon the first deed. By his will testator gave all his estate wherever situated to trustees upon certain trusts, & died insolvent in 1913 without having executed any legal mtge. of the property. By the law applicable to immovables in Dominica the equitable charge was not sufficient to create a valid incumbrance upon this property.

Upon a summons issued by the two sisters in a creditors’ action for the administration of testator’s estate:—

Held: the sisters were entitled to have a legal mtge. of the foreign land executed in their favour to secure the moneys intended to be secured by the two documents. The contract was to be construed by the law of England, & the death of one of the parties could not operate to change the law by which it was to be construed & prejudice the right of the other party to have specific performance.—*Re SMITH, LAWRENCE v. KITSON*, [1916] 2 Ch. 206; 85 L. J. Ch. 802; 115 L. T. 68; 32 T. L. R. 546; 60 Sol. Jo. 555; *subsequent proceedings*, [1918] 2 Ch. 405.

SUB-SECT. 4.—CONTRACTS RELATING TO FOREIGN IMMOVABLES.

See, also, Sect. 3, *post*.

363. Specific performance—Articles concerning foreign boundaries.—Specific performance decreed of articles executed in England concerning boundaries of two provinces in America.—*PENN v. BALTIMORE (LORD)* (1750), 1 Ves. Sen. 444; 27 E. R. 1132, L. C.

Annotations:—*Consd.* *Norris v. Chambres* (1861), 29 Beav. 246. *Expld.* *Cookney v. Anderson* (1862), 31 Beav. 452. *Consd.* *Sichel v. Raphael* (1864), 3 New Rep. 662; 1 R. Comrs. v. Angus, I. R. Comrs. v. Lewis (1889), 23 Q. B. D. 579; *Companhia de Mocambique v. British South Africa Co.*, [1892] 2 Q. B. 358; *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658. *Refd.* *Pike v. Hoare* (1763), Amb. 428; *Houlditch v. Donogall* (1834), 2 Cl. & Fin. 470. *Portarlington v. Soulby* (1834), 3 My. & K. 104; *Re Courtney, Ex p. Pollard* (1840), 4 Deac. 27; *Re Holmes* (1861), 2 John. & H. 527; *Norris v. Chambres* (1861), 4 L. T. 345; *Douglas v. Douglas*, *Douglas v. Webster* (1871), L. R. 12 Eq. 617; *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *A.-G. v. Johnson*, [1907] 2 K. B. 885; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *British Controlled Oilfields v. Stagg* (1921), 66 Sol. Jo. (W. R.) 18. *Mentd.* *Bayley v. Edwards* (1792), 3 Swan. 703; *Bedreechund v.*

Sect. 2.—Equitable jurisdiction in personam: Sub-sects. 4, 5 & 6.]

Elphinstone (1830), 2 State Tr. N. S. 379; Mercantile, Investment & General Trust Co. v. River Plate Trust Loan & Agency Co. (1892), 61 L. J. Ch. 473.

364. — Sale of foreign land—Enforcement of equities against proceeds.]—WATERHOUSE v. STANSFIELD, No. 305, *ante*.

365. — Agreement for.]—NORRIS v. CHAMBRES, No. 341, *ante*.

366. Injunction—To restrain disturbance of possession—Laches by vendor—Effect of decision of local court that vendor not bound.]—A. was the administrator of an estate, to one third of which each of his brothers B. & C. was entitled. In 1833 A. wrote to B. & C., offering, in order to prevent the necessity of accounts & the probability of dispute, to pay each £1,000 for his share. B. accepted the offer & C. wrote to say that whatever B. determined would meet his approbation. A. & B. acted on the contract as complete, & C. never repudiated it or asked for any accounts or explanations. B. died in 1849, & in 1850 C. & B.'s representatives commenced a suit in Chili against A. to recover their shares. Two Chilean courts in succession decided that there was a contract binding B. but not C. A., who had actively defended the suits in Chili, now came to England, & filed a bill, to restrain C. from disturbing him in the possession:—*Held*: (1) C.'s delay for seventeen years, & until after B.'s death, barred his right to an account according to English law & injunction granted.

(2) The contract being between three domiciled Englishmen, was governed by English law, although the principal subject-matter was landed property in Chili, & therefore the Chilean decisions were not binding upon this ct.

A contract between domiciled Englishmen relating to real estate in a foreign country, is to be determined by the *lex loci*, but a contract between an Englishman domiciled & resident in England & an Englishman resident in a foreign country, but not having acquired a foreign domicile, must be governed & construed by the rules of the English Law.—COOD v. COOD (1863), 33 Beav. 314; 3 New Rep. 275; 33 L. J. Ch. 273; 9 Jur. N. S. 1335; 55 E. R. 388.

Annotations:—**Mentd.** Adams v. Clutterbuck (1883), 31 W. R. 723; Bank of Africa v. Cohen, [1909] 2 Ch. 129.

367. — To enforce implied covenant for quiet enjoyment.]—In July 1896 plffs. entered into an agreement with the defts. under which the & exclusive right to work certain lands situate in the Island of Milos & belonging to the defts. was granted to the plffs. for a period of five years; the agreement also contained a provision for a renewal of the period for three further periods of five years each.

The right conferred by this agreement was expressed to be granted for the purpose of enabling

the plffs. to get & work manganese; & they were to pay by quarterly payments certain royalties therefor, & a minimum royalty was fixed.

Clause 6 provided in the event of any royalties being in arrear for three months or a breach of any of the provisions of the agreement the defts. might determine the licence & re-enter the premises.

On May 17, 1898, a further agreement was made modifying the first agreement & providing for the payment of the royalties half-yearly on Apr. 8 & Oct. 8, in each year.

A dispute having arisen between the original grantors of the lands & defts., & the former having requested plffs. to pay the royalties to them instead of to defts., plffs. on Oct. 7, declined to pay to defts. the royalties due on Oct. 8, & offered to refer the question to arbn.

Oct. 12, defts. took forcible possession of the lands & remained in possession of the same.

Oct. 18, plffs. tendered to defts. the money due, but the tender was refused.

Nov. 2, plffs. instituted this action & now moved for an injunction to restrain defts. from taking or keeping possession of the lands in question & of the machinery & stock of manganese in or about the premises.

The registered offices of plffs. & defts. respectively were situate in London:—

Held: if there was jurisdiction to grant the injunction sought for, such jurisdiction ought to be exercised with great caution; as defts. were in actual possession of the lands they ought not to be disturbed & the motion must be refused.—BLACK POINT SYNDICATE, LTD. v. EASTERN CONCESSIONS, LTD. (1898), 79 L. T. 658; 15 T. L. R. 117.

368. Rescission—Contract dealing with mineral rights in foreign country.]—Where a contract dealing with certain mineral rights in Ecuador was signed by the parties thereto in New York City, U.S.A., but expressly provided that it should be considered & held to be one duly made & executed in London, England:—*Held*: (1) such a contract was not made within the jurisdiction under Ord. 11, r. 1 (e), but was by its terms or by implication to be governed by English law; (2) an order giving leave to serve a writ in an action for rescission of such a contract is right, both on technical grounds & also on the ground of convenience, & will not be set aside.—BRITISH CONTROLLED OILFIELDS, LTD. v. STAGG (1921), 66 Sol. Jo. (W. R.) 18.

Title to land directly in issue.]—See Sect. 1, *ante*.

SUB-SECT. 5.—FRAUD AND INEQUITABLE DEALING.

369. Fraudulent conveyance—Defendant within jurisdiction—Land in Ireland.]—Ct. of equity in England will relieve against fraudulent conveyances gained of lands in Ireland, when deft. is in England.—ARGLASSE (LORD) v. MUSCHAMP

PART IV. SECT. 2, SUB-SECT. 4.

365 i. Specific performance—Sale of foreign land—Agreement for.]—HILL v. SPRAID (1909), 11 W. L. R. 680; 2 Alta. L. R. 148.—CAN.

365 ii. — Deft. to purchase land in S. from plff. & to pay for it in instalments; the agreement provided for cancellation by plff. upon default after notice, & a covenant that, on default, the whole purchase money should become payable. In an action in M. to recover the balance due upon default:—*Held*: the ct. had jurisdiction to order that deft. perform his contract within a reasonable time.—BURLEY v. KNAPPEN

(1910), 13 W. L. R. 715.—CAN.

365 iii. — Cassim's Estate v. Cassim (1914), 36 N. L. R. 14.—S. AF.

d. — Exchange of foreign land for land within jurisdiction—Agreement for.]—Plff., an U.S. resident, agreed with deft. to exchange land situate in U.S.A. for land of deft. in O.; & brought this action for specific performance of the contract:—*Held*: the ct. would decree specific performance.—MONTGOMERY v. RUPPENSBURG (1899), 31 O. R. 433.—CAN.

e. Rescission—Sale of foreign land—Contract made in jurisdiction of domestic court.]—ROOD'S TRUSTEES v.

SCOTT & DE VILLIERS, [1910] T. P. D. 47; L. L. R. 97.—S. AF.

PART IV. SECT. 2, SUB-SECT. 5.

369 i. Fraudulent conveyance—Parties within jurisdiction—Foreign land.]—An action will not lie in O. by a judgment creditor to set aside, as fraudulent, a conveyance made by his debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in O.: where fraud exists in respect to specific property out of the jurisdiction, the ct. will interfere where the parties are within the jurisdiction, by ordering conveyances to be made to the persons entitled,

(1682), 1 Vern. 76 ; 23 E. R. 322, L. C. ; *subsequent proceedings*, 1 Vern. 135.

Annotations :—*Refd.* Fryar v. Vernon (1724), Cas. temp. King. 5 ; Barnardiston v. Lingood (1740), 2 Atk. 133 ; Cranstown v. Johnston (1796), 3 Ves. 170 ; British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602 ; Black Point Syndicate v. Eastern Concessions (1898), 79 L. T. 658. *Mentd.* Portarlington v. Soulby (1834), 3 My. & K. 104 ; Duder v. Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132.

370. ——— Land in Scotland.]—(1) To a bill brought for possession of lands in Scotland, & for discovery of the rents & profits & deeds, & fraud in obtaining them ; plea to the jurisdiction of the Ct. bad, on account of not averring that the parties were resident out of the jurisdiction.

As to so much of the bill as seeks possession ; the plea over-ruled, without prejudice to the deft.'s insisting by way of answer upon the same matter.

(2) The Ct. of Chancery in England, respecting lands out of its jurisdiction, cannot enforce its decree *in rem*, but enforces it by process of contempt *in personam* & sequestration.—*ANGUS v. ANGUS* (1737), West temp. Hard. 23 ; 25 E. R. 800, L. C.

Annotation :—As to (1) *Refd.* Black Point Syndicate v. Eastern Concessions (1898), 79 L. T. 658.

371. Purchase by execution creditor—Of colonial land—Purchaser compelled to hold land as security only.]—*CRANSTOWN (LORD) v. JOHNSTON*, No. 338, *ante*.

372. Setting aside judicial sale under process & judgment of local court—General allegations of fraud denied.]—Jurisdiction upon a contract concerning an estate in a Colony.

But the question upon the construction of the contract, for a security by way of mtge., having been before a Ct. of competent jurisdiction in the Colony, & a foreclosure & judicial sale directed, the allegations of fraud merely general, & denied, an injunction was refused.—*WHITE v. HALL* (1806), 12 Ves. 321 ; 33 E. R. 122, L. C.

SUB-SECT. 6.—JURISDICTION TO ORDER ACCOUNTS AND APPOINT RECEIVER.

373. Account—Of waste—Land in Ireland.] On a bill for a partition of lands in Ireland, & an account of waste committed there, a demurrer was allowed as to the partition, & overruled as to the account.—*CARTERETT v. PETTIE* (1676), Cas. temp. Finch, 242 ; 2 Swan. 323, n. ; 23 E. R. 133 ; *sub nom.* CARTWRIGHT v. PETTUS, 2 Cas. in Ch. 214, L. C.

Annotation :—*Mentd.* Leake v. Cordeaux (1856), 4 W. R. 806.

374. ——— In action to enforce creditors' deed—Property of debtor in Ireland—English judgment treated as foreign judgment in Ireland.]—The creditors of a person resident in Ireland, filed a bill in the English Ct. of Ch. & obtained a decree for an account, etc., & afterwards, the property of the debtor lying chiefly in Ireland, filed a bill in the Ct. of Ch. there, praying to have the full benefit of the proceedings in the English suit. The Ct. of Ch. in Ireland dismissed such second bill as for want of jurisdiction :—*Held* : (1) the judgment of the Ct. of Ch. in Ireland was erroneous ; (2) the proceedings in the English Ct. of Ch. were in the nature of a

but will not so do when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce.—*BURNS v. DAVIDSON* (1891), 21 O. R. 547.—*CAN.*

f. ——— Fraudulent mortgage — Foreign land.]—A Ct. cannot entertain an action to set aside a mtge. on foreign lands on the ground

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that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title.—*PURDOM v. PAVEY & CO.* (1896), 26 S. C. R. 412.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 6.

g. Appointment of receiver — Land

foreign judgment, & were to be treated as such in Ireland, namely, as *prima facie* evidence of right in the party who had obtained the judgment ; (3) this House could either remit the case with directions, or appoint a receiver, & take such other proceedings as the Ct. of Ch. in Ireland might have done.

(4) Principle of recognition of foreign judgments discussed. (*See* No. 1164, *post*.)—*HOULDITCH v. DONEGALL (MARQUESS)* (1834), 2 Cl. & Fin. 470 ; 8 Bli. N. S. 301 ; 6 E. R. 1232, H. L.

Annotations :—As to (1) *Refd.* Houlditch v. Wallace (1838), 5 Cl. & Fin. 629. As to (2) *Consd.* Godard v. Gray (1870), L. R. 6 Q. B. 139. *Refd.* Price v. Dewhurst (1837), Donnelly, 264 ; Henderson v. Henderson (1844), 6 Q. B. 288 ; Bank of Australasia v. Harding (1850), 9 C. B. 661 ; Paul v. Roy (1852), 5 Beav. 433 ; Barber v. Lamb (1860), 8 C. B. N. S. 95 ; Abouloff v. Oppenheimer (1882), 10 Q. B. D. 295 ; *Re* Henderson, Nouvion v. Freeman (1887), 56 L. T. 829. As to (3) *Refd.* *Re* Maudslay, Sons & Field, Maudslay v. Maudslay, Sons & Field, [1900] 1 Ch. 602. *Generally, Mentd.* Koster v. Sapte (1838), 1 Curt. 691 ; Williams v. Chard (1851), 21 L. J. Ch. 9 ; Cookney v. Anderson (1863), 1 De G. J. & Sm. 365.

Foreign judgments generally.]—*See* Part XIV., *post*.

375. ——— Of partnership property—In colony—Some defendants in England.]—Pltf., in England, filed a bill for an account against the exors. of a deceased partner, some of whom were in Jamaica, but acting in concert with the others, who were in England ; the partnership property being in Jamaica :—*Held* : the suit was properly instituted in this country.—*HENDRICK v. WOOD* (1861), 30 L. J. Ch. 583 ; 4 L. T. 767 ; 9 Jur. N. S. 117 ; 9 W. R. 588.

Annotation :—*Refd.* Matthaci v. Galitzin (1874), L. R. 18 Eq. 340.

376. ——— Of profits—Of mine in foreign country — Parties foreigners.] —*MATTHACI v. GALITZIN*, No. 329, *ante*.

377. ——— Of purchase-money—On sale of foreign immovable—Parties within jurisdiction.]—The title to immovable property in Saxony was in dispute between A. & B. A. sold the property in Saxony, received part of the purchase-money, & took a mortgage for the balance. Both A. & B. being in England, an action by B. to make A. account for the purchase-money was dismissed for want of jurisdiction.—*Re* HAWTHORNE, *GRAHAM v. MASSEY* (1883), 23 Ch. D. 743 ; 52 L. J. Ch. 750 ; 48 L. T. 701 ; 32 W. R. 147.

Annotations :—*Folld.* Deschamps v. Miller, [1908] 1 Ch. 856. *Refd.* Companhia de Mocambique v. British South Africa Co., De Sousa v. Somo, [1892] 2 Q. B. 358.

378. Appointment of receiver—Land in Ireland.] *HOULDITCH v. DONEGALL (MARQUESS)*, No. 374, *ante*.

379. ——— Of rents & profits arising from foreign land—English company assignees of land subject to express obligation.]—I. Co., a co. incorporated according to the laws of the United States, issued, in 1888, debentures charged upon property in Mexico, of about seventeen million acres in extent. The debentures were secured by a covering deed made between the I. Co. of the first part, the P. Co. called the trustee, of the second part, & three persons, appointed as a committee on the part of the debenture-holders, and called the committee, of the third part. This deed purported to charge the property in Mexico, gave powers of sale & other powers to the trustee co. & the committee,

*in Ireland - Owner abroad.]—*A receiver will not be appointed over deft.'s property if he resides out of the jurisdiction, unless pltf. has a specific lien on the land, or there is danger of immediate loss of the property.—*ARTHUR v. ARTHUR* (1824), 1 Hog. 95.—*IR.*

*Sect. 2.—Equitable jurisdiction in personam: Sub-
l. 3: Sub-sects. 1, 2 & 3.]*

& provided that the committee might at any time, at discretion, call upon the trustee to register in Mexico the hypothecation of the lands to be given by the I. Co. to the trustee. This registration had never been made by the trustee or demanded by the committee. It was admitted that by the law of Mexico the charge on the land had no validity unless registered. The I. Co. were holders of some of these debentures. In May 1889 the M. L. C. Co. was incorporated in England to take over the assets & liabilities of the I. Co. The property of the I. Co. was transferred to the M. L. C. Co., subject to the rights of the debenture-holders. The transfer to the M. L. C. Co. was duly registered in Mexico, & gave that co. a complete legal title according to Mexican law. The land comprised in the debenture trust deed was wholly undeveloped, & produced no income. The M. L. C. Co., being unable to pay the interest on the debentures, proposed a scheme for the conversion of the debentures into preference shares. This scheme was approved by a majority of the debenture-holders, at a meeting held in Oct. 1889, but had not been accepted by the M. I. Co. Early in 1890 the M. I. Co. commenced an action in the Q. B. Div. against the I. Co. for the half-year's interest unpaid on Jan. 1, 1890, & in Feb. 1891 the Ct. of Appeal gave judgment for the pl'tfs. in that action. On Nov. 4, 1891, the M. I. Co. commenced this action in the Ch. Div. to enforce the security of their debenture, & they now moved for a receiver of the rents & profits of the land in Mexico, & the proceeds of sale thereof, & of certain shares & moneys received by the M. L. C. Co. from other cos. for sale of lands alleged to be comprised in the security.

Held: as the deft. co., being subject to the jurisdiction of this ct., had taken a conveyance of the land with notice of & expressly subject to the pl'tfs.' charge, the ct. had jurisdiction to prevent their making an unconscionable use of the Mexican law or gaining any advantage by having registered their transfer before the charge of which they had notice: *Seemle*: it had jurisdiction to appoint the receiver asked for.—**MERCANTILE INVESTMENT & GENERAL TRUST CO. v. RIVER PLATE TRUST, LOAN & AGENCY CO.**, [1892] 2 Ch. 303; 61 L. J. Ch. 473; 66 L. T. 711; 36 Sol. Jo. 427.

Annotations:—**Consd.** *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354. **Refd.** *Re Maudslay, Sons & Field* (1900), 82 L. T. 378; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

380. — Effect of—Interference with receiver.]

In Oct. 1899, receivers were appointed in debenture-holders' actions of the undertaking & of the property whatsoever & wheresoever both present and future of an English co., the order following the wording of the debentures. Among the assets of the co. was a debt due to them from a French firm. In Nov. 1899, P. & Co., English creditors of the co., took proceedings in France for the purpose of attaching the debt due to the co. from the French firm. The pl'tfs. in the debenture-holders' action moved to restrain P. & Co. from intercepting, attaching, or taking in execution, or attempting to obtain payment of moneys due to the co. from the French firm, or from otherwise interfering with the receivers:—

Held: (1) the existence of the charge created by the debenture though valid according to English law, did not entitle the debenture-holders to prevent P. & Co., who were unsecured creditors, from asserting & enforcing any rights given them by French law against this French debt, there

being no equity in favour of the debenture-holders as against P. & Co.; the debt due from the French firm must be treated as being situate in France & subject to French law, & P. & Co. could not be prevented, at the suit of the debenture-holders, from taking any proceedings the law of France allowed for recovering their debt out of this French asset, & the attachment which alone was recognised by the law of France ought to prevail over the title of the debenture-holders; (2) the appointment of the receivers made no difference; for though the Ct. can appoint receivers over property out of the jurisdiction, the receiver is not put in possession of foreign property by the mere order of the Ct.; something else has to be done & until what is necessary has been done in accordance with foreign law, any person, not a party to the suit, who takes proceedings in a foreign country is not guilty of contempt on the ground of interfering with the receivers' possession or otherwise, & for this purpose no distinction can be drawn between a foreigner & a British subject.—*Re MAUDSLAY, SONS & FIELD, MAUDSLAY v. MAUDSLAY, SONS & FIELD*, [1900] 1 Ch. 602; 69 L. J. Ch. 347; 82 L. T. 378; 48 W. R. 568; 16 T. L. R. 228; 8 Mans. 38.

Annotations:—As to (1) **Refd.** *Bank of Africa v. Cohen*, [1909] 2 Ch. 129; *The Kronprinz Olav*, [1921] P. 52. As to (2) **Consd.** *Re Derwent Rolling Mills Co.*, *York City & County Banking Co. v. Derwent Rolling Mills Co.* (1904), 21 T. L. R. 81.

SECT. 3.—ALIENATION AND ASSIGNMENT OF IMMOVABLES.

SUB-SECT. 1.—IN GENERAL.

381. Validity of title—Governed by *lex situs*.]—

The *lex loci rei sitæ* governs exclusively the tenure, title & descent of immovable property.—**FENTON v. LIVINGSTONE** (1859), 33 L. T. O. S. 335; 23 J. P. 579; 5 Jur. N. S. 1183; 7 W. R. 671; 3 Macq. 497, H. L.

Annotations:—**Refd.** *Re Goodman's Trusts* (1881), 17 Ch. D. 266. **Mentd.** *Chichester v. Mure* (1863), 32 L. J. P. M. & A. 146; *R. v. Dibdin*, [1910] P. 57.

382. — — —.]—(1) It is established as a general principle, that a legal title, duly acquired in any one country, is a good title all the world over. Duly to acquire a legal title to real estate, such legal title must be according to the *lex loci rei sitæ*. The due acquisition of a legal title to movables may give rise to the question whether the *lex loci contractus*, or the law of the country wherein the contracting parties may be domiciled, or even the *lex loci rei sitæ*, shall prevail. Where all these circumstances are combined in the acquisition of a legal title to a movable, such title is, beyond doubt, good all the world over.

(2) A judgment of a foreign ct. is conclusive, *inter partes*, where there is nothing on the face of the judgment which a ct. here can inquire into. The cts. of this country may, however, disregard a foreign judgment, *inter partes*, if it appears on the record:—(a) to be manifestly contrary to natural justice; or (b) to be based on domestic legislation not recognised by foreign countries; or (c) to be founded on a misapprehension of what is the law of this country; or (d) to be founded upon a distinct refusal to recognise the laws of the country under which the title to the subject-matter of litigation arose.

Seemle: a foreign judgment even *in rem* may be examined & disregarded, if it appears on the face of it to have been founded on a perverse disregard of English law in a case properly subject to that law by the comity of nations.

(3) The same rules apply to judgments of Colonial cts.

(4) A ship, the property of British subjects, was duly mortgaged, in Great Britain, to other British subjects, & being in the mtgors.' possession, proceeded to New Orleans. Whilst there it was attached by creditors of the mtgors. resident in New Orleans, &, after due intervention & hearing of the British mtgees., before & by the cts. of Louisiana, sold under process of the ct., to satisfy the attaching creditors, to a British subject, who had notice of the mtgees.' intervention. On a bill by the mtgee. against the purchaser:—*Held*: the sale was subject to the right of the mtgees.—*SIMPSON v. FOGO* (1863), 1 Hem. & M. 195; 1 New Rep. 422; 32 L. J. Ch. 249; 8 L. T. 61; 9 Jur. N. S. 403; 11 W. R. 418; 1 Mar. L. C. 312; 71 E. R. 85.

Annotations:—As to (1) *Refd.* *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479; *Taylor v. Ford* (1873), 22 W. R. 47; *Volnet v. Barrett* (1885), Cab. & El. 554. As to (2) *Expld. & Distd.* *Liverpool Marine Credit Co. v. Hunter* (1867), L. R. 4 Eq. 62. *Apprvd.* *London & Mediterranean Bank v. Strutton* (1869), 21 L. T. 415. *Distd.* *Castrique v. Imrie* (1870), L. R. 4 H. L. 414. *Expld.* *Re Queensland Mercantile & Agency Co., Ex p. Australasian Investment Co., Ex p. Union Bank of Australia*, [1892] 1 Ch. 219; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 3 K. B. 532. *Refd.* *The Halley* (1868), L. R. 2 P. C. 193; *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Colliss v. Hector* (1875), L. R. 19 Eq. 334; *Re Kloebe* (1884), 54 L. J. Ch. 297; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600. As to (4) *Consd.* *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479; *Expld.* *Schibsby v. Westenholz* (1870), 19 W. R. 587. *Consd.* *Volnet v. Barrett* (1885), Cab. & El. 554. *Expld.* *Re Queensland Mercantile & Agency Co., Ex p. Australasian Investment Co., Ex p. Union Bank of Australia*, [1892] 1 Ch. 219.

383. Powers given by 1 Will. 4, c. 60, not applicable to foreign immovables.]—The powers given by 1 Will. 4, c. 60, do not extend to real or personal property in a foreign country.—*PRICE v. DEWHURST* (1839), 8 Sim. 617; 8 L. J. Ch. 267; 59 E. R. 244.

384. Bankruptcy—Real property in England.]—To an action on a judgment of the Supreme Ct. of the Cape of Good Hope, deft. pleaded in bar that, before the recovery of the judgment, by an ordinance of that colony relating to the administration & distribution of insolvents' estates, it was enacted, that the Supreme Ct. might, upon petition of the insolvent, accept the surrender of his estate, & place it under sequestration in the hands of the Master of the Ct.; & that further execution of any judgment against the insolvent or his estate should, after the order for sequestration had been lodged, be stayed during the pendency of such sequestration; & that all actions pending against him for any debt or demand provable against the estate, & all proceedings therein upon any order being made for the sequestration of such estate, should, be stayed. The plea then stated the petition of deft., the surrender of his estate, that it had been placed under sequestration, that plffs. proved the amount of the judgment against deft.'s estate, that the estate was distributed, & that plffs. received 1s. 6d. in the pound on the amount of the judgment debt:—*Held*: the plea was bad.

It seems to be clear that the law of the Cape of Good Hope cannot be taken to affect the debtor's real estate out of that country, which, being extra-territorial, is also out of the jurisdiction of the Ct. where the judgment was obtained (*PARKE, J.*).—*FRITH v. WOLLASTON* (1852), 7 Exch. 194; 21 L. J. Ex. 108; 18 L. T. O. S. 228; 155 E. R. 913.

PART IV. SECT. 3, SUB-SECT. 2.

situs—Not complying with domestic law—Verbal grant.]—Grantors of real

estate were Hindoos, & the grantees the East India Co.; the Hindoo law which governed grantor's rights allowed a verbal grant, if followed by possession by the grantees; possession was taken

by them:—*Held*: a valid grant.—*DOE d. SEEBKRISTO (RAJAH) v. EAST INDIA CO.* (1856), 10 Moo. P. C. C. 140; 14 E. R. 445.—*IND.*

— — —.]—*See, further, BANKRUPTCY & INSOLVENCY, Vol. V., p. 693, No. 6116.*

Bankruptcy—Real property in Scotland.]—*See BANKRUPTCY & INSOLVENCY, Vol. V., p. 691, No. 6102.*

SUB-SECT. 2.—CAPACITY AND FORM.

385. Assignment not complying with *lex situs*—Binding between immediate parties & their assignees in bankruptcy—Equitable mortgage of land in Scotland.]—*Re COURTNEY, Ex p. POLLARD*, No. 356, *ante*.

386. — — — Post-nuptial settlement of foreign land—Equity of wife & children.]—After the marriage of a female ward a settlement is made, under the direction of the ct. in England, for the benefit of the wife & children of the marriage, of a moiety of a plantation in Demerara, of which the wife was seized in fee at the time of the marriage; the husband & wife afterwards mortgage the estate to persons having full notice of the settlement; by the law of Demerara the settlement was a nullity, & in no manner affected the rights & powers of the husband and wife over the estate:—*Held*: the mtge. is valid, inasmuch as the equity of the wife & children attached only upon the person of the husband, & not upon the estate.—*MARTIN v. MARTIN, BELL v. MARTIN* (1831), 2 Russ. & M. 507; 39 E. R. 487. *Annotation*:—*Refd.* *Bank of Africa v. Cohen*, [1909] 2 Ch.

387. — — — Whether binding on third parties—Mortgage of colonial land—Proceeds of sale within jurisdiction.]—*WATERHOUSE v. STANSFIELD*, No. 305, *ante*.

388. — — — With notice—Conveyance of land in India with covenant for further assurance.]—*HICKS v. POWELL*, No. 342, *ante*.

389. Assignment complying with *lex situs*—Not complying with *lex loci contractus*—Conveyance of sporting rights over land in Scotland—Not under seal.]—By Scots law an instrument under seal is not necessary for the conveyance of a sporting right, & therefore the stipulations of an unsealed lease made between Englishmen in England of a sporting right over land in Scotland may be enforced by action in the English Courts, as the provision of the law of England that an instrument under seal is necessary for the conveyance of a right to an incorporeal hereditament, is not part of the *lex fori*. Even if such lease were invalid for want of a seal, the lessee, after having had an enjoyment of the right, could not set up the invalidity as a defence to an action for breach of a stipulation in the lease to leave a good breeding stock of game on the ground at the termination of the lease.—*ADAMS v. CLUTTERBUCK* (1883), 10 Q. B. D. 403; 52 L. J. Q. B. 607; 48 L. T. 614; 31 W. R. 723.

SUB-SECT. 3.—MATERIAL VALIDITY OF, AND RESTRICTIONS ON, ASSIGNMENT.

Restrictions—Application of Mortmain Acts.]—*See CHARITIES, Vol. VIII. pp. 286, 287.*

— Rule against perpetuities.]—*See Nos. 448, 449, post.*

Sect. 6.—Commercial domicile: Sub-sect. 2, A., B. & C.; sub-sect. 3.]

an American pass, & all American documents:—*Held*: if the owner really resided in England such papers could not protect his vessel, for, if the owner was resident in England, & the voyage was such as an English merchant could not engage in, an American, resident in England, & carrying on trade, could not protect his ship merely by putting American documents on board, & his interest must stand or fall according to the determination which the ct. could make on the national character of such a person.

(3) If a person goes into another country & engages in trade, & resides there, he is by the law of nations to be considered as a merchant of that country. It is illegal in any person owing an allegiance, though temporary, to trade with the public enemy. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, *bonâ fide* to quit the country, *sine animo revertendi*.

(4) The character of consul does not protect that of merchant united in same person. Whether he is a general merchant, or not is totally immaterial, if it be his first adventure he must be taken as a merchant, & can be considered in no other character.—*THE INDIAN CHIEF* (1801), 3 Ch. Rob. 12; 1 Eng. Pr. Cas. 251.

Annotations:—*As to* (1) *Consd.* *The Flamenco*, *The Orduna* (1915), 32 T. L. R. 53. *Refd.* *R. v. Bjornsen* (1865), 10 Cox, C. C. 74. *As to* (3) *Consd.* *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 441; *The Hypatia*, [1917] P. 36; *Tingley v. Müller*, [1917] 2 Ch. 144; *Casdagli v. Casdagli*, [1919] A. C. 145. *Refd.* *Re Tootal's Trusts* (1883), 23 Ch. D. 532; *The Eumaeus* (1915), 85 L. J. P. 130; *Rodriguez v. Speyer*, [1919] A. C. 59. *As to* (4) *Distd.* *The San Spiridione* (1856), 28 L. T. O. S. 205. *Generally*, *Mentd.* *Advocate-General of Bengal v. Ranee Sur. Dossee* (1863), 2 Moo. P. C. C. N. S. 22; *The Laconia* (1863), 33 L. J. P. M. & A. 11; *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358.

260. —Persons residing in this country, reaping the advantages of the trade of this country, & contributing to the well-being of this country, must for the purposes of trade be considered as belonging to the country. By the law of nations, therefore, the property of such a person is liable to capture by belligerents, on the ground of such property belonging to a subject of this country (*LORD KENYON*, Ch. J.).—*TABBS v. BENDELACK* (1801), 3 Bos. & P. 207, n.; 4 Esp. 108; 127 E. R. 114, N. P.

Annotation:—*Refd.* *R. v. Bjornsen* (1865), 13 W. R. 664.

261. —Fugitive visits to place of birth.]—A ship was claimed for T., describing himself as resident at Hooze:—*Held*: (1) if he had a house of trade at Hooze, from which a trade was carried on to other ports of the north, his employment in Dutch navigation would not necessarily affect that particular & distinct commerce; but it would spread its consequences over his affairs generally, & on such of his property as might be employed in a course of trade that had no distinct national character belonging to itself; (2) it was not fugitive visits to the place of his birth that would entitle him to retain the benefit of a neutral character, in opposition to a regular course of employment in the enemy's country & trade, & such a pretention would be utterly inconsistent with the rules which the ct. was obliged to lay down, in ascertaining questions of domicile (*SIR W. SCOTT*).—*THE VRIENDSCHAP* (1802), 4 Ch. Rob. 167.

262. —Withdrawal of property from enemy country—Subsequent investment in enemy's trade.]—*THE DREE GEBROEDERS*, No. 256, *ante*.

263. Recent establishment—Intention to make permanent residence established.]—Mere recency of establishment would not avail, if the intention of making a permanent residence there was fully fixed upon the party (*SIR W. SCOTT*).—*THE DIANA* (1803), 5 Ch. Rob. 60.

Annotation:—*Mentd.* *The Roland* (1915), 84 L. J. P. 127.

264. —Fixed counting-house not necessary.]—*THE JONGE KLASSINA*, No. 254, *ante*.

265. —Master of ship trading from American port—Acquisition of American citizenship.]—A British-born subject may, by his employment & residence in a foreign country, acquire a new national character for commercial purposes.

The ship *Ann* sailing under American colours was seized in Aug. 1812, in the Thames. The master, who was sole owner, described himself as a British subject & claimed the ship. He was a native of Scotland, where his wife & family resided, but had himself been admitted as an American citizen about 16 years before, upon taking an oath that he had been sailing out of an American port for two years; from 1799 till 1805 he had been connected with a house of trade at Glasgow, which had an establishment at N.Y. & another at Charlestown, & had occasionally resided at each of the last-mentioned places; he had purchased the vessel at public auction in America & had made three voyages in her, the first two from Charlestown to Kingston in Jamaica, returning each time in ballast; & the last from Charlestown to the Thames:—*Held*: in regard to the ship he was to be considered as an American subject.—*THE ANN* (1813), 1 Dods. 221.

266. Residence in one country—Business visits to another country.]—Question respecting the national character of a fishing adventure, carried on by a native Dutchman who had become by domicile a subject of Prussia, & had purchased the vessel, formerly a Dutch vessel, in Feb., at Emden. He had since been employed in fishing off the Dutch coast, having sold his cargoes to English ships, & having once or twice resorted to Dutch ports, not for the purpose of selling his cargoes, but merely to procure bait.

Held: his domicile was Prussian.—*THE LIESBIFT VAN DEN TOLL* (1804), 5 Ch. Rob. 283.

Annotation:—*Refd.* *The Berlin*, [1914] P. 265.

267. —Business in another country—Enemy subject.]—The Crown can claim condemnation of goods seized in transit of an enemy subject having a house of business in a neutral country or in British territory, but who himself resides in an enemy country. Such enemy subject, resident at Hamburg, cannot set up his commercial domicile in a neutral country at Khartoum against the claim of the Crown for condemnation of goods belonging to the firm of which the said enemy subject was a partner, shipped from Khartoum & seized by the Crown at Liverpool. Although a person carrying on business in an enemy country has his commercial domicile there, the converse of the rule does not extend to the case of a merchant residing in a hostile country, & having his house of trade in a neutral country.—*THE CLAN GRANT (PART CARGO EX)* (1915), 31 T. L. R. 321; 59 Sol. Jo. 430.

268. —After the outbreak of war with Germany certain goods belonging to a partnership firm at Buenos Aires, & shipped before the war on a British ship, were seized as a prize. All the partners of the firm were Germans resident at Antwerp, who had been expelled from Belgium as enemy subjects shortly after the outbreak of war:—

Held: although a subject of a belligerent State can acquire a commercial domicile in a neutral

State which will protect his goods captured at sea from condemnation residence in the neutral State is an essential condition of such domicile; &, as none of the enemy partners of the firm were resident in the Argentine Republic at the time of seizure, the goods must be regarded as enemy property & subject to condemnation.—*THE HYPATIA*, [1917] P. 36; 86 L. J. P. 44; 116 L. T. 25; 13 Asp. M. L. C. 574.

269. British & German firm trading in China—Firm registered at German consulate—British partners resident in China—German partners resident elsewhere.]—A firm consisting of two British & two German subjects carrying on business at Shanghai was registered at the German Consulate as a German firm in accordance with the regulations whereby the European communities, to which China has granted extraterritorial privileges, are governed by the laws of their respective countries. The two British partners, who resided in Shanghai, were also registered as British subjects at the British Consulate. Neither of the German partners resided at Shanghai. Goods belonging to the firm having been seized as prize, they were claimed as being the property of the firm as neutrals, & alternatively as the individual property of the partners as neutral and British subjects:—*Held*: (1) the firm could not be treated as a neutral house of trade, & for all purposes of prize it must be regarded as a German firm carrying on business in a German colony; (2) none of the partners had acquired, or could acquire, a neutral commercial domicile, & the shares in the proceeds of the goods attributable to the German partners must be condemned; (3) as regards the shares of the British partners, the case must be adjourned for further evidence as to what measures, if any, were taken by them to sever their connection with the firm on the outbreak of war.—*THE EUMAEUS* (1915), 85 L. J. P. 130; 114 L. T. 190; 32 T. L. R. 125; 60 Sol. Jo. 122; 13 App. M. L. C. 228.

Annotation:—As to (2) *Refd.* *Casdagli v. Casdagli*, [1919] A. C. 145.

270. Partner in business wherever resident.]—Where at the outbreak of war a neutral, wherever resident, was a partner in a house of business trading in or from an enemy country, he has a commercial domicile in that enemy country, & is to be deemed an enemy in respect of his property or interest in such business, unless he has within a reasonable interval after the outbreak of war discontinued or taken steps to dissociate himself from the business, & this theory of commercial domicile is not subject to an exception in a case where goods in which such partner has an interest have been shipped during peace, although if the goods were at sea at the outbreak of war, & have been captured before such reasonable interval has elapsed, the Ct. will in a proper case take notice of a discontinuance or dissociation after the capture or may even adjourn proceedings in the Prize Ct. in order to give an opportunity for such discontinuance or dissociation.—*THE ANGLO-MEXICAN*, [1918] A. C. 422; 87 L. J. P. 33; 118 L. T. 260; 34 T. L. R. 149; 14 Asp. M. L. C. 227, P. C.; *reversg.*, [1916] P. 112.

Annotations:—*Refd.* *The Asturian*, [1916] P. 150; *The Lutzow* (1917), 87 L. J. P. C. 52.

B. By Masters of Ships.

271. Determined by employment.]—A master's national character is taken from his employment.

Where a single man, Prussian by birth, who has established no domicile by family connections, & in his own person has been employed constantly for ten years in trading from Amsterdam to Green-

land; he is by such an occupation divested of his national character, & becomes by adoption, a Dutchman.—*THE EMBDEN* (1798), 1 Ch. Rob. 16.

272. —.]—*THE VRIENDSCHAP*, No. 261, *ante*.

273. Master being owner—Residence with family.]—A *bonâ fide* residing of the master (& owner) & family, though subject to periodical interruption on his part, occasioned by the nature of his professional avocations, decisive as to national character.—*THE JUNGE RUTTER* (1809), 1 Act. 116; 12 E. R. 44.

See, also, No. 265, *ante*.

C. Merchants acting as Consuls.

274. General rule.]—The character of consul does not protect that of merchant united in the same person.—*THE CONCORDIA* (1782), unreported, cited in 3 Ch. Rob. 27.

Annotation:—*Consd.* *The Indian Chief* (1801), 3 Ch. Rob. 12.

275. —.]—*THE HET HUYS BRADENBURG* (1784), cited in 3 Rob. Adm. R. 27.

Annotation:—*Consd.* *The Indian Chief* (1801), 3 Ch. Rob. 12.

276. —.]—*THE INDIAN CHIEF*, No. 259, *ante*.

277. Residence in enemy country—Neutral character not retained.]—A neutral, resident as merchant & consul in an enemy's country, loses his neutral character during such residence.—*THE AINA* (1854), 1 Ecc. & Ad. 313; Spinks, 8; 7 L. T. 340; 18 Jur. 681; 164 E. R. 181; *subsequent proceedings*, 1 Ecc. & Ad. 316.

Annotations:—*Refd.* *Tingley v. Müller*, [1917] 2 Ch. 144. *Mentd.* *The Marie Glaeser*, [1914] P. 218; *The Odessa*, *The Woolston*, [1916] 1 A. C. 145.

278. —.]—If a neutral acting as consul for his own country continues, for the purposes of trade, in the country of a belligerent, after declaration of war, he loses his character of a neutral, every person, in time of war, being considered "as belonging to that nation where he is resident & carries on his trade."—*THE ABO* (1854), Spinks, 42; 1 Ecc. & Ad. 347; 7 L. T. 340; 18 Jur. 965; 164 E. R. 200.

Annotation:—*Mentd.* *The Miranichi*, [1915] P. 71.

279. —.]—A merchant obtains a new national character, when he first takes steps *animo removendi* to abandon his former domicile & *animo manendi* to acquire a new one.

S., a Dane by birth, was Danish Consul at Libau, but was long settled there as a merchant. His son was born there:—*Held*: (1) until the son acquired another mercantile national character he had, being resident at Libau, inherited that of his father & was Russian until he came to England: subsequently he became a British merchant. Later he wound up his affairs in England, took a counting-house in Altona & lodgings in Hamburg:—*Held*: (2) residence there was equivalent to residence in Altona.—*THE BALTICA* (1855), Spinks, 264; 1 Jur. N. S. 1025; 164 E. R. 440; *reversd.* on other grounds, *sub nom.* *SORENSEN v. R.*, *THE BALTICA* (1857), 11 Moo. P. C. C. 141.

Annotations:—As to (1) *Refd.* *The Benedict* (1855), Spinks, 314. *Generally, Mentd.* *The Ariel* (1857), 29 L. T. O. S. 133; *Baltazzi v. Ryder*, *The Panaghia Rhomba* (1858), 12 Moo. P. C. C. 168; *The Tomini*, *The Rothersand*, [1914] P. 251; *The Southfield* (1915), 85 L. J. P. 78; *The Kronprinzessan Margareta*, *The Thal*, [1917] P. 114; *The United States*, [1917] P. 30; *The Dirigo*, *The Hallingdale*, [1919] P. 204; *The Noordam*, [1919] P. 255; *The Hilding* (Part Cargo Ex) (1920), 37 T. L. R. 199; *The Naxos* (1920), 123 L. T. 556; *The Edna*, [1921] 1 A. C. 735; *The Kronprinzessan Margareta*, *The Parana*, [1921] 1 A. C. 486; *The Vesta*, [1921] 1 A. C. 774.

SUB-SECT. 3.—LOSS OF.

280. General rule—Revival of national character.]—National character of a native Frenchman,

Sect. 6.—Commercial domicile: Sub-sect. 3. Part III. Sects. 1 & 2.]

an asserted American subject, but personally present in St. Domingo, shipping goods for France, & described in the evidence as a French merchant :—*Held* : the native character reverted.

The native character easily reverts, & it requires fewer circumstances to constitute domicile in the case of a native subject than to impress the national character on one who is originally of another country.—*LA VIRGINIE* (1804), 5 Ch. Rob. 98.

Annotations :—*Consd.* *Aikman v. Aikman* (1861), 4 L. T. 374. *Refd.* *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 441 ; *The Flamenco* (Part Cargo Ex), *The Orduna* (Part Cargo Ex) (1915), 32 T. L. R. 53 ; *Tingley v. Müller*, [1917] 2 Ch. 144.

281. ———.]—National character by occupation may be more easily changed than that by birth ; but the change must be *bonâ fide*, and cannot be effected by a mere money payment.—*THE ERNST MERCK* (1854), 2 Ecc. & Ad. 87 ; *Spinks*, 98 ; 7 L. T. 340 ; 1 Jur. N. S. 119 ; 164 E. R. 322.

282. ———.]—*THE BALTIKA*, No. 279, *ante*.

283. Departure from trading residence—Interest in business retained.]—*THE PORTLAND*, No. 253, *ante*.

284. ——— To another country—Revesting of original domicile.]—Two consignments of copper belonging to H., a German subject carrying on trade in Chile, were shipped from that country to Liverpool & seized as prize. H. had left Chile before the seizure, & he appeared to have been in Switzerland not long after it :—*Held* : although the country to which H. appeared to have betaken himself was, equally with Chile, a neutral country, yet he had, by leaving Chile, lost the neutral trade domicile which he had acquired by residence there, & had thereby revested himself with his original

character as an enemy.—*THE FLAMENCO* (PART CARGO EX), *THE ORDUNA* (PART CARGO EX) (1915), 32 T. L. R. 53 ; 60 Sol. Jo. 107.

285. Intention to depart from trading residence—No overt act.]—A ship taken on a voyage from the Cape of Good Hope to Europe was claimed for E. as a subject of America. He had been a British-born subject, who had gone to the Cape of Good Hope & been employed as American consul at that place. He had been for many years settled at the Cape, with an established house of trade, & as a merchant of that place. It was alleged that he had intended to remove to Philadelphia :—*Held* : insufficient without some overt act ; he must be taken as a subject & merchant of the enemy's country.—*THE PRESIDENT* (1804), 5 Ch. Rob. 277. *Annotation* :—*Consd.* *Tingley v. Müller*, [1917] 2 Ch. 144.

286. ——— Overt act—Dissolution of partnership—Detention on outbreak of war.]—F., a British-born subject, had been settled as a merchant in Flushing, but on the appearance of approaching hostilities, had taken means to remove himself, & return to England. He had dissolved his partnership ; & had continued to reside in Holland after the war, only under the detention applied to all Englishmen resident in the country of the enemy at the breaking out of hostilities.

Held : he was entitled to restitution as a British subject, having taken what steps he could to remove from enemy jurisdiction.—*THE OCEAN* (1804), 5 Ch. Rob. 90.

287. ——— Must be *bonâ fide*.]—*THE ERNST MERCK*, No. 281, *ante*.

288. Ceasing to act as merchant—Shipment of produce of own estate only.]—*THE DREE GEBROEDERS*, No. 256, *ante*.

289. ——— Within reasonable time Shipment of goods after outbreak of war.]—*THE ANGLO-MEXICAN*, No. 270, *ante*.

Part III.—Nature of Property.

SECT. 1.—IN GENERAL.

290. “Movable” & “Immovable” explained.]—Testator who died in 1888, domiciled in England, bequeathed property, which included mtges. on freehold in Ontario, for charitable purposes. The mtges. contained covenants to pay the money thereby secured. At the date of testator's death the Charitable Uses Act, 1735, then in force, extended to Ontario, & would admittedly have invalidated the bequest of the mtges. had testator been domiciled there :—*Held* : mtges. on land are deemed to be immovables & not movables, & governed by the *lex rei sitæ*, & therefore the bequest of the mtges. was a gift of impure personalty & was invalid.

The terms “movable” & “immovable” are not technical terms in English law, though they are often used, & conveniently used, in considering questions between English law & foreign systems which differ from that law (COZENS-HARDY, M.R.).

The division into movable & immovable property is no part of the law either of England or of Canada, & is only called into operation in England when the English Cts. have to determine rights between domiciled Englishmen and persons domiciled in countries which do not adopt the

English division into real & personal property (FARWELL, L.J.).—*Re HOYLES*, *Row v. Jagg*, [1911] 1 Ch. 179 ; 80 L. J. Ch. 274 ; 103 L. T. 817 ; 27 T. L. R. 131 ; 55 Sol. Jo. 169, C. A.

SECT. 2.—HOW DETERMINED.

291. Immovable—Scottish heritable bond—By Scottish law.]—Though the personal estate of a Scotsman dying domiciled in England, must be distributed according to the law of England, yet that shall not affect or interfere with the succession to his real estate in Scotland. Therefore, where for securing a sum of money borrowed, a heritable bond is granted, by which the land in Scotland is rendered liable as the principal debtor there, & the heir pays the bond by sale of part of the estate, being at the same time one of the next of kin and administrator, he shall not come for relief upon the personal funds in England, as primarily applicable to the payment of such a debt.—*DRUMMOND v. DRUMMOND* (1799), 6 Bro. Parl. Cas. 601 ; 2 E. R. 1293, H. L.

Annotations :—*Consd.* *Brodie v. Barry* (1813), 2 Ves. & B. 127 ; *Allen v. Anderson* (1846), 5 Hare, 163 ; *Cust v. Goring* (1854), 18 Beav. 383. *Expld. & Distd.* *Maxwell v.*

PART III. SECT. 2.

a. General rule.]—The character of funds situated in a foreign country as heritable or movable, is to be determined by the law of that country.

—*NEWLANDS v. CHALMERS' TRUSTEES* (1832), 11 Sh. (Ct. of Sess.) 65.—**SCOT.** **p. Immovable—Mineral claim—By Canadian law.]**—Mineral claims are immovable property, & governed as

to their disposition by the *lex loci rei sitæ*, & not by the law of a foreign country.—*BARINDS v. GREEN* 16 B. C. R. 433.—**CAN.**

Maxwell (1870), L. R. 4 H. L. 506. **Refd.** *Winchelsea v. Garety* (1838), 2 Keen, 293.

292. —.—.—.—.]—*Held*: heritable bonds, given as security for money advanced, did not pass under general words in a will, but descended to testator's heir-at-law.—*JOHNSTONE v. BAKER* (1817), 4 Madd. 474, n.; 56 E. R. 780.

Annotations:—**Distd.** *Cust v. Goring* (1854), 18 Beav. 383. **Refd.** *Buccleuch v. Hoare* (1819), 4 Madd. 467; *Allen v. Anderson* (1846), 5 Hare, 163; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

293. —.—.—.—.]—Heritable bonds, together with English securities, were given on a loan of money, to a domiciled Englishman:—*Held*: a will, disposing of the money due on such securities was effectual, & the heir-at-law of testator had no claim in respect of the heritable bonds.—*BUCCLEUCH (DUTCHESS DOWAGER) v. HOARE* (1819), 4 Madd. 467; 56 E. R. 777.

Annotations:—**Distd.** *Duffield v. Elwes* (1823), 1 Sim. & St. 239. **Consd.** *Jerningham v. Herbert* (1828), 4 Russ. 388; *Cust v. Goring* (1854), 18 Beav. 383; *Lamb v. Lamb* (1857), 29 L. T. O. S. 372. **Refd.** *Allen v. Anderson* (1846), 5 Hare, 163.

294. —.—.—.—.]—A will must be construed according to the law of the country where it is made, & testator is domiciled.

The will of a subject of Great Britain made in India must be construed according to the laws of England.

Money vested in heritable bonds becomes real estate, & where upon the construction of the will no clear intention can be collected to pass real estate, the heir-at-law taking a benefit under the will is not put to his election, but may take the real estate as heir, & also personal estate under the will.

A will by which testator recites that he considers it his duty, while in health, to execute a settlement of all his estate & effects, appointing exors. in England & in India, & directing that the residue of his estate in India should be remitted to his exors. in Scotland, & that they should divide that residue, & the whole of his property in Europe, equally between his brothers & sisters:—*Held*: not to pass the heritable bonds.—*TROTTER v. TROTTER* (1828), 4 Bli. N. S. 502; 5 E. R. 179, H. L.

Annotations:—**Consd.** *Boyes v. Bedale* (1863), 1 Hem. & M. 798. **Refd.** *Dundas v. Dundas* (1830), 2 Dow & Cl. 349; *Price v. Dewhurst* (1837), Donnelly, 264; *Martin v. Lee* (1860), 14 Moo. P. C. C. 142; *Enohin v. Wylie* (1862), 10 H. L. Cas. 1; *Studd v. Cook* (1883), 8 App. Cas. 577. **Mentd.** *Pitman v. Crum Ewing*, [1911] A. C. 217.

295. —.—.—.—.]—**Although containing personal obligation to pay.**—A Scottish heritable bond, although it contains a personal obligation to pay the debt, does not lose its heritable quality & will not pass by an English will, but descends to the heir-at-law.—*JERNINGHAM v. HERBERT* (1829), Tam. 103; 4 Russ. 388; 6 L. J. O. S. Ch. 134; 48 E. R. 42.

Annotations:—**Consd.** *Allen v. Anderson* (1846), 5 Hare, 163. **Distd.** *Cust v. Goring* (1854), 18 Beav. 383. **Refd.** *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *Re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179. **Mentd.** *Gill v. Bagshaw* (1866), L. R. 2 Eq. 746; *Willoughby v. Storer* (1870), 22 L. T. 896.

296. —.—.—.—.]—A Scottish heritable bond descends to the heir, & not to his exor., notwithstanding testator may have resided & died in England, & taken the security for an English debt; & although the heir takes a beneficial interest in other parts of testator's property under his will, he will not be put to his election, unless testator has indicated an intention in his will to devise the heritable bond.—*ALLEN v. ANDERSON* (1846), 5 Hare, 163; 15 L. J. Ch. 178; 6 L. T. O. S. 430; 10 Jur. 196; 67 E. R. 870.

Annotations:—**Consd.** *Maxwell v. Maxwell* (1852), 16 Beav. 106; *Cust v. Goring* (1854), 18 Beav. 383. **Refd.** *Baring*

v. Ashburton (1886), 51 L. T. 463; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573. **Mentd.** *Orrell v. Orrell* (1871), 19 W. R. 370.

297. —.—.—.—.]—The rule that the law of the matrimonial domicile applies to a contract in consideration of marriage will yield to an express stipulation that some other law shall apply, or to other sufficient indications that the parties contracted with reference to some other law.

Scottish "heritable bonds" must be regarded by an English ct. as immovable property & therefore governed by Scots law.

When it is said that a contract, valid by the law of the country in which it is made, cannot be enforced in Eng., and because it is contrary to public policy or the policy of English law, it is meant that the contract conflicts with what are deemed in England to be essential public or moral interests—not merely that it would be invalid under English law.

On the marriage in Scotland of a domiciled Englishman with a domiciled Scotswoman the wife's property, which consisted mainly of Scottish heritable bonds, was settled by a marriage contract executed in Scotland in Scottish form. By this contract the trustees, most of whom were domiciled Englishmen, & who were also the trustees of a contemporaneous settlement of the husband's property in English form, were to hold the wife's property upon trust, in case the husband should survive the wife, to pay the income to him during his life, declaring that all payments to him "shall be strictly alimentary, & shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors." The husband survived the wife, having mtged. his life interest under the Scotch contract to mtgees. in England. He had always retained his English domicile.

By the law of Scotland such a restricted life interest, so far as it does not exceed in amount a reasonable provision, is valid as against creditors, other than alimentary creditors, & in such a case, if the husband fails to maintain the children of the marriage, they are entitled to attach the alimentary provision made for them.

Upon a summons by the trustees to determine the rights of the mtgees. as against the husband & the only child of the marriage.

Held: having regard to all the circumstances & particularly the nature of the limitations in the Scotch contract, it must be taken to have been the intention of the parties that that contract should be governed, not by the law of the English matrimonial domicile but by Scots law, & the alimentary provision to the husband, being valid by that law, must be treated as valid by the English cts., & consequently valid as against the husband's mtgees., there being nothing in the provision contrary to the policy of English law in the proper sense of that term.—*Re FITZGERALD, SURMAN v. FITZGERALD*, [1904] 1 Ch. 573; 73 L. J. Ch. 436; 90 L. T. 266; 52 W. R. 432; 20 T. L. R. 332; 48 Sol. Jo. 349, C. A.

Annotations:—**Refd.** *Re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179. **Mentd.** *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *Knill v. Dumergue* (1911), 105 L. T. 178; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Re Hewitt's Settlement, Hewitt v. Hewitt*, [1915] 1 Ch. 228.

298. —.—.—.—.]—**Slaves in Antigua**—By law of Antigua.]—By the laws of Antigua, slaves were declared to be inheritance, & affixed to the freehold; & by 59 Geo. 3 (c. 120), s. 9, no deed or instrument conveying any interest in slaves was valid, unless the registered names & descriptions of the slaves were set forth in the instrument, or in some schedule thereof. The bkpts. deposited with lv. as security for a loan of money, a deed of conveyance to the

Sect. 2.—How determined. Sect. 3.]

bkpts. of a plantation & slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names & descriptions of the slaves, but they were wholly omitted in the memorandum of the deposit:—*Held*: (1) this was nevertheless a good equitable mtge. of the slaves mentioned in the deed; (2) the slaves, being real property in the island of Antigua, could not be considered as within the order & disposition of the bkpts. at the time of their bkpcy.—*Re RUCKER, Ex p. RUCKER* (1834), 3 Deac. & Ch. 704; 1 Mont. & A. 481; 3 L. J. Bcy. 104.

299. — English leaseholds—By English law.]—Testator, a French subject, having his domicile of origin in France, & at the respective dates of his will & death, domiciled in France, made, in 1890 in France, a holograph will in the French form & language, whereby he appointed B. his universal legatee, upon condition that he satisfied certain legacies therein mentioned, & settled the testator's debts. Among the legacies comprised in the will was a specific bequest to C. of testator's beneficial interest in a leasehold house in England. The will was not attested by any witness, but was valid according to the law of France.

Testator died in 1895, & in 1897 letters of administration, with the will, or a translation thereof, annexed, were granted by the Probate Division to B.

Held: although a leasehold interest in land was a chattel interest, yet for the purposes of testamentary disposition a chattel interest in land must be treated as immovable property, & as governed by the law of the country in which it was situated; & the property in the present case was consequently not disposed of by the unattested will.—*PEPIN v. BRUYÈRE*, [1902] 1 Ch. 24; 71 L. J. Ch. 39; 85 L. T. 461; 50 W. R. 34; 46 Sol. Jo. 29, C. A.

300. — Rent-charge issuing out of English lands—By English law.]—Testator gave a rent-charge, to issue out of lands in England, to A. for life, & directed that after her death it should be continued, & equally divided between B., C. & D. during their lives & the life of the longest liver. B. died domiciled abroad, leaving an English will, by which she disposed of her personal estate. On the death of A., who was survived by C. & D., the Crown claimed from B.'s exors. legacy duty in respect of B.'s third share of the rent-charge:—*Held*: such duty was payable, for that the interest in the rent-charge which passed to B.'s exors. was, by the Wills Act, 1837, an estate *pur autre vie*, applicable by law in the same manner as personal estate, & therefore fell within the Legacy Duty Act, 1796, & it was not exempt from duty by reason of B.'s foreign domicile, inasmuch as, although it was by law applicable in the same manner as personal estate, it was not by any of the statutes made personal estate, but was realty not following the person.—*CHATFIELD v. BERCHTOLDT* (1872), 7 Ch. App. 192; 41 L. J. Ch. 255; 26 L. T. 267; 20 W. R. 401, L. J.

301. — Mortgage on colonial land — By

302 i. Movable—Bonds bearing interest in Jamaica—By law of Jamaica.]—Bonds bearing interest in Jamaica, being by the law of that island movable, are personal property in Scottish law.—*NEWLANDS v. CHALMERS' TRUSTEES* (1832), 11 Sh. (Ct. of Sess.) 65.—**SCOT.**

q. — Mortgage on foreign land—By domestic law.]—Testatrix domiciled in I., possessed mortgages

on freehold property situate in V. & in S.:—*Held*: the mortgages were movable property.—*LAWSON v. INLAND REVENUE COMRS.*, [1896] 2 I. R. 418.—**IR.**

r. — Mortgage on English land—By English law.]—Mortgages over land in England, being personal by the law of that country, are to be taken into account in computing legitim.

colonial law—Same as English law.]—*Re HOYLES, Row v. JAGG*, No. 290, *ante*.

302. Movable—Cattle & stock on plantation in Jamaica—By law of Jamaica.]—A., by bond, in consideration & contemplation of marriage, bound himself in a certain sum, for the purposes of his intended marriage settlement, to mortgage certain estates & properties & the lands thereto belonging, & their respective appurtenances in the Island of Jamaica, of which he was seised in fee, & to raise a certain sum by way of settlement. By a mtge. by way of settlement, in pursuance of such bond, A. mtged., *inter alia*, the estates & pennis, & appurtenances, & all & every the cattle, stock, & plantation implements.

Held: cattle & stock upon the estate & pennis were not included in the bond, & though the mtge. deed, made in pursuance of such bond, was by way of marriage settlement, yet it could not enlarge the provisions of the bond.

Cattle & stock upon a plantation or penn in Jamaica are, by the law of the Island, personal estate, & not affixed to the freehold.—*TURNER v. BARCLAY* (1854), 9 Moo. P. C. C. 264; 14 E. R. 297, P. C.

303. — Interest in proceeds of sale of English freeholds—By English law.]—An interest in the proceeds of sale of real estate settled upon a trust for sale which has not been executed is personal estate within the meaning of Wills Act, 1861, s. 1.—*Re LYNE'S SETTLEMENT TRUSTS, Re GIBBS, LYNE v. GIBBS*, [1919] 1 Ch. 80; 88 L. J. Ch. 1; 120 L. T. 81; 35 T. L. R. 44; 63 Sol. Jo. 53, C. A.

SECT. 3.—PROCEEDS OF SALE OF FOREIGN IMMOVABLES.

304. General rule—Governed by lex situs—Proceeds charged with payment of debts—Sale of immovables on death.]—Testator dies in England, domiciled here, & dies seised of lands in a foreign country, which, by the law of that country, & also by the will, are charged with his debts; the assets being insufficient for the payment of his simple contract debts, the produce of those lands must be applied among the simple contract creditors, according to the priorities recognised by the law of the country where the lands are situate.—*HANSON v. WALKER* (1829), 7 L. J. O. S. Ch. 135.

305. — Proceeds in specie removed from locus rei sitæ.]—Whether the ct. will enforce against debtors, having in their hands proceeds of the sale of land situated out of the jurisdiction, the equities to which such proceeds would have been subject if the land had been situated within the jurisdiction, depends upon the question whether the contract which is sought to be enforced was or was not, by the *lex loci rei sitæ*, capable of being fulfilled.

If a contract relating to land situated out of the jurisdiction be one which the *lex loci rei sitæ* renders incapable of fulfilment, the ct. will not enforce the contract against the proceeds of a sale of such land coming to the possession of parties within the jurisdiction, though they take such proceeds bound

MONTEITH v. MONTEITH'S TRUSTEES (1882), 9 R. (Ct. of Sess.) 982.—**SCOT.**

PART III. SECT. 3.

305 i. General rule—Governed by lex situs—Proceeds in specie removed from locus rei sitæ.]—A domiciled Irishman died intestate in Ireland, possessed of lands in Victoria, which by the law of the Colony were regarded & devolved

by the same equities as affected the party to the contract under whom they claim.

The rights of the parties interested in the proceeds of the sale of land situated out of the jurisdiction do not cease to be governed by the *lex loci rei sitæ* by the circumstance of such proceeds being brought in *specie* within the jurisdiction.

A law permitting alienation of land, only upon the terms of the proceeds being applied in a particular manner, is a restraint upon alienation; & restraints upon the alienation of land are always governed by the *lex loci rei sitæ*.—*WATERHOUSE v. STANSFIELD* (1851), 9 Hare, 234; 21 L. J. Ch. 881; 68 E. R. 489; *subsequent proceedings* (1852), 10 Hare, 254.

306. — — — Proceeds not subject to Mortmain Acts.]—The Royal Geographical Society & the Royal Society being corps., the one for the improvement & diffusion of geographical knowledge, & the other for improving natural knowledge, are charities as defined by 43 Eliz. (c. 4), & are within the Statute of Mortmain.

Testator bequeathed legacies to the societies, & other undoubted charities, & after directing that all the charitable legacies should be paid out of his pure personal estate, he gave the residue of his real & personal estate to his exors., the plffs. His property consisted of pure personalty, leaseholds, in this country, & a small real estate in Madeira, which was sold after his death. The pure personalty was insufficient to pay in full the charitable legacies.

Held: (1) the charities were not entitled to the pure personalty in priority to the debts, funeral & testamentary expenses, & costs of suit; these were first payable ratably out of the pure & mixed personalty; & the charities would then take the residue of pure personalty; (2) the proceeds of sale of the Madeira estate were not pure personalty; but, inasmuch as it was foreign realty, it was not subject to the Mortmain Act, & the charitable legacies were entitled to a claim upon it for so much of their legacies as should remain unpaid after the above application of the pure personalty. — *BEAUMONT v. OLIVEIRA* (1869), 4 Ch. App. 309; 38 L. J. Ch. 239; 20 L. T. 53; 33 J. P. 391; 17 W. R. 269, L. J.J.

Annotations:—As to (1) *Consd. Re Pitt, Lacy v. Stone* (1885), 53 L. T. 113; *Re Arnold, Ravenscroft v. Workman* (1888), 37 Ch. D. 637; *Re Delvingne, Layton v. Royal Earlswood Institution for Mental Defectives*, [1916] W. N. 235. *Refd. Re Royal Soc. of London & Thompson* (1881), 50 L. J. Ch. 344. As to (2) *Consd. Re Arnold, Ravenscroft v. Workman* (1888), 37 Ch. D. 637.

307. — — — Immovable sold under special legislation—Rights of curator ad bona of foreign lunatic.]—A fund of upwards of £13,000 Consols, representing the proceeds of sale of real estate, the absolute property of a foreign lunatic, which had been sold by order of the ct. under the powers of the Partition Act, 1868, stood in ct. to the credit of the lunatic. The *curator ad bona* of the lunatic, duly appointed according to the law of the country in which the lunatic resided, who according to that law had the fullest powers & control over the lunatic's real & personal estate, petitioned for the transfer of the fund to him:—*Held*: the fund, as representative of real estate sold under special legislation, was subject to the laws of this country relative to real estate, & must remain in ct. as a fund which might devolve upon the heir-at-law of the lunatic, & the *curator ad bona* was only entitled to receipt of the dividends.—*GRIMWOOD v. BARTELS* (1877), 46 L. J. Ch. 788; 25 W. R. 843.

as personal estate. Administration was taken out in Ireland, & in Victoria by a person appointed for the purpose,

who sold the lands, & remitted the net proceeds to the Irish admor.:—*Held*: the proceeds of sale of such lands

— — — **Claim statute-barred.]**—See Part IV., Sect. 4, *post*.

308. Exceptions — Foreign immovable forming part of partnership assets—Proceeds treated as personalty.]—A member of a partnership carrying on business at Bombay died domiciled in England. Part of the partnership assets at the time of his death consisted of real estate in Bombay.

Held: the real estate, being partnership assets, was converted into personalty in equity, & the proceeds were therefore liable to legacy duty.—*FORBES v. STEVEN, MACKENZIE v. FORBES* (1870), L. R. 10 Eq. 178; 39 L. J. Ch. 485; 22 L. T. 703; 18 W. R. 686.

Annotations:—*Apld. Re Stokes, Stokes v. Ducroz* (1890), 62 L. T. 176. *Refd. In the Goods of Ewing* (1881), 6 P. D. 19. *Mentd. A.-G. v. Lomas* (1873), L. R. 9 Exch. 29; *A.-G. v. Hubbuck* (1884), 13 Q. B. D. 275; *A.-G. v. Allesbury* (1887), 12 App. Cas. 672.

309. — — — — —.]—S., testator in this action, who died in Sept. 1880, domiciled in England, for many years previous to his death carried on the business of sheep-breeding in partnership with his brother R. in New Zealand. Part of the partnership property consisted of a freehold estate of 29,000 acres in New Zealand known as the Milbourne estate. By articles of partnership dated Feb. 14, 1879, made between S. & R., it was agreed that the Milbourne estate should be forthwith sold in the manner which the parties should mutually agree upon, & the articles contained provisions for the case of no agreement & for carrying on the partnership until sale. R. died in Jan. 1880. S. was entitled to four-sevenths of the partnership property. No sale of the estate was made in R.'s lifetime or in that of S. By his will S. gave his four-sevenths shares in the Milbourne estate to trustees upon trust to sell, with powers of management till sale, & subject to the payment of an annuity, & of the income of one-seventh to the widow of R. during her life, to divide the proceeds & the produce till sale among thirteen charities. An administration action was commenced in 1881. The New Zealand property had never been sold, but the income had from time to time been paid into ct. Under an order made in Apr. 1888, the funds then in ct. had been divided, & legacy duty had been paid upon the moneys arising from the New Zealand estate. The duty had been paid under an arrangement that it should be repaid if it was ultimately decided not to be payable. The Governors of the London Hospital, who had been appointed to represent the other charities, presented a petition asking for distribution of the fund which had accumulated in ct. since Apr. 1888, without payment of legacy duty, on the ground that being proceeds of real estate in New Zealand, it was not subject to English legacy duty:—*Held*: S.'s interest in the property whether regarded as a share in land agreed to be sold by the articles of partnership or as a share in partnership property, was personal & movable property, & therefore subject to legacy duty according to the law of testator's domicile.—*Re STOKES, STOKES v. DUCROZ* (1890), 62 L. T. 176; 38 W. R. 535; 6 T. L. R. 154.

310. — — — Foreign immovable sold under agreement for sale—Proceeds treated as personalty.]—*Re STOKES, STOKES v. DUCROZ*, No. 309, *ante*.

311. — — — Foreign immovable sold under trust for sale—Proceeds held on trusts declared by will—Although invalid by *lex rei sitæ*.]—An English testator, who owned some land in Sardinia, by his

were to be taken as personal estate.—*Re REA, REA v. REA*, [1902] 1 I. R. 451, 461.—1R.

Sect. 3.—Proceeds of sale of foreign immovables.

Sect. 4. Part IV. Sect. 1: Sub-sect. 1.]

will gave all his real & personal estate to trustees upon trust for sale, & conversion, upon certain trusts *inter alia* for his children for their respective lives, with remainders to their respective issue. These trusts were as the ct. held on the evidence to a great extent invalid under Italian law as regarded land in Italy, the result being that the tenants for life took their shares absolutely. Part of the land in Sardinia had been sold by the trustees:—*Held*: (1) whether the trustees or the children took the land, as heirs according to the Italian law, the trustees had power under that law, & it was their duty to sell the land, & the proceeds of sale must be held by them upon the trusts declared by the will; (2) the rents of the unsold land until sale would devolve according to Italian law, but that it was competent to & legal for the children to elect that those rents should be applied as if they had been income resulting from the proceeds of the sale.—*Re* **PIERCY, WHITWHAM v. PIERCY**, [1895] 1 Ch. 83; 64 L. J. Ch. 249; 71 L. T. 745; 43 W. R. 134; 11 T. L. R. 21; 39 Sol. Jo. 43; 13 R. 106.

312. — Interest of proceeds—Treated as personality.—A portion of an entailed estate was sold by the heir in possession for the redemption of the land-tax, & the surplus-money was invested in terms of the statute. The heir of entail next entitled sold for valuable consideration his reversionary & contingent right to the interest of this fund, & assigned it to the purchaser by a deed prepared in the English form, & executed in England, where the parties were domiciled, but without the solemnities required by the law of Scotland.

Held: the interest of the money was movable, & was well assigned by the English deed, *comitate gentium*.—*SCOTT v. ALLNUTT* (1831), 2 Dow & Cl. 404; 6 E. R. 778, H. L.

Annotation:—*Re* **Fitzgerald, Surman v. Fitzgerald**, [1904] 1 Ch. 573.

SECT. 4.—SHARES IN COMPANIES OWNING FOREIGN IMMOVABLES.

313. Whether immovable—So as to attach incidents of *lex loci rei sitæ*.—The bkpt. on borrowing money from his sister, petitioner, deposited with her some certificates of shares in a German mining co., undertaking to complete the transfer when required. These she sealed up, & left in his iron chest for safety. Some time before his bkptcy. he told one of the directors of the co. that he had so deposited the shares & the director told the board the circumstance, on the morning of Dec. 7. On the evening of the same day, the act of bkptcy. was committed:—

Held: the shares were neither in the reputed ownership nor in the order & disposition of the bkpt.

Semble: shares in a commercial co., possessing lands in a foreign country, are not real property so as to attach to them the incidents of the law of the country in which the property is situated.—*Re* **RICHARDSON, Ex p. RICHARDSON** (1839), 3 Deac. 496; Mont. & Ch. 43; 8 L. J. Bcy. 27, Ct. of R.

Annotations:—*Mentd.* *Re* **Worcester, Ex p. Agra Bank** (1868), 3 Ch. App. 555; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426.

Foreign companies.—*See* COMPANIES.

Part IV.—Immovables.

SECT. 1.—GENERAL PRINCIPLES OF JURISDICTION.

SUB-SECT. 1.—TITLE TO FOREIGN IMMOVABLES DIRECTLY IN ISSUE.

314. General rule—Application of foreign law.—The incidents to real estate, the right of alienating or limiting it, & the course of succession to it, depend entirely on the law of the country where the estate is situated.

An estate in Sicily was granted to an English subject, which he disposed of by his will upon certain trusts:—*Held*: as he could not subject his successor to a course of succession different from that which accorded with the grant & the law of Sicily, so neither could he subject the successor, as such, to any duties or obligations different from the duties & obligations which by the grant & the law of Sicily were annexed to his holding.—*NELSON (EARL) v. BRIDPORT (LORD)* (1846), 8 Beav. 547; 9 L. T. O. S. 471; 10 Jur. 1043; 50 E. R. 215.

315. — Colonial land.—Statute of Mortmain, 9 Geo. 2 (cap. 36) does not extend to the island of Grenada, in the West Indies; the object of the statute being wholly political; it having grown out of local circumstances, & being intended to have only a local operation.

PART IV. SECT. 1, SUB-SECT. 1.

314 i. General rule—Application of *lex loci rei sitæ*.—Land in Upper C. was held in common by J. & E. & three others. E. became a nun in M., by which, according to Lower C. law, she became civilly dead as regarded her property; she afterwards

died there:—*Held*: E. had not lost her share of the land by becoming a nun.—*STUART v. PRENTISS* (1861), 20 U. C. R. 513.—**CAN.**

314 ii. — — —.—Immovable property is governed by *lex loci rei sitæ*.—*BARINDS v. GREEN* (1911), 16 B. C. R.

Donations *inter vivos* in Mortmain are not prohibited by the statute, but regulated; the statute requiring enrolment in the Ct. of Ch.; by which is meant the Ct. of Ch., in England, where there is an ancient office for the enrolment of deeds, & there being no enrolment offices annexed to the Cts. of Ch. in the colonies.

Regularly, all questions of title to land in the colonies are to be decided, in the first instance, by cts. of local judicature, from which an appeal lies to the King in Council.—*A.-G. v. STEWART* (1817), 2 Mer. 143; 35 E. R. 895.

Annotations:—*Consd.* *A.-G. v. Giles* (1835), 5 L. J. Ch. 44; *Whicker v. Hume* (1852), 1 De G. M. & G. 506. *Apprvd.* *Jex v. McKinney* (1889), 14 App. Cas. 77. *Re* **Lyons Corp. v. East India Co.** (1836), 1 Moo. P. C. C. 175; *Santos v. Illidge* (1860), 8 C. B. N. S. 861; *Yeap Cheap Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381; *Canterbury Corp. v. Wyburn & Melbourne Hospital*, [1895] A. C. 89. *Mentd.* *Jephson v. Riera* (1835), 3 Knapp, 130.

316. Dispossession—Claim for damages for—Foreign land.—Pltf. brought an action against deft. for assault, robbing him of a ship & goods & dispossessing him of a house & plantation, also of an island called Barella in the East Indies forming part of the dominions of a foreign prince:—*Held*: the ct. had no jurisdiction to grant relief to pltf. for being dispossessed of his house &

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314 iii. — — —.—All rights over immovable property are governed by the law of the country where the property is situate, this principle being universally recognised.—*BONNAUD v. CHARRIOL* (1905), I. L. R. 32 Calc. 631.—**IND.**

island, but awarded him damages for the assault & loss of ship & goods.—*SKINNER v. EAST INDIA Co.* (1866), 6 State Tr. 710.

Annotations:—*Consd.* *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. *Refd.* *Mostyn v. Fabrigas* (1774), 1 Cowp. 161.

317. ——— House in East Indies.]—Seizing a house in the East Indies is not triable here.—*SHELLING v. FARMER* (1725), 1 Stra. 646; 93 E. R. 756.

Annotations:—*Refd.* *Anon.* (1774), Loft, 752; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602.

318. ——— Claim for possession—Colonial land.]—This ct. has no jurisdiction over lands at St. Christopher's, & a demurrer will lie to a bill brought here, for delivery of possession of lands there. Lands in the plantations are no more under the jurisdiction of this ct., than lands in Scotland. Demurring for want of jurisdiction is informal and improper; a deft. should plead to the jurisdiction.—*ROBERDEAU v. ROUS* (1738), 1 Atk. 543; 26 E. R. 342, L. C.

Annotation:—*Mentd.* *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658.

319. ——— ———.]—Where land in a colony is vested in the Queen by a Colonial Act for the public purposes of the colony the Petitions of Right Act, 1860, does not give jurisdiction to the Ct. of Ch. to entertain proceedings against the Crown as a trustee of such land present within the jurisdiction of the Ct.

By a Canal Act of the Provincial Legislature of Canada, land taken for a canal was vested in the Queen. By a second Provincial Act the land so taken was vested in the officers of Her Majesty's Ordnance; & it was enacted that so much of the land taken as had not been used for the canal should be restored to the owners. By a third Provincial Act the lands were re-vested in the Queen for the purposes of the colony, & subject to future colonial legislation.

To a petition of right by suppliants claiming the restoration of certain lands taken for the canal from their predecessors in title, but not used, a demurrer was allowed on the ground that the cts. of this country had no jurisdiction.—*Re HOLMES* (1861), 2 John & H. 527; 31 L. J. Ch. 58; 5 L. T. 518; 8 Jur. N. S. 76; 10 W. R. 39; 70 E. R. 1167.

Annotations:—*Refd.* *Reiner v. Salisbury* (1876), 2 Ch. D. 378; *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. Same*, [1892] 2 Q. B. 358. *Mentd.* *Doss v. Secretary of State for India in Council* (1875), L. R. 19 Eq. 509.

320. ——— Discovery—Land in India.]—Pltf. filed a bill of discovery to obtain inspection of documents in deft.'s possession in England, in aid of proceedings about to be taken for the recovery of land in India:—

Held: the property claimed being in India, & deft. being capable of being sued in India, an English ct. was not the proper tribunal to decide upon pltf.'s claim, & a bill of discovery could not be maintained in aid of such a claim.—*REINER v. SALISBURY (MARQUIS)* (1876), 2 Ch. D. 378, 24 W. R. 843.

Annotation:—*Refd.* *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. Same*, [1892] 2 Q. B. 358.

322 i. Partition—Foreign land.]—The ct. has no power to order division of immovable property in a joint estate situated beyond its jurisdiction.—*MURPHY v. MURPHY*, [1902] T. S. 179.—S. AF.

ii. Determination of title—Foreign land.]—The cts. in O. have no jurisdiction to entertain an action for determining the title to lands in the N.W. Territories, even though the parties

be resident in O.—*ROSS v. ROSS* (1892), 23 O. R. 43.—CAN.

iii. ———.]—*GUNN v. HARPER* (1901), 21 C. L. T. 552; 2 O. L. R. 611; 30 O. R. 650.—CAN.

iv. Trespass to land—Injury to premises attached to foreign soil.]—Pltf. complained to a ct. of O. that defts., by negligent use of their ry, allowed fire to spread from their right of way to pltf.'s premises, whereby

321. Sale of land—Action to recover share of proceeds—Foreign land.]—*Re HAWTHORNE, GRAHAM v. MASSEY*, No. 377, *post*.

322. Partition—Land in Ireland.]—C. exhibited a bill against P.; they were joint tenants of lands in Ireland; pltf. prayed an account of the profits, & a partition of the lands.

Held: as to the profits the bill was good, the person being in England, for they were in the personalty; but as to the partition, which was in the realty, he could not here proceed, for a commission could not be awarded into Ireland: & the bill for a partition was in the nature of a writ of partition at the Common Law, which lieth not in England for lands in Ireland.—*CARTWRIGHT v. PETTUS* (1676), 2 Cas. in Ch. 214; 22 E. R. 916; *sub nom.* *CARTERETT v. PETTIE*, *Cas. temp. Finch*, 242; 2 Swan. 323, n., L. C.

Annotation:—*Mentd.* *Leake v. Cordeaux* (1856), 4 W. R. 806.

323. Settlement of boundaries—Colonial land—Jamaica.]—The cts. of this country, in dealing with real property in Jamaica, will be guided by the law of evidence in Jamaica.

A Ct. of Equity in England will entertain a bill to settle the boundaries of real estates in Jamaica.—*TULLOCH v. HARTLEY* (1841), 1 Y. & C. Ch. Cas. 114; 62 E. R. 814.

Annotation:—*Mentd.* *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. Same*, [1892] 2 Q. B. 358.

—— Foreign land—America.]—*See* BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 270, No. 39.

324. Sequestration of land—Land in Ireland.]—The Ct. of Ch. will not grant a sequestration of lands in Ireland.—*FRYAR v. VERNON* (1724), *Cas. temp. King*, 5; 9 Mod. Rep. 124; 25 E. R. 191.

325. ——— Prior sequestration taken out in England—Nulla bona returned.]—The Ct. of Ch. in England may grant a sequestration against deft. in Ireland, but it must be after a sequestration taken out here & *nulla bona* returned.—*FRYER v. BERNARD* (1724), 2 P. Wms. 261; 24 E. R. 722, L. C.

Annotation:—*Refd.* *Portarlington v. Soulbey* (1834), 3 My. & K. 104.

326. Dévise of land—Determination of validity of will—Land in Pennsylvania.]—Bill by an heir-at-law, for an issue to try the validity of a will made in England, dismissed, partly on the ground of his acquiescence, both in the ecclesiastical ct., & upon a bill to perpetuate testimony, but principally because the lands lay in Pennsylvania.—*PIKE v. HOARE* (1763), Amb. 428; 2 Eden 182; 28 E. R. 867, L. C.

Annotation:—*Refd.* *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. Same*, [1892] 2 Q. B. 358.

327. ——— Land in Ireland.]—Testator being seised of real estate in England & Ireland, by his will devised all his real estates to A. in fee. The heir-at-law instituted a suit in Ireland for the purpose of setting aside the will & upon an issue *devisavit vel non* directed out of the Ct. of Ch. in Ireland, a verdict was found against the will. An application for a new trial was refused, & a decree made declaring the invalidity of the will, from which decree A. appealed to the House of Lords, & that

his house was burnt. The house was in M.:—*Held*: the action could not be entertained.—*BRERETON v. CANADIAN PACIFIC RY. Co.* (1897), 29 O. R. 57.—CAN.

v. Valuation & sale of land—Foreign land.]—An action was raised concluding for a valuation & sale of an estate situated in J.:—*Held*: action must be dismissed as incompetent to the ct.—*FINDLATER v. DUNMORE & Co.* (1899), 16 Fac. Coil. 129, n.—SCOT.

Sect. 1.—General principles of jurisdiction: Sub-sects. 1 & 2. Sect. 2: Sub-sect. 1.]

appeal was still pending. A. then filed her bill in the Ct. of Ch. here, for the purpose of having the will established so far as it related to the real estates in England:—*Held*: the decree of the Irish Ct. of Ch. was no bar to such a suit, that Ct. having no jurisdiction to declare the validity or invalidity of the will generally, but only so far as it affected estates in Ireland.—*BOYSE v. COLCLOUGH* (1854), 1 K. & J. 124; 3 Eq. Rep. 78; 24 L. J. Ch. 7; 24 L. T. O. S. 89; 3 W. R. 8; 69 E. R. 396; *subsequent proceedings* (1855), 1 K. & J. 502.

328. Contract relating to land—Land in Ireland—Sale—Claim for delivery up of deeds.]—A contract was entered into at Boulogne, where pltf. was resident, between him & defts., who were resident in Ireland, for the sale of some land in Ireland. A receiver had been appointed by the Ct. of Ch. in Ireland. A bill was now filed in this country asking that certain deeds relating to the property might be ordered to be given up. A plea by defts. that the ct. had no jurisdiction allowed.—*BLAKE v. BLAKE* (1870), 18 W. R. 944.

Annotations:—Consd. *Matthaei v. Galitzin* (1874), L. R. 18 Eq. 340. *Refd.* *Doss v. Secretary of State for India in Council* (1875), L. R. 19 Eq. 509; *Reiner v. Salisbury* (1876), 2 Ch. D. 378; *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358.

329. — Foreign mine—Injunction to restrain payment away of profits.]—Bill filed by a foreigner against another foreigner, & against an English co. formed for working a Russian mine, to restrain the English co. from paying to a foreigner part of the profits of the mine which were claimed by pltf. by way of commission, & also for an account of profits against the co. Demurrer allowed.—*MATTHAEI v. GALITZIN* (1874), L. R. 18 Eq. 340; 43 L. J. Ch. 536; 30 L. T. 455; 22 W. R. 700.

Annotations:—Refd. *Doss v. Secretary of State for India in Council* (1875), L. R. 19 Eq. 509; *Reiner v. Salisbury* (1876), 2 Ch. D. 378; *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358.

330. — Bond charged on revenues of Indian State.]—Pltfs., who represented certain creditors of the King of Oudh in respect of a debt contracted in 1794, sued the Secretary of State for India, claiming to be entitled to a charge upon the revenue of the territory of Oudh:—*Held*: (1) as the debt was one which there were no means of enforcing against the King of Oudh before the annexation in 1856, neither could it have been enforced after the annexation against the East India Co.; (2) the annexation of Oudh having been a sovereign act of state by the East India Co. as trustees for the British Government that act could not be reviewed by any municipal ct., & the bill was therefore not sustainable; (3) pltfs. being natives of India, the subject-matter being in India, & deft. being capable of being sued in India, an English Ct. of Equity was not the proper tribunal to try the question between the parties; (4) the staleness of the demand & the impracticability of giving effect to any declaration of right were grounds for allowing the demurrer.—*Doss v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1875), L. R. 19 Eq. 509; 32 L. T. 294; 23 W. R. 773.

Annotations:—As to (3) *Refd.* *Reiner v. Salisbury* (1876), 2 Ch. D. 378; *Companhia de Mocambique v. British South Africa Co., De Sousa v. Same*, [1892] 2 Q. B. 358. *Generally, Mentd.* *Cook v. Sprigg*, [1899] A. C. 572; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391.

PART IV. SECT. 1, SUB-SECT. 2.
y Right to personally—Depending

on title to land in foreign country.]—
McLAREN v. RYAN (1875), 36 U. C. R. 307.—**CAN.**

— **Equitable jurisdiction.]—**See Sect. 2, sub-sect. 4, *post*.

331. Rent-charge—Action to recover—Colonial land.]—An action of debt having been brought for arrears of a rent-charge upon lands in Australia prior to the commencement of the Jud. Act:—*Held*: the venue in such action was local, & it could not therefore be maintained in this country.—*WHITAKER v. FORBES* (1875), 1 C. P. D. 51; 45 L. J. Q. B. 140; 33 L. T. 582; 40 J. P. 436; 24 W. R. 241, C. A.

Annotations:—Refd. *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. *Mentd.* *Re Blackburn & District Benefit Bldg. Soc., Ex p. Graham* (1889), 42 Ch. D. 343.

332. Trespass to land—Colonial land.]—Trespass will not lie in this country for entering a house in Canada.—*DOULSON v. MATTHEWS* (1792), 4 Term Rep. 503; 100 E. R. 1143.

Annotations:—Consd. *Whitaker v. Forbes* (1875), L. R. 10 C. P. 583; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. *Refd.* *Phillips v. Eyre* (1870), 10 B. & S. 1004. *Mentd.* *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239.

333. — Injury to pier attached to foreign soil.]—The question of the liability of a shipowner, proceeded against in the English Admlty. Ct., for an injury done by his ship to a pier projecting into the sea, but attached to the soil of a foreign country is governed by the *lex loci*, & not by English law.

Where an English ship, by the negligence of her master & crew, ran into & damaged a pier on the coast of Spain, & the owners of the pier proceeded against the ship for the damage in the Admlty. Ct., & the shipowner pleaded that by the law of Spain a shipowner is not responsible for the damage occasioned by the negligence of his master & crew.

Held: the plea was a good defence to the action.—*THE M. MOXHAM* (1876), 1 P. D. 107; 46 L. J. P. 17; 34 L. T. 559; 24 W. R. 650; 3 Asp. M. L. C. 191, C. A.

Annotations:—Distd. *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521. *Apld.* *Machado v. Fontes*, [1897] 2 Q. B. 231. *Refd.* *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Carr v. Francis Times*, [1902] A. C. 176. *Mentd.* *British Wagon Co. v. Gray*, [1896] 1 Q. B. 35.

334. — Land situate abroad.]—The Supreme Ct. of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad; the rules of procedure under the Jud. Acts with regard to local venue (Order xxxvi. r. 1) did not confer any new jurisdiction.—*BRITISH SOUTH AFRICA CO. v. COMPANHIA DE MOCAMBIQUE*, [1893] A. C. 602; 63 L. J. Q. B. 70; 69 L. T. 604; 10 T. L. R. 7; 37 Sol. Jo. 756; 6 R. 1, H. L.; *reversg.* *S. C. sub nom. COMPANHIA DE MOCAMBIQUE v. BRITISH SOUTH AFRICA CO., DE SOUSA v. SAME*, [1892] 2 Q. B. 358.

Annotations:—Refd. *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132. *Mentd.* *Adam v. British & Foreign S.S. Co.*, [1898] 2 Q. B. 430; *The Duc D'Aumale* (1902), 87 L. T. 674; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist*, [1910] 1 P. 271; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

SUB-SECT. 2.—TITLE TO FOREIGN IMMOVABLES NOT DIRECTLY IN ISSUE.

335. Contract relating to land—Covenant to pay rent—Land in Ireland.]—Action of covenant cannot be brought in England for rent reserved on a lease of lands in Ireland.—*BARKER v. DAMER*

*z. — — —.]—*The title to personally in a foreign State depended upon the right to land in the foreign

(1691), Carth. 183 ; 3 Mod. Rep. 336 ; 1 Salk. 80 ; 1 Show. 192 ; 91 E. R. 76.

Annotations:—*Consd.* Wey v. Rally (1704), 6 Mod. Rep. 194 ; Lichfield Corp'n. v. Slater (1743), Willes, 431 ; Vincent v. Godson (1854), 4 De G. M. & G. 546. *Refd.* London Corp'n. v. Cole (1798), 7 Term Rep. 583 ; Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co., [1892] 2 Q. B. 358. *Mentd.* Tovey v. Pitcher (1690), 2 Vent. 234 ; Stevenson v. Lambard (1802), 2 East, 575.

336. — Agreement to contribute to cost of works—Foreign land.]—Claim stating that pl'tfs. & defts. were each of them limited cos., with registered offices in London, that the action was brought for rent of a railway station in Buenos Ayres, into possession of which the defts. were put by the pl'tfs., & for part of the cost of constructing lines of railway & approaches to the station. Defence, that the pl'tf. & deft. cos. were domiciled in the Argentine Republic, & carried on business there ; that the premises in question were constructed on land which was the property of the republic, & that pl'tfs. and defts. were joint concessionaires under the republic of certain easements appurtenant thereto ; that the construction of the premises was directed by the government of the republic, & was for the benefit & convenience of the citizens of Buenos Ayres, & that by the laws of the republic powers of adjusting all rights arising out of the construction, & applicable to the claim of the pl'tfs. were vested in the government, & that the contract (if any) as to the cost of the construction was made at Buenos Ayres, & was subject to the law of the place of contract, & that the republic had assumed jurisdiction over the pl'tfs.' claim :—*Held* : the defence was bad, as both parties to the action were within the jurisdiction of the English cts., & the facts alleged did not show that the Argentine Republic had exclusive jurisdiction over the claim.—*BUENOS AYRES & ENSENADA PORT RY. CO. v. NORTHERN RY. CO. OF BUENOS AYRES* (1877), 2 Q. B. D. 210 ; 46 L. J. Q. B. 224 ; 36 L. T. 148 ; 25 W. R. 367.

337. — Implied contract or obligation—Damages for waste—Foreign land.]—The possessor of Austrian entailed estates died domiciled in & left property in England. By the law of Austria the possessor is under an obligation to hand over the property to the successor in as good a state as when he received it, & is liable for deterioration, whether voluntary or permissive, unless it occurs without any fault of his, & he is entitled to compensation for improvements made by him. The successor brought a creditor's action in England against the English executrix, in which it was admitted by the parties that there was some deterioration, & also that some improvements had been made. *NORTH, J.*, made a decree for administration with liberty to pl'tf. to take proceedings, in the cts. of the countries in which the estates were situate, to establish the amount of his claim :—*Held* : the objection that the pl'tf.'s claim was for a tort analogous to waste, & therefore, according to English law, died with the person, & could not be enforced in an English ct., was not sustainable, for the deteriorations were not to be regarded as torts but as breaches of an obligation in the nature of an implied contract. But the accounts in an administration suit ought not to be directed till it was ascertained that a sum was due to the pl'tf.—*BATTHYANY v. WALFORD* (1887), 36 Ch. D. 269 ; 56 L. J. Ch. 881 ; 57 L. T. 206 ; 35 W. R. 814, C. A.

Annotation:—*Refd.* *Re* Piercy, *Whitwham v. Piercy* (1894), 64 L. J. Ch. 249.

State : an action was brought in the domestic ct. for trespass to the personality :—*Held* : the ct. had a right, in

a suit against a party subject to its jurisdiction, to try incidentally the question of title to the land for the

Equitable jurisdiction.]—*See* Sect. 2, subsect. 4, *post*.

2.—EQUITABLE JURISDICTION IN PERSONAM.

SUB-SECT. 1.—IN GENERAL.

338. General rule—Colonial land.]—This ct. having jurisdiction *in personam* upon equity arising out of transactions concerning lands abroad, particularly if in the British dominions, a purchase of an estate in the West Indies by a creditor under his own execution was upon the circumstances held only a security for the debt, the expenses of the proceeding & incumbrances paid by him, with interest ; & subject thereto a reconveyance was decreed.—*CRANSTOWN (LORD) v. JOHNSTON* (1796), 3 Ves. 170 ; 30 E. R. 952.

Annotations:—*Consd.* *White v. Hall* (1806), 12 Ves. 321 ; *Norton v. Florence Land & Public Works Co.* (1877), 7 Ch. D. 332 ; *Mercantile Investment & General Trust Co. v. River Plate Trust Loan & Agency Co.*, [1892] 2 Ch. 303 ; *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658 ; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502. *Refd.* *Houlditch v. Donegall* (1834), 2 Cl. & Fin. 470 ; *Re Courtney, Ex p. Pollard* (1840), 4 Deac. 27 ; *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479 ; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743 ; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602 ; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132 ; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

339. ——*As a general rule an English ct. will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction of that ct. ; & the exceptions to this rule depend on the existence between the parties to the suit in England of some personal obligation arising out of contract or implied contract, fiduciary relation, or fraud, or other conduct which in the view of an English Ct. of Equity would be unconscionable, & do not depend for their existence on the law of the locus of the immovable property. In 1831 D. entered into a marriage contract with T. in France, both of them being domiciled French subjects. Pl'tf., the only son of this marriage, alleged that according to French law T. thereby became entitled to one-half of the after-acquired property of D. & to a life interest in the other half of the property. In 1836 D. went to India, & in 1839 went through a form of marriage with X., on whom & on others he by a settlement made in 1865, of which defts. were trustees, conferred interests in immovable property in Madras. D. died in 1885 & T. died in 1890. In 1893 an official in Madras, who was not a party to the English action mentioned below, took out letters of administration in India of the estate of T. which vested all her movable & immovable property in Madras in him. In 1907 pl'tf. took out letters of administration of the estate of T. in England. Pl'tf. & defts. being all in England, pl'tf. in an English action sought to impeach the settlement of 1865 as being contrary to the law of France & in contravention of his rights thereunder :—*Held* : the action ought not to be entertained.—*DESCHAMPS v. MILLER*, [1908] 1 Ch. 856 ; 77 L. J. Ch. 416 ; 98 L. T. 564.*

340. — Land in Scotland.]—(1) The principles which govern the Ch. Ct. upon questions of jurisdiction are analogous to those of the civil law, & the ct., therefore, has power to entertain a suit if the domicile of deft. is within the territorial jurisdiction of the ct., or if the subject-matter of the suit is situate within the territorial

purpose of determining the right to the personality.—*SAYA LOO v. NGA PAW LOO* (1866), 6 W. R. 4.—*IND.*

Sect. 2.—Equitable jurisdiction in personam: Sub-sects. 1, 2 & 3.]

jurisdiction of the ct., or if the contract sought to be enforced was entered into within the territorial jurisdiction of the ct., but if neither of these circumstances exist, the ct. has no jurisdiction.

In a suit where the subject was immovable property situate in Scotland, & the contract sought to be enforced was entered into & to be performed in Scotland, & defts. were domiciled in Scotland:—*Held*: the ct. had no jurisdiction to entertain the suit; (2) upon questions of jurisdiction, Scotland is a foreign country; (3) the statutory power of serving a debt. out of the jurisdiction, & proceeding in his absence, did not give the ct. extended jurisdiction so as to enable it to determine the subject-matter of the suit; (4) where debt. had been served with a *subpoena* out of the jurisdiction, he was entitled to demur for want of jurisdiction, instead of moving to discharge the order for personal service abroad.—**COOKNEY v. ANDERSON** (1863), 1 De G. J. & Sm. 365; 2 New Rep. 140; 32 L. J. Ch. 427; 8 L. T. 295; 9 Jur. N. S. 736; 11 W. R. 628; 46 E. R. 146, L. C.

Annotations:—As to (1) **Folld.** *Blake v. Blake* (1870), 18 W. R. 944. **Consd.** *Mathaei v. Galitzin* (1874), L. R. 18 Eq. 340; *Re Morton, Ex p. Robertson* (1875), L. R. 20 Eq. 733; *Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358. **Refd.** *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Dobson v. Festi, Rasini*, [1891] 2 Q. B. 92; *Turnbull v. Walker* (1892), 67 L. T. 767. As to (3) **Consd.** *National Insee. & Investment Asscn. v. Carstairs* (1863), 2 New Rep. 348; *Steele v. Stuart* (1863), 1 Hem. & M. 793; *Norris v. Cotterill* (1864), 5 New Rep. 215. **Folld.** *Foley v. Maillardet* (1864), 1 De G. J. & Sm. 389; *Samuel v. Rogers* (1864), 1 De G. J. & Sm. 396. **Consd. & N.F.** *Drummond v. Drummond* (1866), 2 Ch. App. 32. **Consd.** *Gibson v. Fisher* (1867), L. R. 5 Eq. 51. **Refd.** *Curtiss v. Grant* (1863), 9 Jur. N. S. 766; *Baile v. Blanchet* (1861), 4 New Rep. 48; *Turner v. Sowdon* (1864), 10 L. T. 60; *Central Railroad & Banking Co. of Georgia v. Mitchell* (1865), 2 Hem. & M. 452; *Henderson v. Campbell* (1865), 13 W. R. 704; *Re Busfield, Whaley v. Busfield* (1886), 32 Ch. D. 123. **Generally, Mentd.** *Re Herefordshire Banking Co.* (1867), L. R. 4 Eq. 250.

341. Against third party—No privity of contract—Third party with notice—Specific performance.]—

(1) A suit, by a pltf. in England, against defts., also residing in England, to enforce a lien on real estate in Prussia, can only be sustained by special circumstances arising out of the dealings between the parties; but where no privity exists between pltf. & defts., & where the principal parties are foreigners, & not amenable to the jurisdiction of the ct., the bill will be dismissed.

(2) If a pltf. in this ct. makes out a case which entitles him to a declaration of lien upon the real estate of a debt. out of the jurisdiction, this ct. will make it, & in some cases will grant a receiver; but it will leave pltf. to make it available or not, as he can, by means of the foreign tribunals.

(3) The cts. of this country will assist foreign tribunals to unravel complications; & they will, so far as the law allows, & so far as their jurisdiction extends, carry into effect the judgments of foreign cts. when legally brought under their cognisance.—**NORRIS v. CHAMBRES** (1861), 3 De G. F. & J. 583; 4 L. T. 345; 7 Jur. N. S. 689; 9 W. R. 794; 45 E. R. 1004, L. C.

Annotations:—As to (1) **Consd.** *Cookney v. Anderson* (1862), 31 Beav. 452; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *Deschamps v. Miller*, [1908] 1 Ch. 856. **Refd.** *Cood v. Cood* (1863), 3 New Rep. 275; *Matthaei v. Galitzin* (1874), L. R. 18 Eq. 340; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Companhia de Mocam-*

bique v. British South Africa Co., De Sousa v. British South Africa Co., [1892] 2 Q. B. 358; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129. **Generally, Mentd.** *Whitaker v. Forbes* (1875), L. R. 10 C. P. 583.

342. — Good title acquired by foreign law.]— Indian Registration Act XX. of 1866, makes void all instruments relating to real estate in India which ought to have been registered under the Indian Registration Act, XVI. of 1864, but were not so registered, & destroys all equities arising out of them. A. being resident at Madras, in 1865 executed a deed by which he conveyed land in India to pltf. & covenanted for further assurance. The deed was not registered under the Indian Registration Act, 1864, which provides that if such a deed be not registered it shall not be received in evidence in any ct. in India. In 1866 A. mtgd. the same land to defts., who had notice of pltf.' conveyance, & defts. registered the mtge. deed under the Indian Registration Act, 1866. Pltf. filed a bill to enforce the covenant for further assurance against defts.:—*Held*: pltf. had no equity against defts., & the bill was dismissed.—*Semble*: independently of the operation of the Indian Registration Act, 1866, as pltf.' deed was forbidden by the Indian Registration Act, 1864, to be received in evidence in India, it could not be sued on in England either as a deed of conveyance or as a deed of covenant for further assurance.—**HICKS v. POWELL** (1869), 4 Ch. App. 741; 17 W. R. 449, L. C.

Annotation:—**Refd.** *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354.

343. To order sale of land outside jurisdiction.]—

In a suit by applts., being mtgees. of a division of 180 miles of respts.' railway & of its revenues subject to working expenses, for a sale of the division & for a receiver & other relief:—

Held: this division of 180 miles was by the law of Canada applicable to the railway a section capable of sale in its entirety, but that the provincial ct. had no power to order a sale, part of the section being within & part without its jurisdiction.—**GREY v. MANITOBA & NORTH WESTERN RY. CO. OF CANADA**, [1897] A. C. 254; 66 L. J. P. C. 66, P. C.

To restrain proceedings in foreign courts.]—See Part XVI., Sect. 5, post.

344. Service of writ outside jurisdiction—Effect of—Jurisdiction not extended.]—**COOKNEY v. ANDERSON**, No. 340, *ante*.

345. —Since the ct. has the same jurisdiction with regard to any contract made, or equity between, persons in this country, respecting lands or assets in a foreign country, as it has where the lands or property are situate in England, to allow service of the writ out of the jurisdiction in a case within the terms of Order xi., r. 1 (g), is not to extend the jurisdiction, but to enable the old jurisdiction to be exercised in cases where formerly this jurisdiction could not have been exercised by reason of defective rules of procedure.

In an action against (1) a Dutch corpn., trustees of a debenture deed, (2) the receivers appointed under this deed, resident in England, & (3) an English co. having property & assets in Brazil, to enforce an alleged prior equitable charge, made in England, upon property & assets in Brazil, & now vested in the first debt.:—

Held: as first defts. were necessary & proper parties to the action, within the terms of Order xi., r. 1 (g), & as the ct. had jurisdiction to grant

PART IV. SECT. 2, SUB-SECT. 1.

343 i. To order sale of land out of jurisdiction—Enforcement of mechanic's lien.]—Where lands are out of the jurisdiction, the ct. cannot affect them otherwise than by proceedings

in personam, & cannot enforce a mechanic's lien by sale of land out of the jurisdiction.—**CHADWICK v. HUNTER** (1884), 1 Man. L. R. 363.—**CAN.**

343 ii. —.]—The ct. will not order a sale of land over which it has not

territorial jurisdiction, not being able to supervise or deal effectually with the many matters which are usual incidents of a sale.—**STRANGE v. RADFORD** (1888), 15 O. R. 145.—**CAN.**

the relief asked, service of the writ on first deft. ought to be allowed; &, on the application of pltf., a receiver of the assets in the debenture deed was also appointed.—*DUDER v. AMSTERDAMSCHE TRUSTEES KANTOOR*, [1902] 2 Ch. 132; 71 L. J. Ch. 618; 87 L. T. 22; 50 W. R. 551.

Annotation:—*Distd. Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

— **When allowed.**—See PRACTICE AND PROCEDURE.

SUB-SECT. 2.—TRUSTS RELATING TO FOREIGN IMMOVABLES.

346. To decide existence of trust.—Testator domiciled in a British Colony left real & personal property in the colony. In an action instituted in England by the heir-at-law & next of kin of testator against persons who had taken possession of the personal & real estate in the colony of testator, all parties to the action being resident in England.

Held: the English ct. had jurisdiction in the action to determine (1) as to the title to the real estate as well as the personalty situate in the colony, the two being so mixed together under the will that they could not be dealt with separately, (2) as to whether a trust of the real estate had been created by the will or not.—*Re CLINTON, CLINTON v. CLINTON* (1903), 88 L. T. 17; 51 W. R. 316; 19 T. L. R. 181; 47 Sol. Jo. 436.

347. To enforce trust.—After two verdicts & judgments in Ireland touching the matters of a bill now brought in England to enforce a trust of lands in Ireland.

Held: the ct. had jurisdiction & the judges in England were proper expositors of the Irish law.—*KILDARE (LORD) v. EUSTACE* (1686), 2 Cas. in Ch. 188; 1 Eq. Cas. Abr. 133; 1 Vern. 437; 22 E. R. 905, L. C.

Annotations:—*Refd. Cranstown v. Johnston* (1796), 3 Ves. 170; *Holmes v. R.* (1861), 5 L. T. 548; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658; *Duder v. Amsterdamsche Trustees Kantoor*, [1902] 2 Ch. 132.

348. Colonial land.—In an action to enforce against real estate in Trinidad the trusts of a creditor's deed (which had been established by a former suit in the Ct. of Ch.), defts. were persons in whom the legal estate was outstanding, one of them being a British subject resident in Trinidad. The other defts. resided in England. An opinion was given by a barrister practising in Trinidad that the beneficial interest in the real estate there was bound by the deed. The writ had been served on those defts. who were in England:—

Held: leave could be given to serve the writ on the deft. who was in Trinidad.—*JENNEY v. MACKINTOSH* (1886), 33 Ch. D. 595; 55 L. T. 733; 35 W. R. 181; *subsequent proceedings* (1889), 61 L. T. 108, C. A.

PART IV. SECT. 2, SUB-SECT. 2.

347 i. To enforce trust.—Foreign land.—Pltf. sued in a ct. in B.I., to establish his right to a share in the income derived from land situate outside B.I., but received by deft. within the jurisdiction of B.I. ct.:—*Held*: the suit was within the jurisdiction of the Court, there being no dispute as to title.—*KASHINATH GOVIND v. ANANT SITARAMBOA* (1899), 1 L. R. 24 Bom. 407.—IND.

surrender for trust—Testator died domiciled in S., leaving heritable & movable property there, & movable & immovable property in A. His will contemplated a sale of his A. immovables by his trustees. The

A cts., applying the A. law, which did not recognise trusts with reference to immovable property in A., declared testator's will null & void in so far as it dealt with his A. immovables, & his children each took an equal share of A. estate as his necessary heirs under A. law. One daughter claimed legitim in S., which did not affect the right of her children to the fee of her share, & was paid her legitim out of testator's movable estate, in addition to her share of the A. immovable property taken by her as one of the necessary heirs. The other children of testator claimed the provisions in their favour under his testamentary writings, but maintained that they were not bound to make available for the purpose of fixing the share of the testator's

349. —.—Testator domiciled in Scotland, & possessed of a large personal & some heritable property in Scotland & of a comparatively small personal property in England, by will made in Scotch form appointed several persons to be exors. & trustees, some of whom resided in England & some in Scotland. The trustees obtained a confirmation of the will in Scotland, & the confirmation was sealed by the English Court of Probate under Confirmation of Exors. (Scotland) Act, 1858. An infant legatee resident in England brought by his next friend an action here to administer the estate, & the writ was served upon some of the trustees in England, & (under an order) upon the Scotch trustees in Scotland. The trustees appeared without prote. & took no steps to discharge the order, but obtained an order of reference to inquire whether the further prosecution of the action would be for the benefit of infant pltf.; upon which an order (not appealed from) was made for the further prosecution of the action. The trustees removed all the English personalty into Scotland before the action came on for trial:—*Held*: the English ct. had jurisdiction to administer the trusts of the will as to the whole estate, both Scotch & English; & as no proceedings were pending in a Scotch ct. (if such were possible) by which the interests of infant pltf. could have been equally protected, the jurisdiction was not discretionary, but the decree was a matter of course.—*EWING v. ORR EWING* (1883), 9 App. Cas. 34; 53 L. J. Ch. 435; 50 L. T. 401; 32 W. R. 573, H. L.; *affg. S. C. sub nom. Re ORR EWING, ORR EWING v. ORR EWING* (1882), 22 Ch. D. 456, C. A.; *subsequent proceedings* (1885), 10 App. Cas. 453, H. L.

Annotations:—*Consd. Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 713; *Re Lane, Lane v. Robin* (1886), 55 L. T. 149; *Re Artola Hermanos, Ex p. André Châle* (1890), 24 Q. B. D. 640. *Refd. Re Matheson* (1884), 51 L. T. 111; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *A.-G. v. Johnson*, [1907] 2 K. B. 885.

350. Land in Scotland—Devise to English trustees—Necessity for application to Scottish court.—As the Scottish Trusts Acts do not apply to English trusts, it is necessary to invoke the “*nobile officium*” of the Ct. of Session in order to confer formal authority upon English trustees to deal with land situate in Scotland.—*Re FORREST, FORREST v. FORREST* (1910), 51 Sol. Jo. 737.

351. To impeach settlement—Colonial land.—*DESCHAMPS v. MILLER*, No. 339, ante.

To appoint trustees—Compound settlements.—See SETTLEMENTS.

To make vesting orders—In respect of land in Scotland, Ireland & Colonies.—See TRUSTS AND TRUSTEES.

SUB-SECT. 3.—MORTGAGES OF FOREIGN IMMOVABLES.

See, also, Sect. 3, post.

352. Action for foreclosure—In England—

estate left in fee to his grand-children the shares of the A. immovable estate taken by them as necessary heirs:—*Held*: they, being unfettered owners of such shares taken by them as necessary heirs, & being able to make those shares available for the purpose of testator's testamentary writings, could not claim the bequests in their favour unless they made available their shares of the A. property for the purpose of the testator's testamentary writings.—*BROWN v. GREGSON* (1919), 56 Sc. L. R. 333.—SCOT.

PART IV. SECT. 2, SUB-SECT. 3.

352 i. Action for foreclosure—In domestic court—Mortgage of foreign land.—In an action on a mortgage of

2.—*Equitable jurisdiction in personam: Sub-sects. 3 & 4.]*

Mortgage of Island of Sark.]—Bill that debt. might redeem a mtge. of the island of Sark, or be foreclosed. Debt. pleaded to the jurisdiction of the ct., that the island was part of the Duchy of Normandy, & had laws of their own, & were under the jurisdiction of the cts. of Guernsey. Plea overruled, because the mtge. was of the whole island, & for that debt. was served here, for *equitas agit in personam*.—*TOLLER v. CARTERET* (1705), 2 Vern. 494; 1 Eq. Cas. Abr. 134, pl. 5; 23 E. R. 916.

*Annotations:—***Consd.** *Dorby v. Athol* (1749), 1 Ves. Sen. 202. **Refd.** *Houlditch v. Donegal* (1834), 8 Bl. N. S. 301; *Portarlington v. Soulby* (1834), 3 My. & K. 104; *Paget v. Ede* (1874), L. R. 18 Eq. 118; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *British South Africa Co. v. De Beers Consolidated Mines* (1910), 80 L. J. Ch. 65.

353. ——— Charge on or mortgage of colonial land.]—A foreclosure decree being a decree *in personam* depriving the mtgor. of his personal right to redeem, the ct. has jurisdiction to make such a decree in respect of a mtge., between an English mtgor. & mtgee., of land in one of the colonies.—*PAGET v. EDE* (1874), L. R. 18 Eq. 118; 43 L. J. Ch. 571; 30 L. T. 228; 22 W. R. 625.

*Annotations:—***Consd.** *British South Africa Co. v. De Beers Consolidated Mines* (1910), 80 L. J. Ch. 65. **Refd.** *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743.

354. ——— Land grant mortgage bond.]—*BAWTREE v. GREAT NORTH-WEST CENTRAL RY. CO.* (1898), 14 T. L. R. 448, C. A.

*Annotation:—***Consd.** *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

355. ——— In colonial court—Prior redemption action in England—Injunction.]—Injunction (on terms) granted to restrain mtgees. of a West India estate from proceeding on a bill of foreclosure in the colonial ct., filed after a decree made in this ct., which directed an inquiry to ascertain the amount of the mtge. debt, on a bill to redeem; all parties being in this country.—*BECKFORD v. KEMBLE* (1822), 1 Sim. & St. 7; 57 E. R. 3.

*Annotations:—***Expld.** *Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416. **Refd.** *Esdaille v. Kynaston* (1836), Donnelly, 52. **Mentd.** *Bunbury v. Bunbury* (1839), 1 Beav. 318.

Restraint of foreign proceedings generally.]—See Part XVI., Sect. 5, sub-sect. 2, *post*.

356. Payment of mortgage debt—Out of proceeds of sale—Mortgage not complying with *lex loci rei sitæ*—Mortgage completed in England.]—Bkpts. deposited with a creditor the title deeds of a real estate in Scotland, accompanied with a written agreement to secure the payment of the general balance; both parties being resident in England, where the transaction itself took place. By the law of Scotland, no lien or equitable mtge. on real property is created by such a deposit:—**Held:** nevertheless, the contract being made in England, by contracting parties domiciled in this country, which was also the domicile of the assignees under the bkcy., the estate was charged, with the equitable mtge., & the assignees were bound to pay to the creditor the amount of the proceeds of the sale of the estate.—*Re COURTNEY, Ex p. POLLARD* (1840), 4 Deac. 27; Mont. & Ch. 239, L. C.; *reversg.* (1837), 2 Deac. 367; *subsequent*

lands situate out of O., judgment of foreclosure will be granted against a debt. residing therein, such judgment merely operating *in personam* as an extinguishment of a personal right.—*STRANGE v. RADFORD* (1888), 15 O. R. 145.—CAN.

b. Payment of mortgage debt—Mortgagor in default to make conveyance of foreign lands.]—Where in a suit

on a mortgage covering lands in O., & also in Q., mortgagor waived his right to claim a sale of the property & elected to have a decree of foreclosure pronounced, the domestic ct. ordered, on default being made in payment, that debt. should execute to pltf. such conveyance as would vest in him all the estate or interest of debt in the lands in Q.—*BRYSON v. HUNTINGTON* (1877), 25 Gr. 265.—CAN.

proceedings (1840), 1 Mont. D. & De G. 264, Ct. of R.

*Annotations:—***Expld.** *Re Richardson, Ex p. Richardson* (1839), 3 Deac. 496. **Distd.** *Waterhouse v. Stansfield* (1851), 9 Hare, 234. **Expld.** *Norton v. Florence Land & Public Works Co.* (1877), 38 L. T. 377. **Distd.** *Re Hart, Ex p. Fletcher* (1878), 26 W. R. 843. **Consd.** *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129. **Refd.** *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; *Brown v. Gregson*, [1920] A. C. 860.

357. ——— ——— ———.]—S. & Co., who were merchants in London & Shanghai, applied to the applts., who were merchants in Prussia, to open a credit on their behalf for £5,000, & offered to deposit with them as a security the title-deeds of a house at Shanghai. The negotiations were commenced verbally, when all parties were in Prussia, but were concluded, after some correspondence, by a letter written by S. & Co. to the applts. from London, inclosing the title-deeds of the house in Shanghai. Applts. accordingly accepted bills drawn by S. & Co. & payable in London. S. & Co. shortly afterwards became liquidating debtors, a considerable sum being then due to the applts. on the bills. No conveyance or memorandum of the deposit was made at the British Consulate at Shanghai, but the house remained registered in the name of S. & Co. Applts. accordingly applied for an order that the trustee in liquidation should convey the house to them. Evidence was adduced that, according to the law of Prussia, the contract was binding personally on S. & Co., but that, as the necessary formalities for perfecting the security at Shanghai had not been gone through, applts. had no mtge. or lien on the house:—**Held:** the contract must be governed by English law, & applts. had a good security on the house by the deposit of the deeds (MELLISH, L.J.):—**Held:** whether the contract was governed by English or by Prussian law, the contract was personally binding on S. & Co., & could be enforced against their trustee in liquidation; and the Ct. made an order to sell the house & pay the proceeds to applts. (MELLISH & JAMES, L.J.J.).—*Re SCHEIBLER, Ex p. HOLTHAUSEN* (1874), 9 Ch. App. 722; 44 L. J. Bey. 26; 31 L. T. 13, L. J.J.

*Annotations:—***Refd.** *Bank of Africa v. Cohen*, [1909] 2 Ch. 129; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354. **Mentd.** *Mercer v. Vans Colina* (1897), 4 Mans. 363; *Powell v. Marshall, Parkes*, [1899] 1 Q. B. 710; *Re Bastable, Ex p. Trustee*, [1901] 2 K. B. 518.

358. ——— Obligation of mortgagee to produce securities for inspection—Mortgage of colonial land.]—Bill by the owner of an estate in Demerara, against an incumbrancer thereon, to restrain him from enforcing payment in this country of notes which had been given for part of the debt, on the ground that the encumbrancer could not deliver up the gross copy of the acts of hypothecation, which it was alleged was necessary to a valid discharge. The common injunction was obtained. The answer admitted that the incumbrancer had no gross copy in his possession, & that a second gross copy would not be issued by the ct. without indemnity; but it did not state for what purpose or in whose favour the indemnity was required, or that gross copies had not been actually taken out

c. Action for redemption—In domestic court—Mortgage of foreign lands.]—A creditor who has recovered judgment in M., & who has a lien on the lands of the judgment debtor there, cannot maintain in O. an action for redemption of a mtge. on such lands in M. as are subject to the lien.—*HENDERSON v. BANK OF HAMILTON* (1893), 20 A. R. 646; 23 S. C. R. 716.—CAN.

in respect of the charges which deft. had upon the estate, or that any inquiries or searches had been made in reference to these questions, or that any cancellation or discharge had been entered in ct. in respect of the previous payments on account of the debt. Pltfs. & deft. had both acted with regard to the estate, in their previous dealings concerning it, without requiring the production of the grosses. The ct. dissolved the injunction upon the incumbrancer giving security to indemnify the pltfs. from any consequences arising from the absence of the grosses.

The cts. of this country will apply the general law of this country, being abstractedly just, and not exclusively founded upon any peculiar or technical rule, to questions relating to lands in a colony, where a different system of jurisprudence prevails, unless it is suggested or shown that the laws of the colony are different on the point in question; & therefore the mtgee. of an estate in Demerara was held not to be bound to produce his securities for inspection before payment.—*BENTINCK v. WILLINK* (1842), 2 Hare, 1; 67 E. R. 1.

Annotations:—*Refd.* *Sichel v. Raphael* (1864), 3 New Rep. 662. *Mentd.* *Owen v. Homan* (1851), 3 Mac. & G. 378; *Beardmore v. Gregory* (1865), 12 L. T. 264.

359. Against subsequent assignee with notice—“Obligations” payable to bearer—Action pending in local court.—A company with an office in London, & having house property at Florence, raised, under powers in their articles, a sum of money by the issue of obligations payable to bearer, whereby they purported to bind themselves, their successors & assigns, & all their estate, property & effects, reserving the right to redeem a certain part of the obligations (to be determined by drawings) in each of eight successive years. Subsequently, by a mtge. in the Italian form, registered at Florence, the co. mtged. the property to a bank with a London office, who had notice of the obligations. The bank having taken proceedings in the tribunal at Florence to enforce their mtge., an action was brought on behalf of the holders of the obligations against the company & the bank, claiming to be mtgees. of the Florence property in priority to the bank. On motion to restrain the sale of the property:—*Held*: if the obligations created a charge on the co.’s property, they could not be enforced as against the bank claiming under a registered mtge. at Florence, & the matter being already before the tribunal of the country where the property was situated, this ct. would not interfere.—*NORTON v. FLORENCE LAND & PUBLIC WORKS CO.* (1877), 7 Ch. D. 332; 38 L. T. 377; 26 W. R. 123.

Annotations:—*Expld.* *Re Florence Land & Public Works Co., Ex p. Moor* (1878), 10 Ch. D. 530. *Refd.* *Re Maudslay, Sons & Field, Maudslay v. Maudslay, Sons & Field*, [1900] 1 Ch. 602. *Mentd.* *British India Steam Navigation Co. v. I. R. Comrs.* (1881), 50 L. J. Q. B. 517.

360. — Express obligation to satisfy claim of incumbrancer.—*MERCANTILE, INVESTMENT & GENERAL TRUST CO. v. RIVER PLATE TRUST, LOAN & AGENCY CO.*, No. 379, *post*.

361. Contract to give legal mortgage—On foreign land—Treated as English mortgage.—(1) An English contract to give a mtge. on foreign land, although the mtge. has to be perfected according to the *lex situs*, is a contract to give a mtge., which, *inter partes*, is to be treated as an English mtge. subject to such rights of redemption & other equities as the law of England regards as necessarily incident to a mtge.

(2) The equitable rule against clogging the equity of redemption of a mtge. applies to an English contract for an issue of debentures to

secure a loan, & will be enforced against a contracting party in the jurisdiction although the floating security to be created by the debentures comprises foreign land where the clog doctrine is possibly not recognised.—*BRITISH SOUTH AFRICA CO. v. DE BEERS CONSOLIDATED MINES, LTD.*, [1910] 2 Ch. 502; 80 L. J. Ch. 65; 103 L. T. 4; 26 T. L. R. 591; 54 Sol. Jo. 679, C. A.; *reversd.* on other grounds, *sub nom.* *DE BEERS CONSOLIDATED MINES, LTD. v. BRITISH SOUTH AFRICA CO.*, [1912] A. C. 52, H. L.

Annotations:—*Foll.* *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Re Smith, Lawrence v. Kitson*, [1916] 2 Ch. 206. *Mentd.* *Kreglinger v. New Patagonia Meat & Cold Storage Co.*, [1914] A. C. 25; *Jenkin v. Pharmaceutical Soc. of Great Britain*, [1921] 1 Ch. 392.

362. — Right to execution of legal mortgage.—By a deed of Oct. 9, 1907, a testator, in consideration of £1,000, then expressed to be owing by him to his two sisters, charged all his share & interest in an estate in the island of Dominica, West Indies, to secure the repayment of this sum, & of such further sums as should thereafter be advanced by his sisters, & he agreed to execute a legal mtge. of the property to them to secure all such principal money & interest whenever required to do so. On July 18, 1912, a further charge for £1,000 on the same property was indorsed upon the first deed. By his will testator gave all his estate wherever situated to trustees upon certain trusts, & died insolvent in 1913 without having executed any legal mtge. of the property. By the law applicable to immovables in Dominica the equitable charge was not sufficient to create a valid incumbrance upon this property.

Upon a summons issued by the two sisters in a creditors’ action for the administration of testator’s estate:—

Held: the sisters were entitled to have a legal mtge. of the foreign land executed in their favour to secure the moneys intended to be secured by the two documents. The contract was to be construed by the law of England, & the death of one of the parties could not operate to change the law by which it was to be construed & prejudice the right of the other party to have specific performance.—*Re SMITH, LAWRENCE v. KITSON*, [1916] 2 Ch. 206; 85 L. J. Ch. 802; 115 L. T. 68; 32 T. L. R. 546; 60 Sol. Jo. 555; *subsequent proceedings*, [1918] 2 Ch. 405.

SUB-SECT. 4. — CONTRACTS RELATING TO FOREIGN IMMOVABLES.

See, also, Sect. 3.

363. Specific performance—Articles concerning foreign boundaries.—Specific performance decreed of articles executed in England concerning boundaries of two provinces in America.—*PENN v. BALTIMORE (LORD)* (1750), 1 Ves. Sen. 444; 27 E. R. 1132, L. C.

Annotations:—*Consd.* *Norris v. Chambres* (1861), 29 Beav. 246. *Expld.* *Cookney v. Anderson* (1862), 31 Beav. 452. *Consd.* *Sichel v. Raphael* (1864), 3 New Rep. 662; *I. R. Comrs. v. Angus, I. R. Comrs. v. Lewis* (1889), 23 Q. B. D. 579; *Companhia de Mocambique v. British South Africa Co.*, [1892] 2 Q. B. 358; *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658. *Refd.* *Pike v. Hoare* (1763), Amb. 428; *Houlditch v. Donegall* (1834), 2 Cl. & Fin. 470. *Portarlington v. Souby* (1834), 3 My. & K. 104; *Re Courtney, Ex p. Pollard* (1840), 4 Deac. 27; *Re Holmes* (1861), 2 John. & H. 527; *Norris v. Chambres* (1861), 4 L. T. 345; *Douglas v. Douglas, Douglas v. Webster* (1871), L. R. 12 Eq. 617; *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *A.-G. v. Johnson*, [1907] 2 K. B. 885; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *British Controlled Oilfields v. Stagg* (1921), 66 Sol. Jo. (W. R.) 18. *Mentd.* *Bayley v. Edwards* (1792), 3 Swan. 703; *Bedreechund v.*

Sect. 2.—Equitable jurisdiction in personam: Sub-sects. 4, 5 & 6

Elphinstone (1830), 2 State Tr. N. S. 379; Mercantile, Investment & General Trust Co. v. River Plate Trust Loan & Agency Co. (1892), 61 L. J. Ch. 473.

364. — Sale of foreign land—Enforcement of equities against proceeds.]—WATERHOUSE v. STANSFIELD, No. 305, ante.

365. — Agreement for.]—NORRIS v. CHAMBRES, No. 341, ante.

366. Injunction—To restrain disturbance of possession—Laches by vendor—Effect of decision of local court that vendor not bound.]—A. was the administrator of an estate, to one third of which each of his brothers B. & C. was entitled. In 1833 A. wrote to B. & C., offering, in order to prevent the necessity of accounts & the probability of dispute, to pay each £1,000 for his share. B. accepted the offer & C. wrote to say that whatever B. determined would meet his approbation. A. & B. acted on the contract as complete, & C. never repudiated it or asked for any accounts or explanations. B. died in 1849, & in 1850 C. & B.'s representatives commenced a suit in Chili against A. to recover their shares. Two Chilean courts in succession decided that there was a contract binding B. but not C. A., who had actively defended the suits in Chili, now came to England, & filed a bill, to restrain C. from disturbing him in the possession:—*Held*: (1) C.'s delay for seventeen years, & until after B.'s death, barred his right to an account according to English law & injunction granted.

(2) The contract being between three domiciled Englishmen, was governed by English law, although the principal subject-matter was landed property in Chili, & therefore the Chilean decisions were not binding upon this ct.

A contract between domiciled Englishmen relating to real estate in a foreign country, is to be determined by the *lex loci*, but a contract between an Englishman domiciled & resident in England & an Englishman resident in a foreign country, but not having acquired a foreign domicile, must be governed & construed by the rules of the English Law.—*COOD v. COOD* (1863), 33 Beav. 314; 3 New Rep. 275; 33 L. J. Ch. 273; 9 Jur. N. S. 1335; 55 E. R. 388.

Annotations:—*Mentd.* Adams v. Clutterbuck (1883), 31 W. R. 723; Bank of Africa v. Cohen, [1909] 2 Ch. 129.

367. — To enforce implied covenant for quiet enjoyment.]—In July 1896 plffs. entered into an agreement with the defts. under which the sole & exclusive right to work certain lands situate in the Island of Milos & belonging to the defts. was granted to the plffs. for a period of five years; the agreement also contained a provision for a renewal of the period for three further periods of five years each.

The right conferred by this agreement was expressed to be granted for the purpose of enabling

the plffs. to get & work manganese; & they were to pay by quarterly payments certain royalties therefor, & a minimum royalty was fixed.

Clause 6 provided in the event of any royalties being in arrear for three months or a breach of any of the provisions of the agreement the defts. might determine the licence & re-enter the premises.

On May 17, 1898, a further agreement was made modifying the first agreement & providing for the payment of the royalties half-yearly on Apr. 8 & Oct. 8, in each year.

A dispute having arisen between the original grantors of the lands & defts., & the former having requested plffs. to pay the royalties to them instead of to defts., plffs. on Oct. 7, declined to pay to defts. the royalties due on Oct. 8, & offered to refer the question to arbn.

Oct. 12, defts. took forcible possession of the lands & remained in possession of the same.

Oct. 18, plffs. tendered to defts. the money due, but the tender was refused.

Nov. 2, plffs. instituted this action & now moved for an injunction to restrain defts. from taking or keeping possession of the lands in question & of the machinery & stock of manganese in or about the premises.

The registered offices of plffs. & defts. respectively were situate in London:—

Held: if there was jurisdiction to grant the injunction sought for, such jurisdiction ought to be exercised with great caution; as defts. were in actual possession of the lands they ought not to be disturbed & the motion must be refused.—*BLACK POINT SYNDICATE, LTD. v. EASTERN CONCESSIONS, LTD.* (1898), 79 L. T. 658; 15 T. L. R. 117.

368. Rescission—Contract dealing with mineral rights in foreign country.]—Where a contract dealing with certain mineral rights in Ecuador was signed by the parties thereto in New York City, U.S.A., but expressly provided that it should be considered & held to be one duly made & executed in London, England:—*Held*: (1) such a contract was not made within the jurisdiction under Ord. 11, r. 1 (c), but was by its terms or by implication to be governed by English law; (2) an order giving leave to serve a writ in an action for rescission of such a contract is right, both on technical grounds & also on the ground of convenience, & will not be set aside.—*BRITISH CONTROLLED OILFIELDS, LTD. v. STAGG* (1921), 66 Sol. Jo. (W. R.) 18.

Title to land directly in issue.]—See Sect. 1, ante.

SUB-SECT. 5.—FRAUD AND INEQUITABLE DEALING.

369. Fraudulent conveyance—Defendant within jurisdiction—Land in Ireland.]—Ct. of equity in England will relieve against fraudulent conveyances gained of lands in Ireland, when deft. is in England.—*ARGLASSE (LORD) v. MUSCHAMP*

PART IV. SECT. 2, SUB-SECT. 4.

365 i. Specific performance—Sale of foreign land—Agreement for.]—*HILL v. SPRAID* (1909), 11 W. L. R. 680; 2 Alta. L. R. 148.—CAN.

365 ii. —.]—Deft. agreed to purchase land in S. from plff. & to pay for it in instalments; the agreement provided for cancellation by plff. upon default after notice, & a covenant that, on default, the whole purchase money should become payable. In an action in M. to recover the balance due upon default:—*Held*: the ct. had jurisdiction to order that deft. perform his contract within a reasonable time.—*BURLEY v. KNAPPEN*

(1910), 13 W. L. R. 715. CAN.

365 iii. —.]—*CASSIM'S ESTATE v. CASSIM* (1914), 36 N. L. R. 14.—S. AF.

d. — Exchange of foreign land for land within jurisdiction—Agreement for.]—Plff., an U.S. resident, agreed with deft. to exchange land situate in U.S.A. for land of deft. in O.; & brought this action for specific performance of the contract:—*Held*: the ct. would decree specific performance.—*MONTGOMERY v. RUPPENSBERG* (1899), 31 O. R. 433.—CAN.

e. Rescission—Sale of foreign land—Contract made in jurisdiction of domestic court.]—*ROOD'S TRUSTEES v.*

SCOTT & DE VILLIERS, [1910] T. P. D. 47; L. L. R. 97.—S. AF.

PART IV. SECT. 2, SUB-SECT. 5.

369 i. Fraudulent conveyance—Parties within jurisdiction—Foreign land.]—An action will not lie in O. by a judgment creditor to set aside, as fraudulent, a conveyance made by his debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in O.; where fraud exists in respect to specific property out of the jurisdiction, the ct. will interfere where the parties are within the jurisdiction, by ordering conveyances to be made to the persons entitled,

(1682), 1 Vern. 76; 23 E. R. 322, L. C.; *subsequent proceedings*, 1 Vern. 135.

Annotations:—*Reid*. Fryar v. Vernon (1724), Cas. temp. King. 5; Barnardiston v. Lingood (1740), 2 Atk. 133; Cranstown v. Johnston (1796), 3 Ves. 170; British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602; Black Point Syndicate v. Eastern Concessions (1898), 79 L. T. 658. *Mentd.* Portarlington v. Soulby (1834), 3 My. & K. 104; Duder v. Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132.

370. — Land in Scotland.—(1) To a bill brought for possession of lands in Scotland, & for discovery of the rents & profits & deeds, & fraud in obtaining them; plea to the jurisdiction of the ct. bad, on account of not averring that the parties were resident out of the jurisdiction.

As to so much of the bill as seeks possession; the plea over-ruled, without prejudice to the deft.'s insisting by way of answer upon the same matter.

(2) The Ct. of Chancery in England, respecting lands out of its jurisdiction, cannot enforce its decree *in rem*, but enforces it by process of contempt *in personam* & sequestration.—*ANGUS v. ANGUS* (1737), West temp. Hard. 23; 25 E. R. 800, L. C.

Annotation:—As to (1) *Reid*. Black Point Syndicate v. Eastern Concessions (1898), 79 L. T. 658.

371. Purchase by execution creditor—Of colonial land—Purchaser compelled to hold land as security only.—*CRANSTOWN (LORD) v. JOHNSTON*, No. 338, *ante*.

372. Setting aside judicial sale under process & judgment of local court—General allegations of fraud denied.—Jurisdiction upon a contract concerning an estate in a Colony.

But the question upon the construction of the contract, for a security by way of mtge., having been before a ct. of competent jurisdiction in the Colony, & a foreclosure & judicial sale directed, the allegations of fraud merely general, & denied, an injunction was refused.—*WHITE v. HALL* (1806), 12 Ves. 321; 33 E. R. 122, L. C.

SUB-SECT. 6.—JURISDICTION TO ORDER ACCOUNTS AND APPOINT RECEIVER.

373. Account—Of waste—Land in Ireland.—On a bill for a partition of lands in Ireland, & an account of waste committed there, a demurrer was allowed as to the partition, & overruled as to the account.—*CARTERETT v. PERTIE* (1676), Cas. temp. Finch, 242; 2 Swan. 323, n.; 23 E. R. 133; *sub nom.* CARTWRIGHT v. PETTUS, 2 Cas. in Ch. 214, L. C.

Annotation:—*Mentd.* Leake v. Cordeaux (1856), 4 W. R. 806.

374. — In action to enforce creditors' deed—Property of debtor in Ireland—English judgment treated as foreign judgment in Ireland.—The creditors of a person resident in Ireland, filed a bill in the English Ct. of Ch. & obtained a decree for an account, etc., & afterwards, the property of the debtor lying chiefly in Ireland, filed a bill in the Ct. of Ch. there, praying to have the full benefit of the proceedings in the English suit. The Ct. of Ch. in Ireland dismissed such second bill as for want of jurisdiction:—*Held*: (1) the judgment of the Ct. of Ch. in Ireland was erroneous; (2) the proceedings in the English Ct. of Ch. were in the nature of a

but will not so do when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce.—*BURNS v. DAVIDSON* (1891), 21 O. R. 547.—*CAN.*

1. — Fraudulent mortgage — Foreign land.—A Ct. cannot entertain an action to set aside a mtge. on foreign lands on the ground

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that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title.—*PURDOM v. PAVEY & Co.* (1896), 26 S. C. R. 412.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 6.

g. Appointment of receiver — Land

foreign judgment, & were to be treated as such in Ireland, namely, as *prima facie* evidence of right in the party who had obtained the judgment; (3) this House could either remit the case with directions, or appoint a receiver, & take such other proceedings as the Ct. of Ch. in Ireland might have done.

(4) Principle of recognition of foreign judgments discussed. (*See* No. 1164, *post*).—*HOULDITCH v. DONEGALL (MARQUESS)* (1834), 2 Cl. & Fin. 470; 8 Bli. N. S. 301; 6 E. R. 1232, H. L.

Annotations:—As to (1) *Reid*. Houlditch v. Wallace (1838), 5 Cl. & Fin. 629. to (2) *Consd.* Godard v. Gray (1870), L. R. 6 Q. B. 139. *Reid*. Price v. Dewhurst (1837), Donnelly, 264; Henderson v. Henderson (1844), 6 Q. B. 288; Bank of Australasia v. Harding (1850), 9 Q. B. 661; Paul v. Roy (1852), 15 Beav. 433; Barber v. Lamb (1860), 8 C. B. N. S. 95; Abouloff v. Oppenheimer (1882), 10 Q. B. D. 295; *Re* Henderson, Nouvion v. Freeman (1887), 56 L. T. 829. As to (3) *Reid*. *Re* Maudslay, Sons & Field, Maudslay v. Maudslay, Sons & Field, [1900] 1 Ch. 602. *Generally, Mentd.* Koster v. Sapte (1838), 1 Curt. 691; Williams v. Chard (1851), 21 L. J. Ch. 9; Cookney v. Anderson (1863), 1 De G. J. & Sm. 365.

Foreign judgments generally.—*See* Part XIV., *post*.

375. — Of partnership property—In colony—Some defendants in England.—Pltf., in England, filed a bill for an account against the exors. of a deceased partner, some of whom were in Jamaica, but acting in concert with the others, who were in England; the partnership property being in Jamaica:—*Held*: the suit was properly instituted in this country.—*HENDRICK v. WOOD* (1861), 30 L. J. Ch. 583; 4 L. T. 767; 9 Jur. N. S. 117; 9 W. R. 588.

Annotation:—*Reid*. Matthaël v. Galitzin (1874), L. R. 18 Eq. 340.

376. — Of profits—Of mine in foreign country — Parties foreigners.—*MATTHAËL v. GALITZIN*, No. 329, *ante*.

377. — Of purchase-money—On sale of foreign immovable—Parties within jurisdiction.—The title to immovable property in Saxony was in dispute between A. & B. A. sold the property in Saxony, received part of the purchase-money, & took a mortgage for the balance. Both A. & B. being in England, an action by B. to make A. account for the purchase-money was dismissed for want of jurisdiction.—*Re* HAWTHORNE, *GRAHAM v. MASSEY* (1883), 23 Ch. D. 743; 52 L. J. Ch. 750; 48 L. T. 701; 32 W. R. 147.

Annotations:—*Fold.* Deschamps v. Miller, [1908] 1 Ch. 856. *Reid*. Companhia de Mocambique v. British South Africa Co., De Sousa v. Same, [1892] 2 Q. B. 358.

378. Appointment of receiver—Land in Ireland.—*HOULDITCH v. DONEGALL (MARQUESS)*, No. 374, *ante*.

379. — Of rents & profits arising from foreign land—English company assignees of land subject to express obligation.—I. Co., a co. incorporated according to the laws of the United States, issued, in 1888, debentures charged upon property in Mexico, of about seventeen million acres in extent. The debentures were secured by a covering deed made between the I. Co. of the first part, the P. Co. called the trustee, of the second part, & three persons, appointed as a committee on the part of the debenture-holders, and called the committee, of the third part. This deed purported to charge the property in Mexico, gave powers of sale & other powers to the trustee co. & the committee,

in Ireland—Owner abroad.—A receiver will not be appointed over deft.'s property if he resides out of the jurisdiction, unless pltf. has a specific lien on the land, or there is danger of immediate loss of the property.—*ARTHUR v. ARTHUR* (1824), 1 Hog. 95.—*IR.*

Sect. 2.—Equitable jurisdiction in personam: Sub-sect. 6. Sect. 3: Sub-sects. 1, 2 & 3.]

& provided that the committee might at any time, at discretion, call upon the trustee to register in Mexico the hypothecation of the lands to be given by the I. Co. to the trustee. This registration had never been made by the trustee or demanded by the committee. It was admitted that by the law of Mexico the charge on the land had no validity unless registered. The I. Co. were holders of some of these debentures. In May 1889 the M. L. C. Co. was incorporated in England to take over the assets & liabilities of the I. Co. The property of the I. Co. was transferred to the M. L. C. Co., subject to the rights of the debenture-holders. The transfer to the M. L. C. Co. was duly registered in Mexico, & gave that co. a complete legal title according to Mexican law. The land comprised in the debenture trust deed was wholly undeveloped, & produced no income. The M. L. C. Co., being unable to pay the interest on the debentures, proposed a scheme for the conversion of the debentures into preference shares. This scheme was approved by a majority of the debenture-holders, at a meeting held in Oct. 1889, but had not been accepted by the M. I. Co. Early in 1890 the M. I. Co. commenced an action in the Q. B. Div. against the I. Co. for the half-year's interest unpaid on Jan. 1, 1890, & in Feb. 1891 the Ct. of Appeal gave judgment for the pl'tfs. in that action. On Nov. 4, 1891, the M. I. Co. commenced this action in the Ch. Div. to enforce the security of their debenture, & they now moved for a receiver of the rents & profits of the land in Mexico, & the proceeds of sale thereof, & of certain shares & moneys received by the M. L. C. Co. from other cos. for sale of lands alleged to be comprised in the security.

Held: as the deft. co., being subject to the jurisdiction of this ct., had taken a conveyance of the land with notice of & expressly subject to the pl'tfs.' charge, the ct. had jurisdiction to prevent their making an unconscionable use of the Mexican law or gaining any advantage by having registered their transfer before the charge of which they had notice: *Semble*: it had jurisdiction to appoint the receiver asked for.—*MERCANTILE INVESTMENT & GENERAL TRUST CO. v. RIVER PLATE TRUST, LOAN & AGENCY CO.*, [1892] 2 Ch. 303; 61 L. J. Ch. 473; 66 L. T. 711; 36 Sol. Jo. 427.

Annotations:—*Consd.* *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354. *Refd.* *Re Maudslay, Sons & Field* (1900), 82 L. T. 378; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

380. — Effect of—Interference with receiver.]

In Oct. 1899, receivers were appointed in debenture-holders' actions of the undertaking & of the property whatsoever & wheresoever both present and future of an English co., the order following the wording of the debentures. Among the assets of the co. was a debt due to them from a French firm. In Nov. 1899, P. & Co., English creditors of the co., took proceedings in France for the purpose of attaching the debt due to the co. from the French firm. The pl'tfs. in the debenture-holders' action moved to restrain P. & Co. from intercepting, attaching, or taking in execution, or attempting to obtain payment of moneys due to the co. from the French firm, or from otherwise interfering with the receivers:—

Held: (1) the existence of the charge created by the debenture though valid according to English law, did not entitle the debenture-holders to prevent P. & Co., who were unsecured creditors, from asserting & enforcing any rights given them by French law against this French debt, there

being no equity in favour of the debenture-holders as against P. & Co.; the debt due from the French firm must be treated as being situate in France & subject to French law, & P. & Co. could not be prevented, at the suit of the debenture-holders, from taking any proceedings the law of France allowed for recovering their debt out of this French asset, & the attachment which alone was recognised by the law of France ought to prevail over the title of the debenture-holders; (2) the appointment of the receivers made no difference; for though the Ct. can appoint receivers over property out of the jurisdiction, the receiver is not put in possession of foreign property by the mere order of the Ct.; something else has to be done & until what is necessary has been done in accordance with foreign law, any person, not a party to the suit, who takes proceedings in a foreign country is not guilty of contempt on the ground of interfering with the receivers' possession or otherwise, & for this purpose no distinction can be drawn between a foreigner & a British subject.—*Re MAUDSLAY, SONS & FIELD, MAUDSLAY v. MAUDSLAY, SONS & FIELD*, [1900] 1 Ch. 602; 69 L. J. Ch. 347; 82 L. T. 378; 48 W. R. 568; 16 T. L. R. 228; 8 Mans. 38.

Annotations:—*As to* (1) *Refd.* *Bank of Africa v. Cohen*, [1909] 2 Ch. 129; *The Kronprinz Olav*, [1921] P. 52. *As to* (2) *Consd.* *Re Derwent Rolling Mills Co., York City & County Banking Co. v. Derwent Rolling Mills Co.* (1904), 21 T. L. R. 81.

SECT. 3.—ALIENATION AND ASSIGNMENT OF IMMOVABLES.

SUB-SECT. 1.—IN GENERAL.

381. Validity of title—Governed by *lex situs*.]—

The *lex loci rei sitæ* governs exclusively the tenure, title & descent of immovable property.—*FENTON v. LIVINGSTONE* (1859), 33 L. T. O. S. 335; 23 J. P. 579; 5 Jur. N. S. 1183; 7 W. R. 671; 3 Macq. 497, H. L.

Annotations:—*Refd.* *Re Goodman's Trusts* (1881), 17 Ch. D. 266. *Mentd.* *Chichester v. Mure* (1863), 32 L. J. P. M. & A. 146; *It. v. Dibdin*, [1910] P. 57.

382. — — — — —.]—(1) It is established as a general principle, that a legal title, duly acquired in any one country, is a good title all the world over. Duly to acquire a legal title to real estate, such legal title must be according to the *lex loci rei sitæ*. The due acquisition of a legal title to movables may give rise to the question whether the *lex loci contractus*, or the law of the country wherein the contracting parties may be domiciled, or even the *lex loci rei sitæ*, shall prevail. Where all these circumstances are combined in the acquisition of a legal title to a movable, such title is, beyond doubt, good all the world over.

(2) A judgment of a foreign ct. is conclusive, *inter partes*, where there is nothing on the face of the judgment which a ct. here can inquire into. The cts. of this country may, however, disregard a foreign judgment, *inter partes*, if it appears on the record:—(a) to be manifestly contrary to natural justice; or (b) to be based on domestic legislation not recognised by foreign countries; or (c) to be founded on a misapprehension of what is the law of this country; or (d) to be founded upon a distinct refusal to recognise the laws of the country under which the title to the subject-matter of litigation arose.

Semble: a foreign judgment even *in rem* may be examined & disregarded, if it appears on the face of it to have been founded on a perverse disregard of English law in a case properly subject to that law by the comity of nations.

(3) The same rules apply to judgments of Colonial cts.

(4) A ship, the property of British subjects, was duly mortgaged, in Great Britain, to other British subjects, & being in the mtgors.' possession, proceeded to New Orleans. Whilst there it was attached by creditors of the mtgors. resident in New Orleans, &, after due intervention & hearing of the British mtgees., before & by the cts. of Louisiana, sold under process of the ct., to satisfy the attaching creditors, to a British subject, who had notice of the mtgees.' intervention. On a bill by the mtgee. against the purchaser:—*Held*: the sale was subject to the right of the mtgees.—*SIMPSON v. FOGO* (1863), 1 Hem. & M. 195; 1 New Rep. 422; 32 L. J. Ch. 249; 8 L. T. 61; 9 Jur. N. S. 403; 11 W. R. 418; 1 Mar. L. C. 312; 71 E. R. 85.

Annotations:—As to (1) *Refd.* *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479; *Taylor v. Ford* (1873), 22 W. R. 47; *Volnet v. Barrett* (1885), Cab. & El. 554. As to (2) *Expld. & Distd.* *Liverpool Marine Credit Co. v. Hunter* (1867), L. R. 4 Eq. 62. *Apprvd.* *London & Mediterranean Bank v. Strutton* (1869), 21 L. T. 415. *Distd.* *Castrique v. Inrie* (1870), L. R. 4 H. L. 414. *Expld.* *Re Queensland Mercantile & Agency Co., Ex p. Australasian Investment Co., Ex p. Union Bank of Australia*, [1892] 1 Ch. 219; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 3 K. B. 532. *Refd.* *The Halley* (1868), L. R. 2 P. C. 193; *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Colliss v. Hector* (1875), L. R. 19 Eq. 334; *Re Kloebe* (1884), 54 L. J. Ch. 297; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600. As to (4) *Consd.* *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479; *Expld.* *Schibsby v. Westenholz* (1870), 19 W. R. 587. *Consd.* *Volnet v. Barrett* (1885), Cab. & El. 554. *Expld.* *Re Queensland Mercantile & Agency Co., Ex p. Australasian Investment Co., Ex p. Union Bank of Australia*, [1892] 1 Ch. 219.

383. Powers given by 1 Will. 4, c. 60, not applicable to foreign immovables.]—The powers given by 1 Will. 4, c. 60, do not extend to real or personal property in a foreign country.—*PRICE v. DEWHURST* (1839), 8 Sim. 617; 8 L. J. Ch. 267; 59 E. R. 244.

384. Bankruptcy—Real property in England.]—To an action on a judgment of the Supreme Ct. of the Cape of Good Hope, deft. pleaded in bar that, before the recovery of the judgment, by an ordinance of that colony relating to the administration & distribution of insolvents' estates, it was enacted, that the Supreme Ct. might, upon petition of the insolvent, accept the surrender of his estate, & place it under sequestration in the hands of the Master of the Ct.; & that further execution of any judgment against the insolvent or his estate should, after the order for sequestration had been lodged, be stayed during the pendency of such sequestration; & that all actions pending against him for any debt or demand provable against the estate, & all proceedings therein upon any order being made for the sequestration of such estate, should, be stayed. The plea then stated the petition of deft., the surrender of his estate, that it had been placed under sequestration, that plffs. proved the amount of the judgment against deft.'s estate, that the estate was distributed, & that plffs. received 1s. 6d. in the pound on the amount of the judgment debt:—*Held*: the plea was bad.

It seems to be clear that the law of the Cape of Good Hope cannot be taken to affect the debtor's real estate out of that country, which, being extra-territorial, is also out of the jurisdiction of the Ct. where the judgment was obtained (*PARKE, J.*).—*FRITH v. WOLLASTON* (1852), 7 Exch. 194; 21 L. J. Ex. 108; 18 L. T. O. S. 228; 155 E. R. 913.

PART IV. SECT. 3, SUB-SECT. 2.

389 i. Assignment complying with *lex situs*—Not complying with domestic law—Verbal grant.]—Grantors of real

estate were Hindoos, & the grantees the East India Co.; the Hindoo law which governed grantor's rights allowed a verbal grant, if followed by possession by the grantees; possession was taken

by them:—*Held*: a valid grant.—*DOE d. SEMBKISTO (RAJAH) v. EAST INDIA CO.* (1856), 10 Moo. P. C. C. 140; 14 E. R. 445.—IND.

—.]—*Sec, further, BANKRUPTCY & INSOLVENCY, Vol. V., p. 693, No. 6116.*

Bankruptcy—Real property in Scotland.]—*Sec BANKRUPTCY & INSOLVENCY, Vol. V., p. 691, No. 6102.*

SUB-SECT. 2.—CAPACITY AND FORM.

385. Assignment not complying with *lex situs*—Binding between immediate parties & their assignees in bankruptcy—Equitable mortgage of land in Scotland.]—*Re COURTNEY, Ex p. POLLARD*, No. 356, *ante*.

386. ——— Post-nuptial settlement of foreign land—Equity of wife & children.]—After the marriage of a female ward a settlement is made, under the direction of the ct. in England, for the benefit of the wife & children of the marriage, of a moiety of a plantation in Demerara, of which the wife was seized in fee at the time of the marriage; the husband & wife afterwards mortgage the estate to persons having full notice of the settlement; by the law of Demerara the settlement was a nullity, & in no manner affected the rights & powers of the husband and wife over the estate:—*Held*: the mtge. is valid, inasmuch as the equity of the wife & children attached only upon the person of the husband, & not upon the estate.—*MARTIN v. MARTIN, BELL v. MARTIN* (1831), 2 Russ. & M. 507; 39 E. R. 487.

Annotation:—*Refd.* *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

387. ——— Whether binding on third parties—Mortgage of colonial land—Proceeds of sale within jurisdiction.]—*WATERHOUSE v. STANSFIELD*, No. 305, *ante*.

388. ——— With notice—Conveyance of land in India with covenant for further assurance.]—*HICKS v. POWELL*, No. 342, *ante*.

389. Assignment complying with *lex situs*—Not complying with *lex loci contractus*—Conveyance of sporting rights over land in Scotland—Not under seal.]—By Scots law an instrument under seal is not necessary for the conveyance of a sporting right, & therefore the stipulations of an unsealed lease made between Englishmen in England of a sporting right over land in Scotland may be enforced by action in the English Courts, as the provision of the law of England that an instrument under seal is necessary for the conveyance of a right to an incorporeal hereditament, is not part of the *lex fori*. Even if such lease were invalid for want of a seal, the lessee, after having had an enjoyment of the right, could not set up the invalidity as a defence to an action for breach of a stipulation in the lease to leave a good breeding stock of game on the ground at the termination of the lease.—*ADAMS v. CLUTTERBUCK* (1883), 10 Q. B. D. 403; 52 L. J. Q. 607; 48 L. T. 614; 31 W. R. 723.

SUB-SECT. 3.—MATERIAL VALIDITY OF, AND RESTRICTIONS ON, ASSIGNMENT.

Restrictions—Application of Mortmain Acts.]—*See CHARITIES, Vol. VIII. pp. 286, 287.*

— Rule against perpetuities.]—*See Nos. 448, 449, post.*

SECT. 4.—PRESCRIPTION AND LIMITATION OF ACTIONS.

See Part XVI., Sect. 6, *post*.

SECT. 5.—BURDENS ON IMMOVABLES.

390. Burden on immovable by *lex situs*—Burden primarily on personalty by deceased's *lex domicilii*—Liability of heir—Payment of heritable bond.]—DRUMMOND *v.* DRUMMOND, No. 291, *ante*.

391. ————.]—All questions respecting real estate belong to the law of the country where the estate is situate.

Petitioner, heir of tailzie under a settlement made by E., of a Scottish estate, filed a bill to have his estate exonerated from a heritable bond by the application of personal estate in England. The question, whether the heir of tailzie in Scotland had an equity to be exonerated by the application of the personal estate, was, like every other question respecting real estates, to be determined by the law of the country, where the real estate was situate, & could not depend upon the law of the country where the personal estate happened locally to be. All which a ct. here could do would be to refer it to the master, to inquire what was the law of Scotland to be applied to the case; & though such a reference was frequently made in a simple case, it could not be conveniently done in a complex case of equitable circumstances (LEACH, V.C.).

It appearing that a suit and cross-suit were already commenced in Scotland, this case ordered to stand adjourned until the determination there.—ELLIOTT *v.* MINTO (LORD) (1821), 6 Madd. 16; 56 E. R. 994.

Annotations:—**Distd.** Wilson *v.* Ferrand (1871), L. R. 13 Eq. 362. **Refd.** Bunbury *v.* Bunbury (1839), 8 L. J. Ch. 297; Carron Iron Co. *v.* MacLaren (1855), 5 H. L. Cas. 416; Venning *v.* Loyd (1859), 1 De G. F. & J. 193.

392. ———— Payment of annuity.]—A domiciled Scotsman, by his will, devised & bequeathed to trustees all his real & personal estate, & after directing payment of his debts, testamentary & funeral expenses, & giving various legacies & annuities, directed the residue of his estate to be apportioned amongst certain charities. Testator's personal estate was more than sufficient to satisfy all his debts, testamentary & funeral expenses, & the legacies & annuities; his residuary estate comprised English & Scottish realty.

By the law of Scotland, debts, testamentary & funeral expenses, & legacies, are a primary charge on personal estate, & annuities are a primary charge on heritable or real estate.

Testator's heir-at-law claimed the English realty as undisposed of, on the ground that by English law it was not liable to contribute to the charities or annuities. It was conceded that the charitable gifts, so far as they were payable out of the English realty, were void:—

Held: the Scots law of administration applied, & the English realty, ratably with the Scottish realty, must contribute towards the annuities.—*Re HEWIT, LAWSON v. DUNCAN*, [1891] 3 Ch. 568; 61 L. J. Ch. 76; 65 L. T. 48; 40 W. R. 188.

393. Movables primarily liable for debts of deceased by *lex situs*—Whether deceased's *lex domicilii* applicable—Payment of debts by heir out of produce of immovables—Right of heir to relief against personalty.]—A person domiciled in England, who was indebted in money upon bond, died intestate, leaving real estate in Scotland, &

the bond debts were paid by the heir out of the produce of the real estate in Scotland.

Held: the right of relief or demand against the personal estate, which by the law of Scotland is given to the heir who has paid movable debts, is capable of being made available in England, where the personal estate is the primary fund for the payment of all debts.—WINCHELSEA (EARL) *v.* GARETTY (1838), 2 Keen, 293; 7 L. J. Ch. 99; 2 Jur. 367; 48 E. R. 641.

394. ———— Right of legatees to marshalling of assets against heir.]—Testator domiciled in England died possessed of personal estate & also of real estates in Scotland. His will purported to deal with the Scottish real estates, but was inoperative to pass them, & they descended to the Scottish heir. A suit having been instituted for the administration of testator's estate against the exors., one of whom was the Scottish heir, he elected to take the descended estates in opposition to the will, & gave up the legacy which had been bequeathed to him by the will:—*Held*: (1) the liability of the Scottish real estates to the payment of debts, as between the heir & the pecuniary legatees, must be determined by the law of Scotland, & not by the law of the country where testator's estate was being administered; (2) as the law of Scotland threw the general debts primarily on the personal estate, & did not permit them to fall, directly or indirectly, on the real estate until the personal estate was exhausted, there could be no marshalling in the English ct. against the Scottish heir in favour of the pecuniary legatees; (3) no part of the general costs of the suit could be thrown on the Scottish estates; & the heir was entitled to his costs out of the personal estate except the extra costs occasioned by his election. *Semble*: if the real estate had been situate in England, the costs of the suit, which, under the circumstances, would have been confined to the administration of the personal estate, ought not to have been thrown on the real estate.—HARRISON *v.* HARRISON (1873), 8 Ch. App. 342; 42 L. J. Ch. 495; 28 L. T. 545; 21 W. R. 490, L. C. & L. JJ.

Annotation:—*As to* (1) *Refd.* *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

Will invalid as to immovables—Valid as to movables—Right to elect.]—See Part VI., Sect. 2, sub-sect. 3, D. (c).

SECT. 6.—CHARGES ON IMMOVABLES—CURRENCY AND RATE OF INTEREST.

395. Sum charged on immovable—How right to sum barred—Governed by *lex loci rei sitæ*.]—By a marriage settlement, a Jamaica estate was limited to trustees for a term of years, in trust to raise £18,000 to be laid out in land, in Great Britain, of the value of £600 a year; & the land, when purchased, was to be settled on the husband for life, with remainder to the wife for life, with an option to her to have an annuity of £600 a year, out of the land, in lieu of her life estate. Before the £18,000 was raised, the wife joined with her husband, both of them being resident in this country, in mortgaging the Jamaica estate in fee, & the wife acknowledged the mtge. deed before a magistrate, which, by the laws of Jamaica, was equivalent to levying a fine. The husband afterwards died:—*Held*: the wife had barred herself of all claim to the provision made for her by the settlement.—FORBES *v.* ADAMS (1839), 9 Sim. 402; 8 L. J. Ch. 116; 59 E. R. 437.

Annotations:—*Refd.* Briggs *v.* Chamberlain (1853), 11 Hare, 69. *Mentd.* Miller *v.* Collins, [1896] 1 Ch. 573.

396. — Currency in which payable—Instrument made in England—Portions out of land in Ireland.]—Pltf. married the only daughter of A. to whom by the marriage settlement & the will of her father, £15,000 was secured, viz. £12,000 by the settlement, & £3,000 by the will, payable at her age of eighteen or marriage. The whole was charged on A.'s Irish estate, but the settlement & will were made in England, & all parties lived here:—*Held*: the money was decreed to be paid into ct. with English interest, & without deducting the charge of the return from Ireland.—*PHIPPS v. ANGLESEA (EARL)* (1721), 1 P. Wms. 696; 2 Eq. Cas. Abr. 220, pl. 1; 5 Vin. Abr. 209, pl. 8; 24 E. R. 576, L. C.

Annotations:—*Expld. & Distd.* *Lansdowne v. Lansdowne* (1820), 2 Bli. 60. *Expld.* *Noel v. Rochfort* (1836), 10 Bli. N. S. 483.

397. — — — — — Annuity out of land in Ireland.]—One by will made in England devises an annuity in trust for his wife out of lands in Ireland, testator & his wife & the trustee residing in England, the annuity shall be paid in England, & the estate bear the charge of the return.

So if one in England gives by will a legacy out of lands in Ireland, the legacy shall be paid in England & in English money.—*WALLIS v. BRIGHTWELL* (1722), 2 P. Wms. 88; 2 Eq. Cas. Abr. 62, pl. 4; 24 E. R. 652, L. C.

Annotation:—*Distd.* *Lansdowne v. Lansdowne* (1820), 2 Bli. 60.

398. — — — — — Rentcharge on land in Ireland.]—Prior to the passing of the Act for assimilating the currencies of England & Ireland, an English lady married an Irish gentleman. By their settlement, which was executed at Bath, where the marriage was solemnised, it was recited that the gentleman had agreed to charge certain of his estates in Ireland with the payment of a rent-charge of £1,000 a year to the lady for life, in case she should survive him, but the sum secured to her by the deed was expressed to be £1,000 a year sterling lawful money of Ireland:—*Held*: she was entitled to £1,000 a year sterling.—*COPE v. COPE* (1846), 15 Sim. 118; 15 L. J. Ch. 274; 60 E. R. 562.

Annotation:—*Refd.* *Bourne v. Hartley*, *Bourne v. Mahon* (1854), 2 Eq. Rep. 910.

399. — — — — — Instrument made out of England—Annuity charged on land in Ireland.]—Testator, by his will made in Ireland, prior to the 6 Geo. 4, c. 79, bequeaths an annuity, & dies domiciled in England, after that Act was passed. The annuity is to be paid according to the rate of Irish currency.—*HOLMES v. HOLMES* (1830), 1 Russ. & M. 660; 8 L. J. O. S. Ch. 157; 39 E. R. 253.

400. — — — — — Portions partly out of land in Ireland.]—A settlement was made in Ireland of estates, some of which were situate there & the rest in England, by which the estates were limited to trustees for a term of years, for raising at a future time £10,000 for portions; & interest at £5 per cent. was to be raised out of the rents for the children's maintenance in the meantime; but the settlement was silent as to the rate of interest on the portions after they had become payable:—*Held*: the £10,000 must be raised in Irish currency; not with Irish interest, but £4 per cent. according to the usual course of the ct.—*YOUNG v. WATERPARK (LORD)* (1842), 13 Sim. 199; 11 L. J. Ch. 367; 6 Jur. 656; 60 E. R. 77; *affd.* (1845), 15 L. J. Ch. 63, L. C.

Annotations:—*Expld.* *Balfour v. Cooper* (1883), 23 Ch. D. 472. *Mentd.* *Cox v. Dolman* (1852), 2 De G. M. & G. 592; *Hughes v. Williams*, *Chappell v. Rees* (1852), 16 Jur. 415; *Petre v. Petre* (1853), 1 Drew. 371; *Mansfield v. Ogle* (1855), 1 Jur. N. S. 414; *Snow v. Booth* (1855), 2 K. & J. 132; *Blower v. Blower* (1858), 5 Jur. N. S. 33; *Burrowes v. Gore* (1858), 6 H. L. Cas. 907; *Knight v. Bowyer* (1858),

2 De G. & J. 421; *Lewis v. Duncombe* 175; *Round v. Bell* (1861), 31 L. J. Ch. 127; *Plummer* (1870), 6 Ch. App. 160.

401. — — — — — Portions out of land in Ireland—Interest pending vesting.]—By a deed of settlement B. was empowered to charge certain lands in Ireland with any sum, not to exceed £400 a year, as a jointure for his wife, & with any sum not to exceed £2,000 sterling for his younger children.

In exercise of the power B. charged the lands with £2,000 late Irish currency, to be vested in & paid to his younger children in equal shares on their attaining twenty-one or marriage; & he directed, in the event of his dying before the shares became vested, that his said children should be entitled to interest on their presumptive portions at 5 per cent. by way of maintenance from the time of his death until such portions should be payable:—

Held: the £2,000 carried interest at 5 per cent. Irish currency, from the death of B. until the shares of the younger children became payable.—*DENNY v. DENNY* (1866), 14 L. T. 854.

402. — — — — — Indicated in instrument—Rent-charge on land in Ireland.]—Power in a marriage settlement to grant to a wife any annual sum of money, or yearly rent-charge to be tax free, & without any deduction, & to be issuing out of & chargeable upon land in Ireland, so that such rent-charge do not exceed, in the whole, the yearly sum of £3,000 of lawful money of Great Britain:—

Held: a rent-charge appointed under this power is payable in Ireland in the currency of England. But that the appointee is not entitled to have the sum transmitted to England free of the charge of conveyance & exchange properly so called. The *lex loci contractus* & the law applicable to cases of money charged as a rent payable out of land, where no provision as to the place of payment is made by the instrument, are inapplicable to a case where the instrument itself furnishes the means of interpretation.

In ambiguous contracts the domicile of the parties, the place of execution, the purpose & the various provisions & expressions of the instrument are material to be considered in the construction.

Courts of equity are not bound to adopt the opinion of the courts of law to which a case is sent for advice.—*LANSDOWNE v. LANSDOWNE* (1820), 2 Bli. 60; 4 E. R. 250, H. L.

Annotations:—*Consd.* *Noel v. Rochfort* (1836), 10

483. *Refd.* *Cope v. Cope* (1846), 15 Sim. 118;

Hartley, *Bourne v. Mahon* (1854), 2 Eq. Rep. 910.

403. — — — — — Mortgage on colonial land.]—A., resident in Amsterdam, being the owner in possession, of a plantation in British Guiana, by an instrument executed on her behalf, by her attorney in London, in the year 1817, sold the plantation, *cum annexis*, to B. for 100,000 guilders Holland currency, & £30,000 sterling; taking, as part of the consideration-money, a first mtge. on the plantation for the 100,000 guilders. By this mtge. it was stipulated that the 100,000 guilders were not to be paid during the lifetime of A.; but upon her death, to her lawful descendants, if any, & if not, to the nephews and nieces of J. B.; & it was specially provided that if at any time the interest, at the rate of 5 per cent., should not be punctually paid every year, at Amsterdam, & that if, by such default, A. should be obliged to appoint an attorney to demand the same in the colony, the interest in that case should be at the rate of 6 per cent., & a further charge of 10 per cent. for commission. A. intermarried with E., and the interest on the mtge. not having been paid as stipulated, an attorney was appointed at British Guiana, to recover the arrears. In 1828

Sect. 6.—Charges on immovables—Currency and rate of interest. Part V. Sects. 1, 2 & 3: Sub-sects. 1 & 2, A

without issue or lawful descendants, leaving E., her husband, surviving; at which time the interest on the mtge. was still in arrear. In the year 1836, C. & Co. purchased the first mtge., & all the interest therein, which the parties claiming title under the limitation in the mtge.-deed to the nephews & nieces of J. B. had. The consideration-money paid by C. & Co. was considerably less than the amount of the first mtge. & interest thereon. Upon the passing of the Act for the abolition of slavery, C. & Co. received from the Compensation Comrs., in respect of this mtge., a sum more than sufficient to repay them what they had paid for the mtge., but much less than was due upon the mtge. for principal & interest. The plantation was sold in 1838, at the suit of B., & all creditors having claims were summoned to render their claims, & upon C. & Co. claiming priority under the first mtge., the Supreme Ct. of Demerara & Essequibo held, that the second mtgee. was preferent over the first, as under the Anastasian law, which they declared prevailed in British Guiana, an assignee for a valuable consideration of a debt or chose in action, secured by debt, could not recover more than the amount of the consideration-money, actually paid to the assignor, with legal interest from the time of payment, & that the sum received by C. & Co. from the Compensation Comrs. was more than sufficient to pay off, & must be held to extinguish the whole debt upon the first mtge.:—*Held*: (1) in the absence of any fraud by C. & Co. in the purchase of the first mtge., & of any authority to show that the *lex anastasiana* prevailed in British Guiana, or could be applied to a case so circumstanced, the amount of the consideration-money given by C. & Co. was not to enter into question between them & the second mtgee.; (2) the term, in the mtge. deed, Holland currency, coupled with the fact of Amsterdam being the place mentioned for payment, meant Dutch currency, & not colonial currency; (3) the clause for varying the interest from £5 to £6 was not confined in its operation to the lifetime of A.; but that circumstances might have rendered it inequitable to increase the rate of interest after A.'s death, or during some portion of the time, after that event.—*MACRAE v. GOODMAN* (1846), 5 Moo. P. C. C. 315; 10 Jur. 555; 13 E. R. 512, P. C.

404. — Rate of interest payable—Instrument made in England—Portions out of land in Ireland.]—*PHIPPS v. ANGLESEA (EARL)*, No. 396, *ante*.

405. — — — — —.]—By a settlement made in England on the marriage of D. certain real estates in Ireland were limited to trustees for

1,000 years, upon trust by mortgaging the said estates, or out of the rents & profits thereof, to raise £15,000, to be divided among the younger children of the marriage as D. should appoint. D. appointed the whole of the portions among his children, appointing £4,000 to his daughter, to be raised at certain specified times, with interest in the meantime at 5 per cent. The trustees being unable to raise the portions by mtge., an action was brought to carry the trusts into effect:—*Held*: (1) D. having only a power of distributing the portions & not of charging them, had no power to fix the rate of interest; but that the land being in Ireland 5 per cent. was the proper rate to be fixed by the ct.; (2) under the terms of settlement the trustees of the term had right to apply the rents & profits in payment of the interest & in reduction of the capital.—*BALFOUR v. COOPER* (1883), 23 Ch. D. 472; 52 L. J. Ch. 495; 48 L. T. 323; 31 W. R. 569, C. A.

Annotation:—*Reid. Re Drax, Savile v. Drax*, [1903] 1 Ch. 781.

406. — — — — — Contract for mortgage on colonial land.]—Where a contract is made in England for a mtge. of a plantation in the West Indies, no more than legal interest shall be paid upon such mtge.—*STAPLETON v. CONWAY* (1750), 3 Atk. 727; 1 Ves. Sen. 427; 26 E. R. 1217, L. C. *Annotations*:—*Reid. Malcolm v. Martin* (1790), 3 Bro. C. C. 50; *Bourke v. Ricketts* (1804), 10 Ves. 330.

407. — — — — — In lieu of instrument made out of England—Purchase-money of colonial land secured by bond.]—14 Geo. 3, c. 79, relates solely to securities on land in Ireland & the Colonies.

A. contracted with B. for the sale of an estate in the West Indies, & it was agreed that part of the purchase-money should remain secured by the bond of B. & C. & that bond was afterwards cancelled, & another executed in England by B. & D., reserving £6 per cent. interest in the same manner as the former one:—*Held*: the bond was usurious.—*DEWAR v. SPAN* (1789), 3 Term Rep. 425; 100 E. R. 656.

Annotations:—*Expld. Re Trye, Ex p. Gullebert* (1838), 7 L. J. Boy. 25. *Reid. Jones v. Smith* (1794), 2 Ves. 372.

408. — — — — — Instrument made out of England—Portions partly out of land in England.]—*YOUNG v. WATERPARK (LORD)*, No. 400, *ante*.

Legacy—Currency in which payable.]—*See* Part VI., Sect. 2, sub-sect. 3, E., *post*.

— Rate of interest payable.]—*See* Part VI., Sect. 2, sub-sect. 3, E., *post*.

— Rate of exchange at which payable.]—*See* CONTRACT; EXECUTORS & ADMINISTRATORS; MONEY & MONEY-LENDING.

Payment of interest under contracts.]—*See* Part VII., Sect. 3, *post*.

— Rate of exchange at which payable.]—*See* CONTRACT; MONEY & MONEY-LENDING.

Part V.—Movables.

SECT. 1.—GENERAL PRINCIPLES OF JURISDICTION.

When territorial jurisdiction attaches.]—*See* No. 3, *ante*.

Title to movables—On alienation & assignment inter vivos.]—*See* Sect. 3, sub-sect. 2, *post*.

— On transmission by succession.]—*See* Part VI., Sects. 2 & 3, *post*.

Torts affecting movables.]—*See* Part VIII., *post*.

Contracts relating to movables—In general.]—*See* Part VII., *post*.

— Marriage contracts or settlements.]—*See* Part XII., *post*.

SECT. 2.—WHAT ARE MOVABLES.

See Part III., *ante*.

SECT. 3.—TITLE TO MOVABLES.

SUB-SECT. 1.—IN GENERAL.

409. Mobilia sequuntur personam.]—First, it is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not

that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession, or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession (LORD LOUGHBOROUGH, C.).—*SILL v. WORSWICK* (1791), 1 Hy. Bl. 665; 126 E. R. 379.

Annotations:—*Consd.* *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Re Queensland Mercantile & Agency Co., Ex p. Australasian Investment Co., Ex p. Union Bank of Australia*, [1891] 1 Ch. 536. *Apld.* *Re Elliott, Elliott v. Johnson* (1891), 39 W. R. 297. *Distd.* *Minna Craig S.S. Co. v. Chartered Mercantile Bank of India, London & China*, [1897] 1 Q. B. 55. *Consd.* *Dulaney v. Merry*, [1901] 1 K. B. 536. *Refd.* *Phillips v. Hunter* (1795), 2 Hy. Bl. 402; *Brickwood v. Miller* (1817), 3 Mer. 279; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Galbraith v. Grimshaw* (1910), 79 L. J. K. B. 1011. *Mentd.* *Hovil v. Browning* (1806), 7 East, 154; *Odwin v. Forbes* (1817), Buck, 57; *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; *Scott v. Bentley* (1855), 1 K. & J. 281; *Re Oriental Steam Co.* (1874), 22 W. R. 622.

410. —.]—The general rule, that *mobilia sequuntur personam*, need not be controverted, though that rule, or rather fiction, if without exception, would in some extreme cases lead to absurdity & injustice, more especially in the modern state of society, & with reference to the nature & extent in these times of personal property, particularly funded property. The rule took its rise when *mobilia*, for the most part, did accompany the person; but still recognising the rule, it is necessary to ascertain the national character of the *persona*; for it would be carrying the fiction into manifest absurdity to hold, that the person & his *mobilia* changed their character with every place which he might enter, or pass through, or move to (SIR J. NICHOLL).—*STANLEY v. BERNES*, No. 40, *ante*.

411. —.]—The law of the domicile of a testator or intestate decides whether his personal property is liable to legacy duty.

A British born subject, died domiciled in a British Colony. At his death he possessed personal property situate in Scotland. Probate of his will was taken out in Scotland, for the purpose of there administering this property: & out of the fund thus obtained legacies were paid to legatees residing in Scotland:

Held: Legacy Duty was not payable in respect of these legacies.—*THOMSON v. ADVOCATE-GENERAL* (1845), 12 Cl. & Fin. 1; 13 Sim. 153; 4 L. T. O. S. 389; 9 Jur. 217; 8 E. R. 1294, H. L.

Annotations:—*Apld.* *A.-G. v. Napier* (1851), 6 Exch. 217. *Foll.* *Wilson v. Dunsany* (1854), 18 Beav. 293. *Consd.* *Re Capdevielle* (1864), 2 H. & C. 985; *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656. *Apld.* *Wallace v. A.-G.*, *Jeyes v. Shadwell* (1865), 1 Ch. App. 1. *Distd.* *A.-G. v. Campbell* (1872), L. R. 5 H. L. 524. *Consd.* *Chatfield v. Borcholdt* (1872), 7 Ch. App. 192; *Lyall v. Lyall* (1872), L. R. 15 Eq. 1; *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Re Tootal's Trusts* (1883), 23 Ch. D. 532; *Harding v. Queensland Stamps Comrs.*, [1898] A. C. 769; *Re Manchester, Duncannon v. Manchester*, [1912] 1 Ch. 540. *Refd.* *R. v. Stamps & Taxes Comrs.* (1849), 13 Jur. 624; *Jefferys v. Boosey* (1854), 4 H. L. Cas. 819; *Re Steer* (1858), 32 L. T. O. S. 130; *A.-G. v. Kent* (1862), 1 H. & C. 12; *A.-G. v. Rowe* (1862), 1 H. & C. 31; *Re Radart's Trusts* (1870), L. R. 10 Eq. 288; *Forbes v. Steven, Mackenzie v. Forbes* (1870), 39 L. J. Ch. 485; *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400; *Smelting Co. of Australia v. I. R. Comrs.* (1896), 66 L. J. Q. B. 137; *A.-G. v. Jewish Colonization Assocn.*, [1901] 1 K. B. 123; *Lambe v. Manuel*, [1903] A. C. 68; *Winans v. A.-G.*, [1910] A. C. 27.

412. —.]—The doctrine depends upon a principle which is expressed in the Latin words; & that is the only principle of the whole of our law as to domicile when applicable to the succession of what we call personal estate. It is so, not by

any special law of England, but by the deference, which, for the sake of international comity, the law of England pays to the law of the civilised world generally. Domicil is allowed in this country to have the same influence as in other countries in determining the succession of movable estate; but the maxim of the law of the civilised world is *mobilia sequuntur personam*, & is founded on the nature of things. When "*mobilia*" are in places other than that of the person to whom they belong, their accidental situs is disregarded, & they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immovable & not movable. The doctrine is inapplicable to it (LORD SELBORNE, C.).—*FREKE v. CARBERY* (LORD), No. 448, *post*.

413. —.]—The statement that personal estate is governed by the law of its owner's domicile must be taken with material qualifications (*per cur.*).—*BLACKWOOD v. R.*, No. 457, *post*.

414. — Not applicable to caducary rights of State.]—*Re BARNETT'S TRUSTS*, No. 490, *post*.

— Application to succession of property.]—*See Part VI., Sect. 2, post*.

415. Validity of title—In general—Governed by *lex loci actus*.]—*CAMMELL v. SEWELL*, No. 1192, *post*.

416. —.]—*SIMPSON v. FOGO*, No. 382, *ante*.

417. —.]—As to personal chattels it is settled that the validity of a transfer depends, not upon the law of the domicile of the owner, but upon the law of the country in which the transfer takes place (KAY, L.J.).—*ALCOCK v. SMITH*, [1892] 1 Ch. 238; 61 L. J. Ch. 161; 66 L. T. 126; 8 T. L. R. 222; 36 Sol. Jo. 199, C. A.

Annotations:—*Foll.* *Embricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 677. *Refd.* *Dulaney v. Merry*, [1901] 1 K. B. 536.

— In particular instances.]—*See Sub-sect. 2, post*.

418. Dispute as to title—Between domiciled English parties—Movable fund in Scotland—Governed by English law.]—The law of Scotland & of England is that a pledgee may redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge.

The pledgees of a bill of lading returned it to the pledgors to obtain delivery & sell on behalf of the pledgees, & account for the proceeds towards satisfaction of the debt:—*Held*: the pledgees' security was not affected, & they were entitled to the proceeds of the cargo as against the diligence of general creditors of the pledgors.

A question between domiciled English parties as to the title to a movable fund situated in Scotland is generally a question of English law.—*NORTH WESTERN BANK v. POYNTER, SON & MACDONALDS*, [1895] A. C. 56; 64 L. J. P. C. 27; 72 L. T. 93; 11 R. 125, H. L.

Annotation:—*Distd.* *Inglis v. Robertson*, [1898] A. C. 616.

Administration of assets—On death.]—*See Part VI., Sects. 2, 3, post*.

419. Distribution of assets—Governed by *lex fori*.]—In the distribution of assets the *lex fori* prevails.—*SIMPSON v. FOGO*, No. 382, *ante*.

SUB-SECT. 2.—ON ALIENATION AND ASSIGNMENT INTER VIVOS.

A. By Operation of Law.

420. By foreign statute—Sequestration of debts due to British subjects—Assignment contrary to

Sect. 3.—Title to movables: Sub-sect. 2, A., B., C.

usage of nations.]—An ordinance was made by Denmark pending hostilities with Great Britain, whereby all ships, goods, money & money's worth, belonging to English subjects, were sequestered & detained; in consequence, a suit then pending in the Danish ct. for recovering a debt due from a Danish to a British subject was not further prosecuted, & the debt was paid by the Danish subject to commissioners appointed to receive payment, whereupon the Danish ct. quashed the suit:—*Held*: no answer to an action against the Danish subject to recover same debt in the cts. of this country, for the ordinance not being conformable to the usage of nations, was held to be void.—*WOLFF v. OXHOLM* (1817), 6 M. & S. 92; 105 E. R. 1177.

Annotations:—*Apld.* *Re Fried Krupp Act.*, [1917] 2 Ch. 188. *Consd.* *Stevenson v. Akt. für Carton-nagen Industrie*, [1918] A. C. 239. *Distd.* *Re Ferdinand (Ex-Tsar of Bulgaria)*, [1921] 1 Ch. 107. *Refd.* *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; *Porter v. Freudenberg*, *Kreglinger v. Samuel & Rosenfeld*, *Re Merton's Patents*, [1915] 1 K. B. 857; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456.

421. — Sale of business in France by French court—Effect on property in England—Effect on trade marks registered in England.]—By the French Law of Associations, 1901, the Monastery of La Grande Chartreuse was dissolved, & its property confiscated & vested in a liquidator. The monks for many years had manufactured a liqueur known as chartreuse. The business & property were sold by the liquidator to a co. which made a similar liqueur under the old name chartreuse. The liquidator procured the insertion in England, of his name as owner of certain trade marks formerly employed by the monks:—*Held*: the liquidator & his assignees were not entitled to use the word Chartreuse as descriptive of the goods made by them, & the monks were entitled to have the liquidator's name as owner of the trade marks & names expunged from the register.—*LECOUTURIER v. REY*, [1910] A. C. 262; 79 L. J. Ch. 394; 102 L. T. 293; 26 T. L. R. 368; 54 Sol. Jo. 375, II. L.

Annotations:—*Consd.* *Re Neuchatel Asphalte Co.'s Trade Mk.*, [1913] 2 Ch. 291. *Refd.* *Poirot v. Poirot & Nash* (1920), 37 R. P. C. 177; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 3 K. B. 532.

Assignment of trade marks generally.]—See TRADE MARKS, TRADE NAMES & DESIGNS.

By foreign judgment in rem—When binding.]—See Part XIV., Sect. 3, sub-sect. 2, *post*.

As regards ships.]—See SHIPPING & NAVIGATION.

On bankruptcy.]—See BANKRUPTCY & INSOLVENCY, Vol. V., pp. 667, 689–693. Nos. 5917, 6095–6101, 6106–6115.

By execution.]—See EXECUTION.

B. Of Documents of Title.

422. Foreign hypothecation bond—Covenant & directions thereunder to assign—Whether equitable assignment governed by lex loci rei sitae.]—By deed executed & registered in manner required by the law of Ceylon, estates there were mortgaged to A. & Co., to secure payment of bills of exchange which had been discounted by them &, subject thereto the same estates were, by another deed duly executed & registered, mortgaged to R., & by deed, not executed as required by the law of Ceylon, A. & Co. covenanted on payment of the bills to transfer the mtge. securities to R. The bills were paid at maturity by R., the funds being advanced by S. upon an agreement that the mtge. securities should be transferred to him, & accord-

ingly R. by letter directed the banking company to transfer the mtge. securities to S.; but afterwards R. demanded & obtained possession thereof as being the next registered incumbrancer. S. then filed a bill against A. & Co. & others, alleging that the deed of covenant & the letter of R. constituted A. & Co. trustees for him, & that in delivering the securities to R., they had committed a breach of trust:—*Held*: although the transactions would by the law of this country constitute the pltf. equitable assignee of the securities, yet as it appeared by the evidence they were insufficient for that purpose according to the law of Ceylon, the bill must be dismissed with costs as against A. & Co.—*SICHEL v. RAPHAEL* (1864), 5 New Rep. 149; 34 L. J. Ch. 106; 11 L. T. 433; 10 Jur. N. S. 1165; 13 W. R. 191, L. C.

423. Life insurance policy—Assignment of English policy to wife—Validity governed by lex domicilii of assignor.]—Pltf. sued the trustees of an English life insurance co. as assignee of a policy of life insurance granted by such co. The assignment was made in Cape Colony & at the time of assignment the assured, the assignor, was & remained till his death, domiciled there, & pltf. was his wife. By the law of that colony such an assignment was void by reason of the assignee being the wife of the assignor:—*Held*: the law of Cape Colony applied to the assignment of the policy, & therefore defts. were entitled to judgment.—*LEE v. ABDY* (1886), 17 Q. B. D. 309; 55 L. T. 297; 34 W. R. 653.

Annotations:—*Consd.* *Kelly v. Selwyn*, [1905] 2 Ch. 117. *Refd.* *Alcock v. Smith*, [1892] 1 Ch. 238; *Re Maudslay, Sons & Field*, *Maudslay v. Maudslay, Sons & Field*, [1900] 1 Ch. 602.

424. Foreign shares certificate—Pledge in England—Whether pledgee lawfully in possession governed by English law—Consequences of lawful possession governed by foreign law.]—The registered owner of shares in a New York co. held certificates which stated that the shares were transferable only on the surrender & cancellation of the certificate by an indorsement thereof. The indorsement was in the form of a transfer for value received, blank in the names of the transferor & transferee, with a power of attorney in blank to carry out the transfer. His owner's exors. obtained probate of his will, & in order that the shares might be registered in their own names signed as exors. the transfers on the back of each certificate, in blank, & sent them to their broker, who fraudulently deposited them with a bank which took them *bond fide* & without notice as security for advances. The bank retained the certificates & took no steps to obtain registration. The exors. having brought an action against the bank to establish their title to the certificates:—*Held*: since all the dealings with the certificates were transacted in England by persons domiciled there, the respective rights of the exors. and the bank must be determined by English law.

What is effectual to transfer shares in a foreign country must be decided by the laws of that country.—*COLONIAL BANK v. CADY & WILLIAMS, LONDON CHARTERED BANK OF AUSTRALIA v. CADY & WILLIAMS* (1890), 15 App. Cas. 267; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17; 6 T. L. R. 329, II. L.

Annotations:—*Consd.* *Fox v. Martin* (1895), 64 L. J. Ch. 473; *Stern v. R.*, [1896] 1 Q. B. 211; *Fry v. Smellie*, [1912] 3 K. B. 282. *Apld.* *Fuller v. Glyn, Mills, Currie*, [1914] 2 K. B. 168. *Refd.* *Simmons v. London Joint Stock Bank*, *Little v. London Joint Stock Bank*, [1891] 1 Ch. 270; *Alcock v. Smith*, [1892] 1 Ch. 238; *Venables v. Baring*, [1892] 3 Ch. 527; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120; *Schofield v. Londesborough*, [1896] A. C. 514; *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Montagu v.*

Weston, Clevedon & Portishead Light Rys. (1903), 19 T. L. R. 272.

Transfer of share certificates generally.]—See *BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS*, Vol. VI., pp. 451–453.

425. Delivery warrant—Of goods 'n Scotland—Delivery warrants pledged in England—Pledge subject to requirements of Scottish law.]—Goods were stored by G. a domiciled Englishman in a bonded warehouse in Glasgow, transferred into the name of G. as owner; & the warehouse-keeper issued to G. delivery orders showing that the goods were held to G.'s order "or assigns by indorsement hereon." G. obtained a loan from I., an English merchant, and delivered to him in England a letter of hypothecation bearing that he deposited a part of the goods with him in security, with power of sale, & G. indorsed & handed to I. the delivery warrants. I. did not intimate or give notice of the right he had acquired to the warehouse-keeper. R. & B. claiming as personal creditors of G., arrested the goods in the hands of the warehouse-keeper in order to found jurisdiction against G. in Scotland; & then raised an action against him in the Scottish ct., upon dependence of which they again arrested the goods, claiming through the arrestment a preferable right thereto:—*Held*: (1) the case was governed by the law of Scotland, & the right of the pledgee I., in the goods was defeated by the arrestment executed by R. & B., I. not having intimated his pledge to the warehouse-keeper; (2) Factors Act, 1889 (c. 45) [extended to Scotland by Factors (Scotland) Act, 1890 (c. 40)], s. 3, was merely intended to define the full effect of the pledge of the documents of title made by a mercantile agent, & had no application to the case of the pledge of the documents of title by one in the position of G. who was not a mercantile agent within the meaning of the Act; nor was G. a pledgor within s. 9 of the same Act.—*INGLIS v. ROBERTSON*, [1898] A. C. 616; 67 L. J. P. C. 108; 79 L. T. 224; 14 T. L. R. 517, H. L.

Negotiable instrument.]—See *BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS*, Vol. VI., pp. 428, 429, 431–433.

Assignability of contracts generally.]—See Part VII., Sect. 2, sub-sect. 7, *post*.

C. Of Choses in Action.

See *CHOSES IN ACTION*, Vol. VIII., pp. 476, 477, 481, 485, Nos. 459, 462, 495, 541.

D. Of Funds in Court.

426. To which foreign infant entitled—Payment to guardian—On proof that guardian's receipt valid discharge by lex domicilii.]—Upon a petition of an infant above the age of puberty, domiciled in Scotland, & C. D. her curator, praying the transfer into their joint names of a sum of stock paid into ct., to which sum the infant was entitled under a will of a testator, who died domiciled in this country:—*Held*: the stock might be transferred accordingly, upon the ct. being satisfied that the receipt of the curator was a valid discharge, according to the law of the infant's domicile.—*Re CRICHTON'S TRUST* (1855), 24 L. T. O. S. 267. *Annotation*:—*Distd. Re Chatard's Settlement*, [1899] 1 Ch. 712.

427. ——— On proof that guardian entitled to receive fund by lex domicilii.]—A fund devolving upon an infant under a settlement made according to the law of Prussia was ordered to be paid to the father as guardian, upon evidence that by the law of Prussia he was entitled in that character to receive the fund & administer it during the

infant's minority.—*Re BROWN'S TRUST* (1865), 12 L. T. 488; 13 W. R. 677.

Annotation:—*Consd. Re Chatard's Settlement*, [1899] 1 Ch. 712.

428. ——— On proof that payment out beneficial for infant.]—Where infants who were French subjects domiciled in France had become absolutely entitled to a fund in ct., & it appeared that by the law of France their father as their legal guardian was entitled to receive & give legal discharges for all moneys coming to them during minority:—*Held*: the ct. was not bound to pay out the fund to the father as of right, but that evidence ought to be adduced showing that the fund would be applied for the benefit of the infants.—*Re CHATARD'S SETTLEMENT*, [1899] 1 Ch. 712; 68 L. J. Ch. 350; 80 L. T. 645; 47 W. R. 515.

Annotation:—*Refd. Thierry v. Chalmers, Guthrie*, [1900] 1 Ch. 80.

See, generally, INFANTS & CHILDREN.

429. To which lunatic in foreign country entitled—Payment to committee—Discretion of court to order.]—Where a fund belonging to an Englishman residing abroad & found lunatic under a foreign inquisition is paid into ct. under Trustee Relief Act, 1847 (c. 96), the ct. has discretion to refuse to transfer the *corpus* to the foreign provisional committee of the estate of the lunatic, though such committee is duly constituted according to the laws of the country where the inquisition was held, & has power to sue & give valid receipts for the fund.—*Re GARNIER* (1872), L. R. 13 Eq. 532; 41 L. J. Ch. 419; 25 L. T. 928; 20 W. R. 288.

Annotations:—*Consd. Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15. *Refd. Re Brown*, [1895] 2 Ch. 666; *Re Knight*, [1898] 1 Ch. 257; *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666; *Re Sanchez De Larragoini* (1907), 96 L. T. 862.

430. ——— Payment to colonial master in lunacy—Jurisdiction of court to order.]—F., having become of unsound mind, was admitted as an insane patient into a public hospital for the insane, in New South Wales. Subsequently a fund, consisting partly of *corpus* & partly of accumulated income, to which the lunatic was entitled under the will of B., was paid into ct. in England, under Trustee Relief Act, 1847 (c. 96).

A petition was presented by the Master in Lunacy of New South Wales, & the lunatic by her next friend, asking for payment out of the fund to the master:—*Held*: the master was empowered to collect the assets of the lunatic in the colony, but no such power was given him with regard to assets in England; (2) the ct. had jurisdiction to order payment of the *corpus* to the master where such payment was shown to be necessary for the protection of the lunatic's estate, or for her maintenance, but no necessity had been shown.—*Re BARLOW'S WILL* (1887), 36 Ch. D. 287; *sub nom. Re BARLOW'S WILL TRUSTS, Re BARLOW, BARTON v. SPENCER*, 56 L. J. Ch. 795; 57 L. T. 95; 35 W. R. 737; 3 T. L. R. 695, C. A.

Annotations:—*As to* (1) *Consd. Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15. *Refd. Re Brown*, [1895] 2 Ch. 666; *Re Selot's Trust*, [1902] 1 Ch. 488. *As to* (2) *Consd. Re Brown*, [1895] 2 Ch. 666. *Distd. Re De Linden, Re Spurrier's Settlement, De Hayn v. Garland*, [1897] 1 Ch. 453. *Consd. Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15. *Expld. Re Selot's Trust*, [1902] 1 Ch. 488. *Refd. Re Chatard's Settlement*, [1899] 1 Ch. 712; *Thierry v. Chalmers, Guthrie*, [1900] 1 Ch. 80; *Re Carr's Trusts, Carr v. Carr*, [1904] 1 Ch. 792.

See, generally, LUNATICS & PERSONS OF UNSOUND MIND.

431. To which foreign married woman entitled—Payment to married woman—On proof that fund not affected by settlement.]—Where it is sought to have funds belonging to a domiciled Scottish *feme covert* paid out of ct., & a Scottish settlement

Sect. 3.—Title to movables: Sub-sect. 2, D. & E.; sub-sect. 3. Sect. 4. Part VI. Sect. 1: Sub-sects. 1 & 2, A.]

exists, the ct. requires the testimony of a Scottish advocate to show that it does not affect the fund.—*Re TODD, SHAND v. KIDD* (1854), 19 Beav. 582; 52 E. R. 476.

432. — Payment to husband—When ordered.]—Where a fund is standing in a cause to the credit of a married woman whose domicile is Scottish, the ct. will not, on petition, order it to be transferred to her husband, but will order a commission to take the consent of the wife.—*IRELAND v. TREMBATH* (1866), 13 L. T. 626; 14 W. R. 275.

See, generally, HUSBAND & WIFE.

433. Person beneficially entitled absent—Payment to judicial factor—When ordered.]—A person who has been appointed judicial factor by the Scottish ct. in respect of a dormant fund in ct. in England is not entitled as such to call for a transfer in the absence of the persons beneficially interested.—*GORDON v. SMITH* (1913), 108 L. T. 951; 57 Sol. Jo. 595.

E. Other Cases.

By bill of sale.]—See BILLS OF SALE, Vol. VII., p. 28.

By stoppage in transitu.]—See SALE OF GOODS.

434. By donatio mortis causa—Governed by law applicable to gifts inter vivos—Lex situs applicable.]—A domiciled Russian resident in London, instructed B. in the presence of other persons, in case of K.'s death, after making certain payments thereout to pass over the remnant of £1,000 then in a bank in London to the pltf. L., a Russian lady then living in Switzerland. K. further instructed B. at same interview to pass to pltf. certain Russian bonds, money, etc., left by K. in the custody of W.

in 1917 before going on a perilous voyage, with the view of providing for the pltf. in the case of K.'s death. In 1919, K. went under a serious operation & died intestate:—*Held*: (1) the gift constituted a good *donatio mortis causa* by English law; (2) the law to be applied to it was that applicable to gifts *inter vivos* & not that applicable to testamentary dispositions.—*Re KORVINE'S TRUST, LEVASHOFF v. BLOCK*, [1921] 1 Ch. 343; 90 L. J. Ch. 192; 124 L. T. 500; 65 Sol. Jo. 205.

Of ships.]—See SHIPPING & NAVIGATION.

Of trade marks.]—See TRADE MARKS, TRADE NAMES & DESIGNS.

Of patents.]—See PATENTS & INVENTIONS.

Of copyright.]—See COPYRIGHT & LITERARY PROPERTY.

435. Under 1 Will. 4, c. 60—Powers given by not applicable to foreign movables.]—PRICE v. DEWHURST, No. 383, ante.

SUB-SECT. 3.—ON TRANSMISSION BY SUCCESSION.

See Part VI., Sects. 2 & 3, post.

SECT. 4.—CURRENCY AND RATE OF INTEREST.

In what currency discharge of contracts by performance payable.]—See Part VII., Sect. 2, sub-sect. 8, post.

Rate of interest payable—As regards contracts.]—See Part VII., Sect. 3, post.

—As regards sums charged on immovables.]—See Part IV., Sect. 6, ante.

At what rate of exchange damages & interest payable.]—See CONTRACT; MONEY & MONEY LENDING.

Part VI.—Succession.

SECT. 1.—TO IMMOVABLES.

SUB-SECT. 1.—INTESTATE SUCCESSION.

436. Governed by lex loci rei sitæ.]—DRUMMOND v. DRUMMOND, No. 291, ante.

437. —.]—An alien woman held real estates in Champagne in her own right in fee simple & these estates were expressly excluded by the marriage contract from the community of goods. By the custom of Paris, which governed this contract, this estate remained during the coverture the separate property of the wife, & she could during her husband's lifetime, with his consent, have alienated them away, & have absolutely disposed of them at his death, so as to exclude her issue's right to *legitim*. The estates were confiscated by the French Revolutionary Government under the law of the French Convention against emigration, & she died in her husband's lifetime, leaving issue a son, a British subject:—*Held*: the son had neither an indefeasible, nor a contingent interest in such estates, & he was not entitled to

indemnity for their loss.—*WALL'S (COUNT DE) CASE* (1848), 6 Moo. P. C. C. 216; 13 E. R. 666; *sub nom. DE WALL'S (COUNT) CASE*, 12 Jur. 145, P. C.

438. —.]—FENTON v. LIVINGSTONE, No. 381, ante.

439. — English leaseholds.]—Leaseholds in England, belonging to a domiciled Scotsman, devolve, in case of his intestacy, upon the persons entitled according to the English Stat. Distributions.—*DUNCAN v. LAWSON* (1889), 41 Ch. D. 394; 58 L. J. Ch. 502; 60 L. T. 732; 53 J. P. 532; 37 W. R. 524; 5 T. L. R. 402.

Annotations:—*Consd. Peplin v. Bruyère*, [1902] 1 Ch. 24. *Refd. Re Stokes, Stokes v. Ducroz* (1890), 62 L. T. 176; *Re Hoyles, Row v. Jagg*, [1910] 2 Ch. 333.

Wills of English leaseholds.]—See Sub-sect. 2, B., post.

Capacity—Claimant illegitimate by lex loci rei sitæ—Legitimate by law of birth-place—Per subsequens matrimonium.]—See BASTARDY, Vol. III., p. 374, Nos. 143–145.

PART VI. SECT. 1, SUB-SECT. 1.

436 i. Governed by lex loci rei sitæ.]—Lex loci governs the devolution of immovable property in the case of intestacy.—*LAN LEUNG SHI v. LAN PO TSUN* (1911), 6 Hong Kong L. R. 149.—HONG KONG.

436 ii. —.]—Intestate, during his life & at the time of his death, was domiciled in K.; among his effects were municipal bonds & immovable property in C.:—*Held*: the law of C.

must govern the succession.—*BAKER'S ESTATE v. BAKER'S ESTATE* (1908), 25 S. C. 234.—S. AF.

h. — In absence of grant of administration by court of domicile.]—*Re MIKKELSON* (1908), 1 Sask. L. R. 513; 9 W. L. R. 608.—CAN.

439 i. — Chinese leaseholds.]—Leaseholds being "immovables" descend according to the law of the place where they are situated.—*LAN LEUNG*

***SHI v. LAN PO TSUN* (1911), 6 Hong Kong L. R. 149.—HONG KONG.**

439 ii. —.]—*Ho Tsz Tsun v. Ho An Shi* (1915), 10 Hong Kong L. R. 69.—HONG KONG.

439 iii. — Irish leaseholds.]—Succession to chattels real depends on the law of the country wherein they are situate, & not on that of deceased's domicile.—*In the Goods of GENTILI* (1875), 9 I. R. Eq. 541.—IR.

SUB-SECT. 2.—WILLS OF IMMOVABLES.

A. In General.

440. Lex loci rei sitæ governs—Will of English realty made abroad—Unaffected by foreign probate.]—If a will of land in England made in France be proved there, the probate does not affect the will because probate is not of materiality in the case of land. But if the will be of personalty in England, the will would have to be proved here.—*LEE, MOORE & ROBLIN'S CASE* (1621), Palm. 163; 81 E. R. 1028.

441. — Formal validity—Will of English realty made abroad—Attestation of.]—Wills made beyond the sea of lands in England must be attested by three witnesses as required by Stat. Frauds.—*COPPIN v. COPPIN* (1725), 2 P. Wms. 291; *Cas. temp. King*, 28; 24 E. R. 735, 1. C.

Annotations:—Mentd. *Mackreth v. Symmons* (1808), 15 Ves. 329; *Selby v. Selby* (1828), 4 Russ. 336; *Sproule v. Prior* (1836), 8 Sim. 189; *Courtenay v. Williams* (1844), 3 Hare, 539; *Philips v. Philips* (1844), 3 Hare, 281; *Turner v. Martin* (1857), 7 De G. M. & G. 429.

442. — Attestation on sealed envelope enclosing will.]—An Englishman who had acquired a domicile in Chile executed a closed or secret will according to the Chilean Civil Code before a notary public & five witnesses. By that code a closed will was deemed to include the cover which contained it, & that cover was the only document on which the names of the testator, the five witnesses, & the notary were signed together, the will itself being signed by the testator alone. This closed will, with the cover thus indorsed, was proved or registered in Chile, & letters of administration with the will, including the cover, annexed, were granted to pltf. in England, where the testator possessed real property:—*Held*: the indorsement on the envelope & the document therein enclosed constituted one testamentary disposition, & the testator had executed a will capable of passing his real estate in England.—*Re NICHOLLS, HUNTER v. NICHOLLS*, [1921] 2 Ch. 11; 90 L. J. Ch. 379; 125 L. T. 55; 65 Sol. Jo. 533.

443. Construction—Devise of “rents, issues & profits” of West Indies estate—What included in.]—Testator, resident in Jamaica, devised the rents, issues & profits of his estate in that island, to A.:—*Held*: the estate & the slaves, mules, cattle & machinery thereon passed under this devise.—*STEWART v. GARNETT* (1830), 3 Sim. 398; 57 E. R. 1047.

Annotations:—Distd. *Turner v. Barclay* (1854), 9 Moo. P. C. C. 264. *Reid.* *Fenton or Livingstone v. Livingstone* (1856), 27 L. T. O. S. 18. *Mentd.* *Silvey v. Howard* (1837), 6 Ad. & El. 253.

Construction of wills generally, *see* WILLS.

444. — Incidents of estate created—Scottish will of English & Scottish realty—Effect as to

Scottish heritage.]—Where a testator in a foreign will expresses himself in technical language of the place where made & where he is domiciled, to obtain the intention the technical terms must be interpreted by the meaning put on them in the system of law from which they are borrowed.

(2) By the common law of Scotland the actual intention of the maker of any validly executed settlement of movables received effect when duly ascertained, & now by Titles to Land Consolidation (Scotland) Act, 1868, c. 101, the Scottish law, which would previously have rejected as inoperative a foreign will dealing with Scottish lands not executed with all the required formalities, & not expressed in appropriate terms of *de presenti* conveyance, must, so far as may be practicable with the principles of that law, give effect to the intention as expressed in the will, just the same as if it dealt with movables & not heritage.

(3) The technical rule of Scottish law applicable to movable & immovable property, that a gift or devise to a parent in life-rent, & after his death to his unborn or unnamed children in fee, confers a fee on the parent & a *spes successionis* only on the children is excluded by anything in the gift itself, showing beyond doubt that the intention was to give nothing more than a life interest to the parent.

(4) A testator, domiciled in England, who died possessed of lands in England & Scotland, left a will executed according to the forms of English law, by which he devised all such of his lands as consisted of freehold of inheritance to the use of his eldest son, E., & his assigns for his life without impeachment of waste, & after the death of E. to the use of the first & every other son of E., successively, according to their respective seniorities in tail male, with remainders over. Under a subsequent clause E. took as residuary legatee all property not otherwise disposed of. Subsequent to the date of the will children were born to E. He claimed the Scottish estate as vested in him absolutely, or alternatively that the estate belonged to him as residuary legatee or as heir-at-law. This claim was opposed on behalf of his infant children:—*Held*: (1) under the above Act the law of Scotland must, so far as practicable, give effect to the intention of the testator, as gathered from the whole context interpreted by English law; (2) undoubtedly the intention of the testator was that E. should take a life interest only, & that the fee of the Scottish estates should go to the eldest son of E., & the others nominated; (3) the intention as to the separate destination of the life-rent & fee of the estate, could be carried out substantially without inconsistency with the practice or policy of the law of Scotland, the rule being *valcat quantum valere potest*; (4) a registrable title fell to

PART VI. SECT. 1, SUB-SECT. 2.—A.

440 i. Lex loci rei sitæ governs—Will of Canadian property made abroad.]—Testator's domicile was in U.S., which was his domicile at the time of his death; he devised real property in C.:—*Held*: the will with respect to such land must be construed according to C. law.—*McCONNELL v. McCONNELL* (1889), 18 O. R. 36.—CAN.

440 ii. — Devise of land in Jamaica made in England.]—*ROBERTSON v. ROBERTSON* (1812), Hume, 262, n.—SCOT.

441 i. — Formal validity.]—The validity of a will of immovables is determined by the laws of the place where the property is situate.—*Re MILLAR'S ESTATE*, [1918] 1 W. W. R. 87; 11 Sask. L. R. 76.—CAN.

441 ii. — .]—*MACALISTER'S EXECUTORS v. MACALISTER'S TRUSTEES*

(1834), 13 Sh. (Ct. of Sess.) 171.—SCOT.

441 iii. — Will of realty made abroad—Attestation of.]—Testatrix, domiciled in T., & owning immovable property there, had executed a will in C. which had been attested insufficiently according to the requirements of C., but sufficiently according to the law of T.:—*Held*: the law of T. governed.—*Re ELIAHOF'S ESTATE*, [1903] T. S. 833.—S. AF.

j. — Construction.]—Testator owned lands in E. & O. in fee, & devised them to his wife for life, & after her decease devised them unto his “right heirs for ever”:—*Held*: (1) C.S.U.C. c. 82, did not apply, & the eldest son took the estates in O. as in E.; (2) even if the Act did apply, the common law heir was the party to take the estates under the words of this devise.—*TYLKE v. DEAL* (1878), 10 Gr. 601.—CAN.

444 i. — Incidents of estate created—English will of Scottish realty—Effect.]—An English will containing a conveyance of Scottish heritage:—*Held*: a valid conveyance thereof under 31 & 32 Vict. c. 101, s. 20, the deed having been duly executed as a testamentary writing, although prior to the Act it would not have been received as a probative deed by the law of S.—*CONNEL'S TRUSTEES v. CONNELL* (1872), 10 Macph. (Ct. of Sess.) 627.—SCOT.

k. Law of testator's domicile governs.]—A domiciled Scotsman who possessed heritable property in N.Z. executed there a will, which was drawn according to the law of N.Z.:—*Held*: The will must be construed & his testamentary succession regulated by S. law, as the law of testator's domicile.—*SMITH v. SMITH* (1891), 18 R. (Ct. of Sess.) 1036; 28 So. L. R. 956.—SCOT.

leaseholds passed to the person pointed out in the will as the donee of that interest, provided the bequest did not infringe the law of England, *e.g.*, that relating to accumulations or perpetuity.—*Re GRASSI, STUBBERFIELD v. GRASSI*, [1905] 1 Ch. 584; 74 L. J. Ch. 341; 92 L. T. 455; 53 W. R. 396; 21 T. L. R. 343; 49 Sol. Jo. 366.

Annotation.—*Consd. Re Lyne's Settlement. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

450. ———.—(1) Leaseholds situated in England are personal estate, but are not movables, & the disposition of them by will is governed by English law.

(2) A domiciled Scotsman made a will disposing of, *inter alia*, certain leasehold property in England, which disposition was, however, revoked by his marriage. A codicil was subsequently made referring to the will:—*Held*: it revived the will so far as it dealt with the leasehold property.—*Re CAITHNESS (EARL)* (1891), 7 T. L. R. 354.

451. ———.—Will not attested as required by English law—Effect of grant of letters of administration.—*PEPIN v. BRUYÈRE*, No. 299, *ante*.

By British subjects—Wills Act, 1861 (c. 114).—*See* Sect. 2, sub-sect. 3, C., *post*.

Succession to English leaseholds on intestacy.—*See* No. 439, *ante*.

452. Will of foreign leaseholds.—Governed by *lex loci rei sitæ*—Not by *lex domicilii*.—Testator domiciled in England made an English will by which he gave, devised & bequeathed all his real & personal estate both in England & South Africa to his wife for her widowhood with remainders over. The property included long leaseholds in the Transvaal, where the Roman-Dutch law prevailed:—*Held*: the Roman-Dutch law, as stated in an uncontested opinion of an ex-Chief Justice of the Transvaal, was applicable to the Transvaal leaseholds, & the widow was consequently entitled to them *in specie*.—*Re MOSES, MOSES v. VALENTINE*, [1908] 2 Ch. 235; 77 L. J. Ch. 783; 99 L. T. 519.

SECT. 2.—TO MOVABLES.

SUB-SECT. 1.—IN GENERAL.

A. By what Law governed.

453. By *lex domicilii*.—(1) Succession of movable effects situated in a foreign country, whether testate or intestate, are regulated by the *lex domicilii*.

(2) Succession to personal effects must be regulated by the *lex domicilii*.

PART VI. SECT. 2, SUB-SECT. 1.—A.

453 i. By *lex domicilii*.—Where a testator bequeaths notional personalty situated in N.S.W. to persons domiciled & resident in the same foreign country, the rights of those persons *inter se* to the property are regulated by the law of that domicile.—*Re LEE HING'S WILL* (1901), 1 S. R. N. S. W. 199; 18 N. S. W. N. 239.—AUS.

453 ii. ———.—A will having directed the whole estate to be converted into personalty, legatees domiciled without O. could not be affected by any statute of O.; the locality of all rights to movable property being at the domicile of the person entitled to it.—*Re GOODHUE* (1872), 19 Gr. 366.—CAN.

453 iii. ———.—An English will of movables by a testator domiciled in L. C. must be interpreted with regard to the law of L. C., & not that of E.—*McGIBBON v. ABBOTT* (1885), 10 App. Cas. 653, P. C.—CAN.

453 iv. ———.—In the succession of movables *lex domicilii* prevails.—*LASHLEY v. MORELAND* (1809), 15 Fac. Coll. 465, H. L.—SCOT.

453 v. ———.—The character of funds situated in a foreign country as heritable or movable is to be determined by the law of that country; accordingly, bonds bearing interest in the island of Jamaica & falling by succession to a married woman in S., being by the law of J. movable, become part of the goods in communion & the husband on the wife's death is entitled to one half thereof.—*NEWLANDS v. CHALMERS' TRUSTEES* (1832), 11 Sh. (Ct. of Sess.) 65.—SCOT.

453 vi. ———.—*MACPHERSON v. TYTLER* (1850), 12 Dunl. (Ct. of Sess.) 486; 22 Sc. Jur. 103.—SCOT.

453 vii. ———.—Where a person dies domiciled in S., having money in British stocks, the right of succession depends on the law of S.—*CRAIGIE v.*

(3) The domicile of the deceased father being in Scotland, the right of *legitim* extends to personal effects in England or elsewhere, as well as in Scotland.—*HOG v. HOG* (1792), 2 Coop. temp. Cott. 497; 47 E. R. 1269; *sub nom.* *HOG v. LASHLEY*, 6 Bro. Parl. Cas. 577, H. L.

Annotations.—*As to* (1) *Refd.* *Lashley v. Hog* (1804), 2 Coop. temp. Cott. 449; *Price v. Dewhurst* (1837), 8 Slm. 279. *Generally, Mntd.* *Thorold v. Thorold* (1809), 1 Phillim. 1.

454. ———.—(1) A. & his wife, who were by birth British subjects but were afterwards domiciled at St. C., belonging to Denmark, returned to England, & there made a joint will, disposing of a mtge. at St. C., which belonged to them jointly. They afterwards made separate wills, which were proved in the Prerogative Ct. of Canterbury. After the death of the survivor, certain proceedings were instituted at St. C., by the exors., named in the joint will, & a judgment was obtained for the establishment of that will:—*Held*: the ct. at St. C. had no authority to decide as between the contending parties, & the exor. of the joint will, having come over to this country, was held liable to account to the parties beneficially interested under the separate wills for the assets of A. received at St. C.

(2) The law of the country in which a deceased party was domiciled at his death, both decides the right of succession as to his personal estate, & also regulates the decision as to what constitutes his last will.—*PRICE v. DEWHURST* (1838), 4 My. & Cr. 76; 8 L. J. Ch. 57; 2 Jur. 1006; 41 E. R. 30, L. C.

Annotations.—*As to* (1) *Refd.* *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 341. *As to* (2) *Consd.* *Laneville v. Anderson* (1860), 2 Sw. & Tr. 21. *Refd.* *Whyte v. Rose* (1842), 3 Q. B. 493; *Pemberton v. Hughes*, [1899] 1 Ch. 781.

455. ———.—(1) The persons named as trustees & exors. in the will of a domiciled Scotchman having declined to act, his next of kin obtained letters of administration of his personal estate in England from the proper Ecclesiastical Ct. there, & afterwards consented to the appointment by the Ct. of Session in Scotland of other persons as trustees & exors. in place of those named in the will with all the powers that had been thereby given to them. These trustees so appointed raised an action in the Ct. of Session against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, & offering her a full release from liability:—*Held*: the personal estate in England must be administered there by the administratrix, by virtue of the letters of administration.

(2) The law of the domicile of a deceased person governs the succession to his personal estate,

GARDINER (1817), 19 Fac. Coll. 346.—SCOT.

453 viii. ———.—A husband & wife were married in S. & afterwards removed to E. The wife afterwards returned to S. & died there, but the domicile of the parties at the dissolution of the marriage was in E. At the date of the marriage, the wife possessed a heritable bond, which she afterwards uplifted, & deposited the price in a S. bank in her own name. The wife having left a trust settlement, & the sum in the bank being claimed by her trustees, on the ground that it was a *surrogatum* for the heritable bond, & also by the surviving husband, as falling under the *jus mariti*:—*Held*: the parties having been domiciled in E. at the dissolution of the marriage, the question of right to the property must be regulated by the law of E.—*HALL'S TRUSTEES v. HALL* (1854), 16 Dunl. (Ct. of Sess.) 1037; 26 Sc. Jur. 570.—SCOT.

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wherever situated; but the estate itself must be administered in the country in which possession is taken of it under lawful authority.

(3) The cts. in Scotland have no power to appoint persons to administer personal property in England, that power being exclusively vested in the English Ecclesiastical Cts., & of that the Scottish cts. are bound to take notice.—*PRESTON v. MELVILLE* (1841), 8 Cl. & Fin. 1; 8 E. R. 1, L. C.; *subsequent proceedings* (1845), 15 Sim. 35.

Annotations:—As to (1) Consd. Carron Iron Co. v. MacLaren (1855), 5 H. L. Cas. 416. *Distd. Ewing v. Orr Ewing* (1883), 9 App. Cas. 34. *Refd. Stirling-Maxwell v. Cartwright* (1879), 11 Ch. D. 522; *Re Kloebe, Kannreuther v. Geiselbrecht* (1884), 28 Ch. D. 175. *As to (2) Consd. Enohin v. Wylie* (1862), 10 H. L. Cas. 1. *Refd. Blackwood v. R.* (1882), 8 App. Cas. 82; *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453.

456. —.]—The law of the domicile of a testator governs questions of testacy & intestacy, of the construction of the will & of the rights of those who claim to be next of kin.

Where, therefore, a will is made by an Englishman, who dies domiciled abroad, & the foreign court has granted probate of the will, it becomes the duty of the English Ct. of Probate (some of his personal property being situated in this country) to grant ancillary probate to the foreign exors. It has no right to constitute itself a court of construction.

The Ch. Ct., in like manner, is not entitled to entertain an administration suit founded on a question relating to the construction of the will, & the foreign executors may properly accept its jurisdiction.

But parties thus entitled to insist on the authority of the ct. of the domicile, may by their conduct give to the English ct. authority & jurisdiction to construe the will, & administer the estate, so far as funds & persons in this country are concerned.—*ENOHIN v. WYLIE* (1862), 10 H. L. Cas. 1; 31 L. J. Ch. 402; 2 L. T. 263; 8 Jur. N. S. 897; 10 W. R. 467; 11 E. R. 924, H. L.

Annotations:—Folld. Crispin v. Doglioni (1863), 3 Sw. & Tr. 96. *Consd. Miller v. James* (1872), L. R. 3 P. & D. 4; *King v. George* (1876), 4 Ch. D. 435; *Stirling-Maxwell v. Cartwright* (1879), 11 Ch. D. 522. *Folld. Eames v. Hacon* (1880), 16 Ch. D. 407. *Apld. Bloxam v. Favre* (1883), 8 P. D. 101. *Consd. Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; *Concha v. Concha* (1886), 11 App. Cas. 541; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431; *Re Artola Hermanos, Ex p. André Châle* (1890), 24 Q. B. D. 640. *Refd. In the Goods of Earl* (1867), L. R. 1 P. & D. 450; *Travers v. Blundell* (1877), 6 Ch. D. 436; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Re Kloebe, Kannreuther v. Geiselbrecht* (1884), 54 L. J. Ch. 297; *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453; *Re Bonnefol, Surrey v. Perrin*, [1912] P. 233.

457. —.]—(1) Foreign personal assets are governed by the *lex domicilii* of deceased owner for the purpose of succession & enjoyment. For the purpose of legal representation, of collection, & administration, as distinguished from distribution among the successors, they are governed by the *lex loci*.

(2) The above rule subject to qualifications (see No. 413, ante).—*BLACKWOOD v. R.* (1882), 8 App. Cas. 82; 52 L. J. P. C. 10; 48 L. T. 441; 31 W. R. 645, P. C.

Annotations:—As to (1) Consd. Re Kloebe, Kannreuther v. Geiselbrecht (1884), 28 Ch. D. 175. *Folld. Stamps Comrs. v. Hope*, [1891] A. C. 476; *Honty v. R.*, [1896] A. C. 567; *Woodruff v. A.-G. for Ontario*, [1908] A. C. 508; *R. v. Lovitt*, [1912] A. C. 212. *Consd. Re Scull, Scott v. Morris* (1917), 87 L. J. Ch. 59. *Refd. Re Maudslay Sons & Field* (1900), 82 L. T. 378; *Winans v. A.-G.*, [1910] A. C. 27; *Re Manchester, Duncannon v. Manchester*, [1912] 1 Ch. 540.

458. — At death of testator.]—The succes-

sion to property in England of a deceased foreigner is regulated by the law of his place of domicile as it existed at the time of his death.

A domiciled Paraguayan died in Paraguay leaving personal property in England. After his death, but before a grant was made in England, a decree of the Govt. of Paraguay declared that all the property of deceased, wheresoever situate was the property of the nation of Paraguay:—*Held*: although by the law of Paraguay as existing at the time when a grant of probate of deceased's will was applied for the will might be invalid, the right to the grant & the succession to the property must be governed by the law of Paraguay as it existed at the time of the death, & the Govt. of Paraguay had no *locus standi* to contest the validity of the will.—*LYNCH v. PARAGUAY PROVISIONAL GOVERNMENT* (1871), L. R. 2 P. & D. 268; 40 L. J. P. & M. 81; 25 L. T. 164; 35 J. P. 761; 19 W. R. 982.

Annotations:—Consd. Blyth v. Whiffen (1872), 27 L. T. 330. *Apld. Re Aganoor's Trusts* (1895), 64 L. J. Ch. 521.

459. —.]—In the administration of the personal estate of a person dying domiciled abroad, the ct. applies the law of the place of domicile as it stood at the time of the death of the deceased person, & does not take any account of any subsequent change, though retrospective, which the legislature of the foreign country may make in that law.—*Re AGANOR'S TRUSTS* (1895), 64 L. J. Ch. 521; 13 R. 677.

460. — Ascertainment of domicile—Decree of Probate Court.]—A native of Chili made his will in London & died. A caveat having been entered on behalf of his daughter, the exors. propounded the will in solemn form, alleging that testator was domiciled in England. The daughter pleaded that deceased was at the date of the will & until his death domiciled in Chili, & that the will was not duly executed according to the law of Chili. Upon this plea, *inter alia*, the exors. took issue. The judge of the Probate Ct. made a decree by which he pronounced for the validity of the will, found that deceased was at the date of the will & at his death a domiciled Englishman, & decreed probate to the exors. The daughter afterwards filed a bill against the exors., alleging that testator was a domiciled Chilean, that his will, being executed in England according to English law, was good by the law of Chili, but so far only as testator could by the law of Chili dispose by will of one-fourth of his personal estate, & that the other three-fourths belonged to the daughter. The exors. by answer set up the decree of the Probate Ct. as a bar. An order having been made for inquiry as to testator's domicile in an administration suit under circumstances which, it was contended, made it equivalent to an order in the suit by the daughter against the exors., the question whether the order was right was litigated between the daughter & the residuary legatee:—*Held*: (1) the decree of the Probate Ct. was not conclusive *in rem* as to the domicile, because the finding as to the domicile was not necessary to the decree; (2) for the same reason the decree of the Probate Ct. was not conclusive *inter partes* as to the domicile as between the daughter & the residuary legatee, for the exors. could not, by litigating in the Probate suit a question of domicile, which it was not necessary to decide for the purposes of that suit, conclude the residuary legatee as to testator's power of disposing of his property, & as the residuary legatee was not bound, the daughter could not be bound, since estoppel must be mutual.—*CONCHA v. CONCHA* (1886), 11 App. Cas. 541; 56 L. J. Ch. 257; 55 L. T. 522; 35 W. R. 477, H. L.

Annotations :—As to (1) *Refd.* The Parisian (1887), 13 P. D. 16; *Re De Nicols, De Nicols v. Curlier* (1898), 67 L. J. Ch. 419. As to (2) *Consd.* *Re Allsop & Joy's Contract* (1889), 61 L. T. 213; *Worman v. Worman* (1889), 43 Ch. D. 296. *Refd.* *Mirza Kurratullah Bahadur v. Peara Sahab* (1905), 21 T. L. R. 650. *Generally, Mentd.* *Strauss v. Goldschmidt* (1892), 6 T. L. R. 239; *Re Larard, Ex p. Yeomans & Heap* (1896), 3 Mans. 317.

Domicil generally, *see* Part II., *ante*.

Law governing intestate succession.]—*See* Sub-sect. 2, *post*.

When territorial jurisdiction attaches.]—*See* No. 3, *ante*.

B. How Law ascertained.

461. Where court of domicil has pronounced—How far decision binding on English Court.]—The law of the domicil of a deceased person governs the succession to his personal property.

Where, therefore, in a foreign ct., upon the death of a person domiciled in the country where that ct. had jurisdiction, C. claimed to be the natural son of H., deceased, & as such natural son to be entitled by the law of that country to inherit his father's property, & alleged that his father was of a particular station in society (a circumstance which allowed of such a claim by a natural son), & that the father had died domiciled in the country, & had died intestate, & the foreign ct. found all these allegations in his favour:—*Held*: the Probate Ct. in this country was bound by the judgment of the foreign ct., & had, therefore, rightly admitted C. to be heard as contradictor to a will set up in this country as having been made by H., disposing of his personal property here.—*DOGLIONI v. CRISPIN* (1866), L. R. 1 H. L. 301; 35 L. J. P. & M. 129; 15 L. T. 44, H. L.; *affg.* S. C. *sub nom.* *CRISPIN v. DOGLIONI* (1863), 3 Sw. & Tr. 96.

Annotations :—*Apld.* *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600. *Consd.* *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Re Martin, Loustalan v. Loustalan*, [1900] P. 211. *Mentd.* *R. v. Marylebone* (1863), 27 J. P. 423.

462. ——— Jurisdiction of court to impugn validity.]—If the will of a deceased has been formally recognised & acted upon by the ct. of competent jurisdiction in the country of his domicil & at the time of death, & remains unquestioned in that country, the Ct. of Probate will not allow the validity of such will to be litigated here.—*MILLER v. JAMES* (1872), L. R. 3 P. & D. 4; 42 L. J. P. & M. 21; 27 L. T. 862; 37 J. P. 488; 21 W. R. 272.

463. ——— Though judgment by default—& all parties not before foreign court.]—Although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which he was domiciled, & although the cts. of this country may be called upon to administer the estate of a deceased person domiciled abroad, & may in such a case be bound to ascertain as best they can who according to the law of the domicil are entitled to the estate, yet where the title has been adjudicated upon by the cts. of the domicil, such adjudication is binding upon, & must be followed by, the cts. of this country, even if the judgment of the foreign ct. has by the default of the party complaining of the judgment proceeded on a mistake as to the English law, or the whole of the facts were not before the foreign tribunal; for the cts. of this country do not sit to hear appeals from foreign tribunals, & if the decision of the foreign tribunal is wrong, recourse must be had to the mode of appeal provided in the foreign country. A testator

who was by birth a British subject, & was the father of pltf., went to reside in Switzerland, & in 1842 acquired the "Landrecht" or "Indigenat" in the canton of Zurich, without being required to renounce his English nationality, which in the then state of English law he could not have effectually done; & he thereby became of Swiss nationality. With the sanction of the cantonal authorities he could have relinquished this "Landrecht" or "Indigenat," but he never effectually did so, although he afterwards left Switzerland & went to reside in France, where he died with a French domicil in the year 1878:—*Held*: (1) Naturalisation Act, 1870 (c. 14), s. 6, applied to testator; at the time of his death he was a Swiss, & not a British subject; & having regard to the French law, under which the Swiss tribunals were the proper *forum*, the cts. of Zurich had jurisdiction to decide upon the right of succession to his personal estate; (2) notwithstanding an attempted disposition by testator of the whole of his personal estate in favour of a stranger, pltf. was, in accordance with a judgment of the cts. of Zurich, entitled as testator's only child to nine-tenths of such estate as his compulsory portion.—*Re TRUFORT, TRAFFORD v. BLANC* (1887), 36 Ch. D. 600; 57 L. J. Ch. 135; 57 L. T. 674; 36 W. R. 163; 3 T. L. R. 798.

Annotations :—As to (1) *Consd.* *Re Bonnefoi, Surrey v. Perrin*, [1912] P. 233. *Refd.* *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Re Martin, Loustalan v. Loustalan*, [1900] P. 211.

— — — Extent to which English Probate Court follows foreign grant.]—*See* Sub-sect. 4, A. (b), *post*.

Conclusiveness of foreign judgments generally, *see* Part XIV., Sect. 3, *post*.

464. Where lex domicilii applies other law—Law of country of origin—Testator domiciled in Belgium.]—*COLLIER v. RIVAZ*, No. 594, *post*.

465. ——— Testator domiciled in France—British subject having acquired Swiss nationality.]—*Re TRUFORT, TRAFFORD v. BLANC*, No. 463, *ante*.

466. ——— Intestate domiciled in Syria.]—This was a question as to who was entitled to the personal estate of a British subject who died intestate domiciled in Syria at the time of her death. The intestate, a widow, left two children & the children of a deceased child. There was no doubt that the law of the domicil applied to personalty, & the only difficulty was to ascertain what that law was:—*Held*: if the lady had been a subject of the Ottoman Empire, the Turkish or Syrian law of succession would have applied, & the surviving children would have taken to the exclusion of the grandchildren, but part of the Syrian law was to leave the succession to the personal estate of British subjects to be governed by British law; the succession was, therefore, relegated back to the English law, & the grandchildren took the share that their deceased parent would have taken.—*Re CHURCHILL (DECEASED), LEWIS v. CHURCHILL* (1892), 36 Sol. Jo. 731.

467. ——— Law of country where will executed.]—*LANEUVILLE v. ANDERSON*, No. 571, *post*.

SUB-SECT. 2.—INTESTATE SUCCESSION.

468. Governed by lex domicilii.]—The personal estate of an intestate is distributable according to the laws of the country where he was resident at

PART VI. SECT. 2, SUB-SECT. 2.

468 i. Governed by lex domicilii.]—S., whose domicil of origin was N.S.W., died intestate in New Caledonia. According to English law he was domiciled in New Caledonia; but,

according to F. law, he was not *de jure* so domiciled as he had never obtained the permission of F. Govt. to live there. Under F. law deceased's movables would be distributed according to the law of his nationality:—*Held*: his movable property was

distributable according to law of N. S. W.—*SIMMONS v. SIMMONS* (1917), 17 S. R. N. S. W. 419; 34 N. S. W. W. N. 174.—AUS.

468 ii. ———.]—A party domiciled in S. died possessed of movable

Secl. 2.—To movables: Sub-sects. 2 & 3, A.]

the time of his death.—*PIPON v. PIPON* (1741), Amb. 25, 799; 9 Mod. Rep. 431; 27 E. R. 14, 507; *sub nom. PIPPON v. PIPPON*, Ridg. temp. H. 165, L. C.

Annotations:—Consd. Sill v. Worswick (1791), 1 Hy. Bl. 685; *Re Orr Ewing*, Orr Ewing v. Orr Ewing (1882), 22 Ch. D. 456. *Refd.* Thorne v. Watkins (1750), 2 Ves. Sen. 35; Burn v. Cole (1762), Amb. 415; Phillips v. Hunter (1795), 2 Hy. Bl. 402; Price v. Dewhurst (1837), Donnelly, 264; Scott v. Bentley (1855), 3 Eq. Rep. 428.

469. —. —.]—One dies intestate, having personal property in England & abroad. Distribution must be according to the law of that country where he was resident when he died.—*BURN v. COLE* (1762), Amb. 415; 27 E. R. 277.

Annotation:—Refd. Price v. Dewhurst (1837), 8 Sim. 279.

470. —. —.]—*HOG v. HOG*, No. 453, *ante*.

471. —. —.]—**Unaffected by doctrine of hotchpot under lex situs.**—If a Scotsman dies intestate, having his domicile in England, his whole personal estate as well in Scotland as England shall be distributed according to the law of England, & an heir of entail to whom his heritable or real estate in Scotland descends shall not be obliged to collate, or bring into hotchpot, such heritable estate, inasmuch as the title of the heir to a share of the intestate's personal estate accrues by the law of England.—*BALFOUR v. SCOTT* (1793), 6 Bro. Parl. Cas. 550; 2 E. R. 1259, II. L.

Annotations:—Consd. Brodie v. Barry (1813), 2 Ves. & B. 127. *Refd.* Price v. Dewhurst (1837), Donnelly, 264; Anderson v. Laneuvillo (1854), 2 Ecc. & Ad. 41.

472. —. —.]—*BEMPDE v. JOHNSTONE*, No. 80, *ante*.

473. —. —.]—*SOMERVILLE v. SOMERVILLE* (LORD), No. 20, *ante*.

474. —. —.]—**British subject dying in British Empire.**—(1) The succession to the personal estate of a British subject dying domiciled in any part of the British Empire intestate is to be regulated by the law of that part of the British Empire which was his domicile at the time of his death.

Qu.: whether a British subject can so far *exuere patriam* as to render his property here liable to distribution according to any foreign law, even in case of his intestacy. Though admitting this to be, it would by no means follow that his will, to be valid here, must conform to that foreign law, either upon principle or upon authority.

(2) The rule, that, where property is to be distributed under a certain law in case of intestacy, it must be so distributed in the absence of a will valid by that law, only applies to cases in which, there being no conflict of domicils, the law by which the case must be governed, whether ultimately to be deemed a case of testacy, or one of intestacy, admits of no question.—*CURLING v. THORNTON* (1823), 2 Add. 6; 162 E. R. 198;

property in E., leaving a son & a married daughter domiciled in S. The son obtained letters of administration, but neither the daughter nor her husband obtained confirmation, or took any step during her life to get possession of her share of the stock as one of the next-of-kin:—*Held*: (1) according to the law of E. the daughter immediately on the death of her parent acquired a vested interest in her share; (2) being so vested it was according to the law of S. transmitted to & vested in the husband "*jus mariti*."—*EGERTON v. FORBES* (1812), 17 Fac. Coll. 17; Buchan. 362.—*SCOT*.

468 iii. —. —.]—A woman domiciled in S. having died possessed of funds in E., & being succeeded by her children resident in S., who died without

having obtained confirmation:—*Held*: the funds were vested in them, *ipso jure*, according to the law of E., so as to be transmissible to their exors., in preference to the nearest of kin of their mother.—*MILLIGAN v. MILLIGAN* (1826), 4 Sh. (Ct. of Sess.) 432; 1 Fac. Coll. 340.—*SCOT*.

468 iv. —. —.]—*MURRAY v. ROTNES* (EARL) (1836), 14 Sh. (Ct. of Sess.) 1049; 11 Fac. Coll. 871.—*SCOT*.

468 v. —. —.]—The mother of an Englishman who has died intestate, being his next-of-kin by the law of that country, & having obtained letters of administration there as such, is entitled to be confirmed in S. as executrix dative to her son.—*HASTINGS (MARCHIONESS) v. HASTINGS* (MAR-

proceedings, sub nom. THORNTON v. CURLING (1824), 8 Sim. 310.

Annotations:—Refd. Price v. Dewhurst (1838), 4 My. & Cr. 76; Craigie v. Lewin (1843), 3 Curt. 435; Ferraris v. Hertford (1843), 7 Jur. 262.

475. —. —.]—*MOORE v. BUDD*, No. 127, *ante*.

476. —. —.]—*CRAIGIE v. LEWIN*, No. 41, *ante*.

477. —. —.]—A spinster, born in England & residing there until the age of 21, proceeded three years before her death to Scotland to reside permanently with her father, who had deserted her seven years before & settled there, & she continued to reside in Scotland until her death, dying intestate:—*Held*: administration of her effects must be governed by the law of Scotland.—*In the Goods of GRIFFITH* (1847), 5 Notes of Cases, 144.

478. —. —.]—*ENOHIN v. WYLIE*, No. 456, *ante*.

479. —. —.]—*DOGLIONI v. CRISPIN*, No. 461, *ante*.

480. —. —.]—**De facto domicile sufficient.**—*HAMILTON v. DALLAS*, No. 59, *ante*.

— **Right of child legitimated per subsequens matrimonium.**—*See BASTARDY*, Vol. III., pp. 372, 374; Nos. 135, 147, 148.

481. —. —.]—(1) Civil status with its attendant rights & disabilities depends not upon nationality, but upon domicile.

(2) The law of a testator's domicile governs all questions as to testacy or intestacy, & as to the rights of persons claiming succession *ab intestato*.

(3) The Ord. in Council establishing a Consular Court at Constantinople provided by s. 6, that the jurisdiction should be exercised on the principles of, & in conformity with, the law for the time being in force in & for England. S. 91 gave the ct. probate jurisdiction over the property of resident subjects or protected persons. A testator, a member of the Chaldean Catholic community, born at Bagdad of Ottoman parents, after residing, first in India & then at Jeddah, proceeded in 1858 to Cairo, where he lived as a protected person till his death in 1885. In 1876 he married a Turkish lady in the manner prescribed by Consular Marriages Act, 1849 (c. 68), & in 1884 he executed a will in the English form:—*Held*: domicile independent of locality & arising simply from membership of a privileged society could not be reconciled with any definition of domicile; testator was domiciled in Turkey, & his estate must be administered in accordance with the law of Turkey.—*ABD-UL-MESSIH v. FARRA* (1888), 13 App. Cas. 431; 57 L. J. P. C. 88; 59 L. T. 106; 4 T. L. R. 407, P. C.

Annotations:—As to (3) Consd. Casdagli v. Casdagli, [1919] A. C. 145. *Refd.* Abdallah v. Rickards (1888), 4 T. L. R. 622. *Generally, Menth.* *Re Johnson*, Roberts v. A.-G. (1903), 72 L. J. Ch. 682.

482. —. —.]—**Lex domicilii applying other law.**—*Re CHURCHILL* (DECEASED), LEWIS v. CHURCHILL, No. 466, *ante*.

483. —. —.]—**Law of domicile of origin applicable—Domicile of choice in country not recognising**

QUEST) EXECUTORS (1852), 14 Dunt. (Ct. of Sess.) 489; 24 Sc. Jur. 231; 1 Stuart, 405.—*SCOT*.

468 vi. —. —.]—Intestate, who during his life & at the time of his death was domiciled in E., was the son born of a marriage in England with a deceased's wife's sister, which was then illegal. The intestate married G., who survived him, but there were no children of the marriage. Among his effects were certain municipal bonds, all in C. By English law his wife was entitled to one half of the movables, the other half being regarded as *bona vacantia*:—*Held*: the law of intestate's domicile governed the succession of the movables.—*BAKER'S ESTATE v. BAKER'S ESTATE* (1908), 25 S. C. 234.—*S. AF*.

domicil.]—*Re* JOHNSON, ROBERTS *v.* A.-G., No. 248, *ante*.

Only one domicil permissible for purpose of succession.]—*See* Nos. 20, 21, 22, *ante*.

484. Intestate leaving only property abroad—Jurisdiction of English court to make grant.]—Administration will not be granted when it appears that deceased left no personal property in England.—*In the Goods of* FITTOCK (DECEASED) (1863), 32 L. J. P. M. & A. 157; 9 Jur. N. S. 311.

485. ———.]—Where deceased died in France leaving personal estate there, but none in England, & it was alleged that by the law of France her husband, from whom she had eloped, could not establish his claim to her property there without a grant from this ct.:—*Held*: the ct. had no jurisdiction to make a limited grant to enable him to substantiate his claim to the property in the cts. of France.—*In the Goods of* TUCKER (1864), 3 Sw. & Tr. 585; 34 L. J. P. M. & A. 29.

Annotations:—*Consd.* *In the Goods of* LOCK (1875), 40 J. P. 168. *Refd.* *In the Goods of* MURRAY, [1896] P. 65.

486. Intestate leaving property in England & abroad—Administration to English assets granted to one of next of kin.]—A., a married woman, died domiciled in the colony of the Cape of Good Hope. On her marriage with B., an agreement was entered into between them which, according to the laws of the colony, excluded B. from all right or interest in her property, but did not deprive him of the right to administration of her personal estate & effects, in the event of her dying intestate. On her death, intestate, letters of administration were granted by the Supreme Ct. of the colony to the husband of her sister:—*Held*: administration of her personal estate & effects in England might be granted to one of her brothers & next of kin resident in this country, without requiring the husband to be cited.—*In the Goods of* PROBART (1867), 36 L. J. P. & M. 71; 16 L. T. 298; 15 W. R. 798.

Grants of letters of administration generally, *see* Sub-sect. 4, *post*.

487. Where no one entitled by lex domicilii appearing—No claim by Crown—Grant to agent of head of country of domicil.]—Administration of the goods of a public functionary of the Emperor of Morocco was decreed to a party specifically empowered to take it on his behalf on proof of the Emperor's title by the Mohammedan law, not questioned by the Crown nor by any one who might be entitled here though excluded by Mohammedan law, to deceased's effects.—*In the Goods of* BEGGIA (1822), 1 Add. 340; 162 E. R. 119.

Annotations:—*Consd.* *Aspinwall v. Queen's Proctor* (1839), 2 Curt. 241. *Expld.* *In the Goods of* Dost Aly Khan (1880), 49 L. J. P. 78.

488. ——— Grant to colonial Administrator-General.]—B., having acquired a domicil in British Guiana, died a bachelor & intestate without any known relations there. Under an ordinance of that colony the Administrator-General took possession of B.'s property in that colony & appointed Messrs. P. to be his attorneys & in his name to take letters of administration to the personal estate of deceased in this country. After the usual notice to the Queen's Proctor & citations of next of kin:—*Held*: the grant should be made.—*In the Goods of* O'BRIEN (1861), 2 Sw. & Tr. 604; 31 L. J. P. M. & A. 194; 7 L. T. 249; 25 J. P. 360; 164 E. R. 1132.

489. ——— Claim by Crown—Grant to foreign

consul refused.]—Administration of the effects of a citizen of the United States of America dying intestate in this country *in itinere* was limited for the purpose of paying his debts, etc., & transmitting the balance to the Treasury of the United States, & was refused to the American Consul upon the non-appearance of any next of kin of deceased, the Crown opposing the grant.—*ASPINWALL v. QUEEN'S PROCTOR* (1839), 2 Curt. 241; 163 E. R. 398.

Annotation:—*Mentd.* *In the Goods of* Wyckoff (1862), 3 Sw. & Tr. 20.

490. ——— Claim by Government of country of domicil—Bona vacantia.]—An Austrian who was entitled to a fund in ct. in this country died in Vienna a bastard intestate & without heirs. By Austrian law the succession of an Austrian citizen in such a case was confiscated as heirless property by the *fiscus*. The Austrian Government having claimed the fund:—*Held*: as the right claimed was not in the nature of a succession, the maxim *mobilia sequuntur personam* did not apply & the Crown by the law of England was entitled to the fund as *bona vacantia*.—*Re* BARNETT'S TRUSTS, [1902] 1 Ch. 847; 71 L. J. Ch. 408; 86 L. T. 346; 50 W. R. 681; 18 T. L. R. 454.

Grants of letters of administration generally, *see* Sub-sect. 4, *post*.

491. Party becoming executor de son tort by lex domicilii—Claim in country of origin by bond creditor of intestate.]—On the decease in Belgium of an Englishman residing there his brother, deft. H., went & took possession of his property, all personal, there, demanding it of the Belgian authorities as next of kin of deceased, & without giving any inventory. By the Belgian law a person so taking possession of a deceased person's property is held to have thereby admitted assets as between himself & creditors of deceased. Pltf., being a bond creditor of the intestate, took out letters of administration in England to his estate, & then sued H. for the amount of his bond debt here:—*Held*: (1) the possession by H. of assets in Belgium did not make him executor *de son tort* in England; (2) the peculiar liability imposed by the Belgian law on persons taking possession of the assets of deceased persons, being a legal right in Belgium, & requiring no aid from this ct., was equally invalid to support the suit, & the bill must be dismissed with costs.—*BEAVAN v. HASTINGS (LORD)* (1856), 2 K. & J. 724; 27 L. T. O. S. 282; 2 Jur. N. S. 1044; 4 W. R. 785; 69 E. R. 973.

SUB-SECT. 3.—WILLS OF MOVABLES GENERALLY.

A. Formal Validity.

492. Governed by lex domicilii.]—On a question as to the validity of the will of a domiciled inhabitant of Scotland the Court here will follow the decision of a Scottish Ct. of Probate.—*HARE v. NASMYTH* (1821), 2 Add. 25; 162 E. R. 205, H. L. *Annotations*:—*Distd.* *Curling v. Thornton* (1823), 2 Add. 6. *Consd.* *De Bonneval v. De Bonneval* (1838), 1 Curt. 856; *Price v. Dewhurst* (1838), 4 My. & Cr. 76. *Refd.* *Crocker v. Hertford* (1844), 4 Moo. P. C. C. 339; *Lancuville v. Anderson* (1860), 2 Sw. & Tr. 24.

493. ———.]—A will made in Lisbon in English form, intended to pass property in English funds by an Englishman, domiciled in Portugal, was not executed according to the requirements of Portuguese law:—*Held*: the will was void.—*Re* BARNETT (*temp.* 1813–1828), cited in 15 Jur. 255.

Annotation:—*Consd.* *A.-G. v. Napier* (1851), 15 Jur. 253.

PART VI. SECT. 2, SUB-SECT. 3.—A.

493 i. Governed by lex domicilii—At time of execution.]—A will invalidly executed according to the laws of the

place of execution & of testator's domicil at time of execution, cannot be recognised as valid for the purposes of probate in T., notwithstanding that the country where testator was

domiciled at time of his death would have accorded such will recognition.—*Re* McMILLAN'S ESTATE, [1913] T. P. D. 198.—S. AF.

Sect. 2.—To movables: Sub-sect. 3, A., B. & C.]

494. — .]—*STANLEY v. BERNES*, No. 40, *ante*.

495. — .]—*DE BONNEVAL v. DE BONNEVAL*, No. 32, *ante*.

496. — .]—*PRICE v. DEWHURST*, No. 454, *ante*.

497. — .]—*CRAIGIE v. LEWIN*, No. 41, *ante*.

498. — Property situate elsewhere—Will duly executed according to *lex situs*.]—*CROKER v. HERTFORD (MARQUIS)*, No. 499, *post*.

499. — Will made abroad by domiciled Englishman—Wills Act, 1837 (c. 26).]—A domiciled Englishman, while resident at Milan, executed in Oct. 1838 a codicil disposing of personal property situate in the United States of America. This codicil was holograph, signed, though not attested, but was well executed, according to the Austrian law:—*Held*: (1) the validity of the codicil was to be governed by the law of the domicile; (2) the provisions of Wills Act, 1837 (c. 26), applied to testamentary papers made in foreign countries by a domiciled Englishman.—*CROKER v. HERTFORD (MARQUIS)* (1844), 4 Moo. P. C. C. 339; 3 Notes of Cases 150; 8 Jur. 863; 13 E. R. 334, P. C.; *affg.* S. C. *sub nom.* *FERRARIS (COUNTESS) v. HERTFORD (MARQUIS)* (1843), 3 Curt. 468.

Annotations:—Refd. *Anderson v. Laneville* (1854), 2 Ecc. & Ad. 41; *Duncan v. Cannan* (1855), 25 L. T. O. S. 2. *Mentd.* *Morrice v. Morrice* (1843), 2 Notes of Cases, 199; *Fowls v. Davidson* (1845), 4 Notes of Cases, 149; *Ingoldby v. Ingoldby* (1846), 4 Notes of Cases, 493; *Oliver v. Weale* (1847), 11 Jur. 852; *Haynes v. Hill* (1849), 1 Rob. Eccl. 795; *Johnson v. Ball* (1851), 5 De G. & Sm. 85; *In the Goods of Hakewill* (1856), 26 L. T. O. S. 207; *Allen v. Maddock* (1858), 11 Moo. P. C. C. 427; *In the Goods of Watkins* (1865), 35 L. J. P. & M. 14; *Anderson v. Anderson* (1872), L. R. 13 Eq. 381; *In the Goods of Adamson* (1875), L. R. 3 P. & D. 253.

500. — .]—*BREMER v. FREEMAN*, No. 69, *ante*.

501. — Effect of grant of probate—Not appealed against.]—*WHICKER v. HUME*, No. 70, *ante*.

502. How validity pleaded.]—Where a declaration propounding a will depends on the due execution according to the law of testator's domicile, it must contain a distinct averment that it was duly executed according to the law of the domicile. An averment that the will was admitted to probate by a competent ct. of the alleged domicile is insufficient.—*ISHERWOOD v. CHEETHAM* (1862), 2 Sw. & Tr. 607; 31 L. J. P. M. & A. 99; 7 L. T. 250; 26 J. P. 326; 164 E. R. 1133.

499 i. — Will made by Irishman domiciled abroad.]—M., a native of Ireland, domiciled in Belgian Congo but retaining his British nationality, died in the Congo. A holograph will executed by M. in the Congo was discovered:—*Held*: the will was valid in form as it was valid under Belgian Congo law where it was made, & Roman-Dutch law is satisfied if a will is made according to the form required in the country in which it was made.—*Re MORGAN'S ESTATE*, *Ex p. LAW*, [1915] S. R. 147.—S. AF.

PART VI. SECT. 2, SUB-SECT. 3.—B.

503 i. Governed by *lex domicilii*—Bequest to take effect in foreign country.]—A testator domiciled in O. directed his exors. to deliver the residue of his estate to Govt. & Legislature of V., to be disposed of as to them should seem best, having regard to certain recommendations set forth in the will:—*Held*: the fact that the bequest was for the benefit of, & to take effect in a foreign country, could not be urged as an objection to its validity.—*PARKHURST v. ROY* (1882), 7 A. R.

614.—CAN.

503 ii. — .]—A testator domiciled in M., U.S., at the time of execution of his will & at the time of his death, bequeathed personal property situate in O to a lodge of Oddfellows in N.Y., U.S., which although unincorporated at the time of the testator's death, was subsequently authorised by law to take & hold, in the names of trustees, property devised to the lodge. In an action to test the validity of the bequest:—*Held*: the action must be dealt with in O. according to the law of testator's domicile.—*GRAHAM v. CANANDAIGUA LODGE* (1892), 24 O. R. 255.—CAN.

503 iii. — Bequests of personally inoperative.]—Testator & his wife, being domiciled in Scotland, were married there without ante-nuptial contract in 1859. Pltf. was one of three children born in S. The spouses came with their children to S.A. in 1882, became domiciled there, & by their joint earnings acquired both movable & immovable property there. In 1908 testator died, & by his will

B. Material Validity.

503. Governed by *lex domicilii*—Bequests of personalty null & void.]—Plea by an exor., who has proved a will, that testator was at the date of his will & also at the time of his death, domiciled in the empire of France, & that all the bequests of personal estate affected to be made by it are by the laws of said empire null & void, is a good plea in bar to a suit by a legatee under the will for payment of his legacy & for administration of the personal estate of testator.—*CAMPBELL v. BEAUFOY* (1859), John. 320; 28 L. J. Ch. 645; 33 L. T. O. S. 7 W. R. 513; 70 E. R. 445.

504. Marshalling in favour of charities allowed.]—By Indian Succession Act, 1865 (X. of 1865), succession to the immovable property in India of a deceased person was regulated by the law of India, wherever he might have had his domicile at the time of his death, & succession to the movable property in India was regulated by the law of the country of the domicile. By the Act no man having a nephew or niece or nearer relation had power to bequeath any property to charitable uses, except by a will executed twelve months before death & deposited as therein required. A domiciled Scotchman, possessed of both movable & immovable property in India, made a will in Scotland, appointing both Indian & Scottish exors., & duly executed same according to the law of both countries. He thereby devised & bequeathed all his Indian property, movable & immovable, to the Indian exors. upon trust to sell & realise, & after payment of costs & expenses out of the free proceeds to pay £10,000 sterling to the Scottish exors., & to pay the residue to legatees. He then directed his Scottish exors. to lay out the £10,000 legacy in erecting & maintaining a hospital in Scotland. Testator died in Scotland a few days after the date of the will leaving sisters. The movable & the immovable property in India each exceeded £10,000. It being in evidence that there was no rule against marshalling in favour of charities known to the law of Scotland:—*Held*: the £10,000 might be well paid out of the movable property only, & the distribution of such movable property being by the law of India regulated by the law of Scotland, the whole legacy was well given to the charity.—*MACDONALD v. MACDONALD* (1872), L. R. 14 Eq. 60; 41 L. J. Ch. 566; 26 L. T. 685; 20 W. R. 739.

See, further, CHARITIES, Vol. VIII., p. 302.

505. — Enlargement of testamentary capacity

purported to leave his wife the usufruct of the whole estate, which after certain prelegacies was to pass to a son:—*Held*: (1) the law of the matrimonial domicile governed the rights of spouses, both as regards property existing at the time of the marriage & property subsequently acquired; & the change of domicile did not affect these rights; (2) the children acquired, by S. law, a right of legitimation in the estate of their father, & were not deprived of this right by their parents' acquisition of a S. Af. domicile.—*GAARN v. CAIRNS' EXECUTORS*, [1910] E. D. L. 462.—S. AF.

503 iv. — .]—M., a native of Ireland, domiciled in Belgian Congo but retaining his British nationality, died in the Congo. He executed a will in the Congo:—*Held*: the material validity of a will depends on the law of deceased's domicile & as the Congo law lays down that the effects of a valid testament are determined by the national law of the deceased, the laws prevailing in Ireland would govern the question of the material validity of M.'s will.—*Re MORGAN'S ESTATE*, *Ex p. LAW*, [1915] S. R. 147.—S. AF.

by change of domicile.]—Testatrix by her will made in the Dutch language & duly executed according to the law of Holland appointed her intended husband as heir of her estate, with reservation only of the legitimate portion or the lawful share coming to her relations in a direct line in so far as they might exist at her death & might be competent & able to inherit from her. At the date of her will both the testatrix & her intended husband were of Dutch nationality & domiciled in Holland. After their marriage, which under the law of Holland did not revoke the previous will, they acquired an English domicile, the husband becoming a naturalised British subject. Testatrix died in 1903 possessed of personal estate only & leaving her husband & five children surviving her. According to the law of Holland three-fourths of her estate would under the circumstances have been distributable amongst her children as their legitimate portion & one-fourth only have been disposed of by her will in favour of her husband:—*Held*: the testamentary capacity of testatrix at the date of her death having been enlarged by her acquisition of an English domicile, her husband became entitled under the will to the whole of her estate.—*Re GROOS, GROOS v. GROOS*, [1915] 1 Ch. 572; 84 L. J. Ch. 422; 112 L. T. 984; 59 Sol. Jo. 477.

C. Made by British Subjects since Wills Act, 1861 (c. 114).

506. Who is "British subject"—Naturalised British subject.]—A naturalised British subject whilst domiciled in England made a will according to the forms required by the law of England. At the time of his death he was domiciled in Italy. His will was admitted to probate under Wills Act, 1861 (c. 114), s. 2.—*In the Goods of GALLY* (1876), 1 P. D. 438; 45 L. J. P. 107; 41 J. P. 25; 24 W. R. 1018.

507. — Restrictions imposed by certificate of naturalisation.]—Where an alien naturalised in 1858 under a certificate of the Secretary of State, which conferred upon him the rights of a native-born British subject, with the exception, *inter alia*, of any rights & capacities of a native-born British subject, out of, & beyond, the dominions of the British Crown & the limits thereof, other than such as might be conferred upon him by the grant of a passport enabling him to travel in foreign parts, made a codicil to his will in the Canton of Ticino in Switzerland:—*Held*: taking the certificate & Aliens Act, 1844 (c. 60), s. 6 together, such codicil could not be admitted to probate in England.—*In the Goods of GATTI* (1879), 39 L. T. 639; 27 W. R. 323.

508. — Foreigner domiciled in England.]—Wills Act, 1861 (c. 114), applies only to the wills of British subjects.

Therefore the ct. refused to admit to probate the will of a foreigner domiciled in England at the time it was made, such will having been executed in accordance with the law of Baden, which was testator's domicile of origin, but not with the forms required by the laws of this country.—*In the Goods of KELLER* (1891), 61 L. J. P. 39; 65 L. T. 763.

Whether "British subject" applicable to s. 3.]—See No 556, *post*.

509. What included in "personal estate"—Leaseholds.]—An Englishman resident in Scotland bequeathed his whole means & estate to a trustee to pay certain pecuniary legacies, & all the rest of his means & estate to be divided equally among certain of his godchildren. The execution of the will was valid according to the law of Scotland, but invalid according to the English law. Testator

possessed leasehold property in England:—*Held*: the English leaseholds passed under the will by virtue of Wills Act, 1861 (c. 114), s. 2.—*Re WATSON, CARLTON v. CARLTON* (1887), 35 W. R. 711.

Annotations:—*Consd. Re Grassi, Stubberfield v. Grassi* (1905), 74 L. J. Ch. 341. *Expld. Re Lyne's Settlement Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

510. — — —.]—*Re GRASSI, STUBBERFIELD v. GRASSI*, No. 449, *ante*.

Wills of leaseholds generally, see Sect. 1, subsect. 2, B., *ante*.

511. — Share in proceeds of sale of freeholds—Held on trust for sale but not converted.]—*Re LYNE'S SETTLEMENT TRUSTS, Re GIBBS, LYNE v. GIBBS*, No. 303, *ante*.

512. Will made within United Kingdom—In accordance with English law—Domicile of testator immaterial.]—When a British subject dies abroad after Wills Act, 1861 (c. 114), leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign domicile.—*In the Goods of RIPPON* (1863), 3 Sw. & Tr. 177; 32 L. J. P. M. & A. 141; 9 L. T. 117; 164 E. R. 1242.

513. — — —.]—(1) In the event of a British subject dying abroad in a foreign country & a will is produced executed in England in proper form, the case is within Wills Act, 1861 (c. 114), s. 2, & the ct. will make a grant of probate to the exor. appointed in the English will without any regard to the domicile of deceased.

(2) But the English ct. will not make a grant of probate which might conflict with any order already made by some foreign ct. This rule applies only when an order has been made in a foreign ct., & does not apply to cases in which proceedings have been taken but no order made.—*Re COCQUEREL*, [1918] P. 4; 87 L. J. P. 47; 118 L. T. 96.

514. Will or codicil made abroad—Principles guiding English court in granting probate.]—Deceased wrote on the back of his will, which was not duly executed, a document headed "2 codicil." This document, although it was properly executed according to the law of the country where made, could not by that law have an independent existence, nor establish the will by reason that it was indorsed upon the will & referred to it:—*Held*: (1) neither the will nor codicil could be admitted to probate; (2) in determining the question what papers were testamentary under Wills Act, 1861 (c. 114), the ct. would have regard to the law of one country only, & would not mix up the legal precepts of different countries.—*PECHELL v. HILDERLEY* (1869), L. R. 1 P. & D. 673; 38 L. J. P. & M. 66; 20 L. T. 1014; 33 J. P. 679; 17 W. R. 865.

Annotations:—*As to* (1) *Reid. In the Goods of Lacroix* (1877), 2 P. D. 94. *As to* (2) *Consd. In the Goods of Lacroix* (1877), 2 P. D. 94.

515. — — — No specific provision in lex loci as to form—Nor particular form prescribed.]—Testator, an English subject, residing in the Congo Free State, made a will in holograph unattested form in that state:—*Held*: such a will was good as made according to the forms required by the law of the place where same was made, because in fact the cts. of the Congo Free State would have upheld the will.

Semble: where there is an absence of any specific provision in the law of a foreign country as to the forms of wills, & there is a general provision that, where no specific provision exists, cases are to be decided according to general principles of law & equity, any form is sufficient which carries out the necessary requirements of testamentary disposition.—*STOKES v. STOKES* (CHURCH MISSIONARY

. 2.—*To movables: Sub-sect. 3,*

SOCIETY FOR AFRICA & THE EAST CITED) (1898), 67 L. J. P. 55; 78 L. T. 50.

516. ——— When probate granted by English court—Codicil duly executed as to form but unable by *lex loci* to have independent existence or to confirm will—Will not executed in accordance with English law.]—PECHELL *v.* HILDERLEY, No. 514, *ante*.

517. ——— Will valid by *lex loci*—Will in English form.]—Testator, a Frenchman, naturalised in England, executed a will in Paris in the English form & disposing of property in England, also a will valid according to the law of France disposing of the property in France. A French advocate made an affidavit that the will in the English form would be valid in France when made by a British subject:—*Held*: the will should be admitted to probate under Wills Act, 1861 (c. 114), s. 1.—*In the Goods of LACROIX* (1877), 2 P. D. 94; 46 L. J. P. 40; *sub nom.* *In the Goods of DE LA CROIX*, 41 J. P. 664.

518. ——— Will in holograph unattested form.]—STOKES *v.* STOKES (CHURCH MISSIONARY SOCIETY FOR AFRICA & THE EAST CITED), No. 515, *ante*.

519. ———.]—Where a domiciled Englishwoman, while temporarily residing in Scotland, executes a valid will in Scots form, probate of it will be granted in England.—*In the Goods of BATHO*, BATHO *v.* CROSS (1908), 52 Sol. Jo. 318.

520. ——— Holograph will incorrectly dated.]—A domiciled Englishwoman residing in France drew up in her own handwriting, & signed, a document purporting to dispose of her personal estate, but owing to an inadvertent error it was incorrectly dated by her. Under French law a holograph will, in order that it might be held valid, must bear the date on which it is made, & the date, like the rest of the document, must be in testator's own handwriting. Also by French law a wrong date was regarded as no date, & a holograph will, wrongly dated, was *prima facie* held to be invalid. But the invalidity might be rebutted by showing that the mistake was brought about by accident or inadvertence:—*Held*: on the facts being proved as above such a document, although incorrectly dated, being otherwise a valid testamentary document according to French law, & the date having been inserted under such circumstances that the French cts. would grant relief, was entitled to be admitted to probate in England although it had not been adjudicated upon in the French cts.—LYNE *v.* DE LA FERTÉ & DUNN (1910), 102 L. T. 143.

Grants of probate & letters of administration generally, *see* Sub-sect. 4, *post*.

D. Construction.

(a) *In General.*

521. Governed by *lex domicilii*.]—A native of Scotland domiciled in England having personal

PART VI. SECT. 2, SUB-SECT. 3.—
D. (a).

521 i. Governed by *lex domicilii*—Where change of domicile.]—Testator's original domicile was in O., he had changed it to U.S.A., which was his domicile at the time of his death:—*Held*: his will must be construed according to the laws of U.S.A., as regards all his personal estate.—MCCONNELL *v.* MCCONNELL (1889), 18 O. R. 36.—CAN.

521 ii. .]—Where testator has an

ascertained domicile, the construction of his will, with respect to personal property, must depend on the law of that domicile; but if no particular law is applicable, the will is to be interpreted by principles of natural justice.—BARLOW *v.* ORDE (1870), 5 B. L. R. 1; 13 W. R. 41; 13 Moo. Ind. App. 277.—IND.

521 iii. .]—A will executed by a Scotsman at St. Kitts, written by himself in ordinary popular language, must even with regard to a bequest of funds in S. be interpreted & testator's

property only executed, during a visit to Scotland, & deposited there, a will prepared in the Scottish form, & died in England:—*Held*: the will was to be construed according to the English law.—ANSTRUTHER *v.* CHALMER (1826), 2 Sim. 1; 4 L. J. O. S. Ch. 123; 57 E. R. 691.

Annotations:—*Consd.* Stanley *v.* Barnes (1830), 3 Hag. Ecc. 373; Yates *v.* Thomson (1835), 3 Cl. & Fin. 544; Price *v.* Dewhurst (1837), Donnelly, 264; Boyes *v.* Bedale (1863), 1 Hem. & M. 798. *Refd.* Price *v.* Dewhurst (1838), 4 My. & Cr. 76; Bradford *v.* Young (1885), 33 W. R. 860. *Mentd.* Chambers *v.* Blecknell (1843), 2 Hare, 536; Yates *v.* Haddan (1849), 13 Jur. 331; Edgar *v.* Reynolds (1858), 27 L. J. Ch. 562.

522. .]—J., born in Scotland but domiciled in England, bought a Scottish estate, paid part of the price, & for the remainder, which was declared to be a lien on the estate, he gave a bond, payable within a given time, if all pre-existing incumbrances affecting the estate should be then discharged. The vendor assigned the bond & real lien to the bank of L. who gave J. notice thereof. J., finding that the incumbrances were not discharged at the expiration of the time for payment of the bond, deposited the principal & interest in the bank of Scotland, & informed the assignees that the money was so consigned, but should be paid to them on producing discharges from the incumbrances. The assignees produced some discharges, & received a proportion of the deposit. The balance remained in the bank on receipts taken in J.'s name up to the time of his death. J. before his death executed in England several instruments in writing. In a will respecting his Scottish estate he declared his will to be, that said receipts of deposit should become the property of certain trustees of that estate, & be indorsed to them by his exors. in a will of his English property, the money to remain in deposit until the titles of the estate should be cleared, & then to become the property of the vendors' representatives on payment of the bond. He then made a will respecting his English property, appointing exors., & afterwards cancelled it. He subsequently executed a trust deed, disposing of his Scottish estate, & therein declared that he had in a separate will respecting his English property directed his trustees & exors. to endorse said receipts to the trustees of his Scottish estate. He afterwards made a will disposing of his English property, & thereby gave his goods & chattels, wherever situated, to his nephew, & appointed him sole exor. & residuary legatee. He obtained probate of the will, & claimed thereunder the bank deposit in a suit instituted in Scotland between him & other claimants:—*Held*: (1) the Scottish ct. had a right to look to the first will for discovering testator's intentions respecting the deposited money; (2) without looking to that will, the trust deed contained a sufficient declaration of J.'s intention to appropriate the money to his trustees for payment of his bond; (3) following up the principle that the *lex loci domicilii* governed the distribution of personal estate, the Scottish & all foreign cts. are bound in the interpretation of a testator's written declarations of intention touching his personal estate, situated within the foreign juris-

intention judged of according to the law of England.—GORVAN *v.* BRADLEY (1845), 7 Dunl. (Ct. of Sess.) 433; 17 Sc. Jur. 215.—SCOT.

1. ——— English legal terms used—Interpreted according to foreign law.]—A will was drawn by an E. lawyer & expressed in E. legal phraseology; testator, both at the date of execution & at the date of his death, was domiciled in C.:—*Held*: his disposition must be interpreted in the light of C. law.—KEMP'S ESTATE *v.* McDONALD'S TRUSTEE, [1915] App. D. 491.—S. AF.

diction, to adopt the principles of construction applicable to such instruments by the law of testator's domicile, & that law, being matter of fact, was to be inquired after like other facts, but they were not bound to adopt foreign rules of evidence, every ct. having its own technical rules of procedure.—*YATES v. THOMSON* (1835), 3 Cl. & Fin. 544; 6 E. R. 1541; *sub nom.* *YEATS v. THOMSON*, 1 Sh. & Macl. 795, H. L.

Annotations:—*As to* (3) *Consd.* *Bain v. Whitehaven & Furness Ry.* (1850), 3 H. L. Cas. 1; *Boyes v. Bedale* (1863), 1 Hem. & M. 798.

523. — Scottish settlement & English will—Application of English doctrine of presumption against double portions—Satisfaction.—By a settlement made in the Scottish form upon the marriage of his daughter with a domiciled Scotsman A., a domiciled Englishman, covenanted to pay the trustees £4,000 as a provision for the benefit of his daughter & her husband & the younger children of the marriage. The £4,000 was not paid by A. during his lifetime, but by his will, made after the death of his daughter, A. gave £16,000 between the younger children of the marriage:—*Held*: the will being an English disposition, the English doctrine of presumption against double portions was applicable, & the provisions made by testator's will in favour of his grandchildren operated as a satisfaction of the provisions made for them by the settlement.—*CAMPBELL v. CAMPBELL* (1866), L. R. 1 Eq. 383; 35 L. J. Ch. 241; 13 L. T. 667; 12 Jur. N. S. 118; 14 W. R. 327.

Annotations:—*Expld.* *Fairer v. Park* (1876), 3 Ch. D. 309. *Mentd.* *McCarogher v. Whieldon* (1866), L. R. 3 Eq. 236.

524. — Unless indications on face of will that will to be construed with reference to other law—“This will annuls all others & shall thus be considered in England the same as in France.”—*Re PRICE, TOMLIN v. LATTE*, No. 615, *post*.

525. — Use of technical terms.—*STUDD v. COOK*, No. 444, *ante*.

526. ——*BRADFORD v. YOUNG*, No. 66, *ante*.

Construction of particular terms, *see* Sub-sect. 3, D. (b), *post*.

527. Will in foreign language—Probate of translation—Right to refer to original for construction.—A will was made in French, & the probate was in English, & varied from the original:—*Held*: probate being in a different language was not conclusive.—*L'FIT v. L'BATT* (1718), 1 P. Wms. 526; 2 Eq. Cas. Abr. 777, pl. 1; 24 E. R. 500.

Annotation:—*Consd.* *Re Cliff's Trusts*, [1892] 2 Ch. 229.

528. — Evidence of foreign lawyers.—An Englishman who had resided in France died there, having made a will in the French language, which was registered in France & was retained there. Probate of an English translation was afterwards granted by the Probate Division of the High Ct. to the exor. appointed by the will. The translation was certified by an English notary public to be a true & faithful translation of a copy, in French, of the original will, which was certified by a notary public in France to be a correct copy. The English translation & the certified French copy were both annexed to the certificate of the English notary, & were both deposited in the Probate Registry. A question upon the construction of the will being raised in the Ch. Division, & it being alleged that the English translation was inaccurate:—*Held*: (1) none of the parties insisting upon an application being made to the Probate Division to correct the English translation, the ct. was entitled to look at the original French as well as at the English translation; (2) the ct. could not construe the will without the assistance of French lawyers, nor until the testator's

domicil had been ascertained.—*Re CLIFF'S TRUSTS* [1892] 2 Ch. 229; 61 L. J. Ch. 397; 66 L. T. 483; 40 W. R. 439; 36 Sol. Jo. 398.

Grant of probate & letters of administration generally, *see* Sub-sect. 4, *post*.

529. ——A domiciled Englishman made his will in a Spanish colony, in the Spanish language & form, & empowered K., whom he appointed his universal heir, to make his, testator's, will, making therein the declaration, etc., & other matters which had been, & would be, communicated to him. The will was admitted to probate:—*Held*: (1) the will was an English will, & in construing it the Spanish language was only to be looked to, in order to ascertain the equivalent expressions in English; (2) K. being appointed universal heir, the beneficial interest after performing the trusts, if any there were, belonged to K., & not to testator's next of kin.—*REYNOLDS v. KORTRIGHT* (1854), 18 Beav. 417; 2 Eq. Rep. 784; 24 L. T. O. S. 40; 2 W. R. 445; 52 E. R. 164.

(b) Of Particular Terms.

See, generally, WILLS.

530. “Male children”—In Dutch will.]—“Male children” in a Dutch will mean “male descendants,” & “male descendants” mean, according to the English law, descendants claiming through males only.—*BERNAL v. BERNAL* (1838), 3 My. & Cr. 559; Coop. Pr. Cas. 55; 7 L. J. Ch. 115; 2 Jur. 273; 40 E. R. 1042, L. C.

Annotations:—*Reid.* *Re Cliff's Trusts*, [1892] 2 Ch. 229. *Mentd.* *Sinnett v. Herbert* (1872), 7 Ch. App. 232; *Pelham Clinton v. Newcastle*, [1902] 1 Ch. 31.

531. “Children”—In Canadian will—Whether grandchildren included.]—In a will containing bequests by testator to his children:—*Held*: the word “children” *prima facie* did not include grandchildren, unless the context showed that such was the intention.

Semble: where a will made in an acquired domicile uses technical language of the native domicile, the cts. of the acquired domicile resort to the law of the native domicile for the purpose of ascertaining the meaning of such language.—*MARTIN v. LEE* (1861), 14 Moo. P. C. C. 142; 4 L. T. 657; 9 W. R. 522; 15 E. R. 259, P. C.

Annotations:—*Consd.* *McGibbon v. Abbott* (1885), 10 App. Cas. 653; *Galliers v. Rycroft*, [1901] A. C. 130.

—Whether children legitimated per subsequens matrimonium included.]—*See* *BASTARDY*, Vol. III., p. 373, No. 140; *ESTATE & OTHER DEATH DUTIES*.

532. “Next of kin” of foreigner—In English will—Whether sister of half-blood or nephew preferred.]—A bequest of personalty in the will of a domiciled Englishman to the next of kin of a foreigner must be construed to mean the nearest in blood according to English law, subject to any question of status should it arise.

Accordingly where a domiciled Englishman bequeathed a legacy to a German with a direction that in the event of the death of the legatee in his lifetime, which happened, the legacy should not lapse but be divided among the next of kin of the legatee:—

Held: the next of kin must be ascertained according to English law, & a sister of the half-blood was therefore entitled to the exclusion of nephews & nieces who by German law would have had priority.—*Re FERGUSSON'S WILL*, [1902] 1 Ch. 483; 71 L. J. Ch. 360; 50 W. R. 312; 40 Sol. Jo. 247.

533. “Securities for money”—English bond secured by Scottish heritable bond.]—A. & B. were both domiciled in England. A. lent B. money on

Sect. 2.—To movables: Sub-sect. 3, D. (b) & (c).]

an English bond, payable to him & his exors. Afterwards B. gave A. a heritable bond charging lands in Scotland as an additional security, & made payable to him & his heirs at a different time & with a different rate of interest. On the death of A.:—*Held*: the English bond was the primary security, it did not merge in the Scottish heritable bond as the *jus nobilius*, & the debt passed under A.'s will, executed according to the English, but not according to the Scottish, solemnities, under the general term "securities for money."—*CUST v. GORING* (1854), 18 Beav. 383; 24 L. J. Ch. 308; 23 L. T. O. S. 338; 18 Jur. 884; 2 W. R. 370; 52 E. R. 151.

Annotation:—*Consd. Lamb v. Lamb* (1857), 5 W. R. 720.

534. "All my just debts"—Debts contracted in country other than that of domicile.—The expression in a will "all my just debts" include all testator's debts whenever or wherever contracted, & therefore include a debt contracted by him after the making of the will, & contracted in a country other than that of his domicile, & secured upon property situated in that other country.

The burden of showing that the words have a less extensive meaning lies on him who asserts their restricted operation.

A Scotsman domiciled in England had a Scottish estate, G. He made a trust disposition & settlement in the Scottish form of this estate, creating thereby certain charges upon it, & giving it, subject to those charges, to his eldest son. A Scottish trust disposition & settlement is equivalent to an English will, & three years afterwards he made a codicil to it, revoking one of the charges. He was possessed of considerable property in England as well as of this estate in Scotland, & shortly after making this codicil he made an English will, declaring it to be the last will as to all property real or personal of which he was capable of disposing by English law. He declared that the provisions of this will were not in any manner to affect the G. estate, nor to put to election persons who might be entitled both under the trust disposition & under the will. He directed the trustees under his will to sell, etc., all the residuary real & personal estate, & out of the moneys which should come to their hands by virtue of the residuary devise & bequest "to pay & discharge all my just debts, funeral & testamentary expenses," etc. He became entitled to the interest for his own life of a sum of money which was afterwards to go to his children. He induced the trustees of that money to let him have the money itself on his executing to them in the Scottish form a heritable bond, which by law of Scotland made the Scottish estate, G., a security for the amount:—*Held*: this sum so borrowed from the trustees & secured by heritable bond on the estate of G. was a "debt" within the meaning of the direction to pay all testator's just debts contained in the English will, & the residuary

personal estate of testator was liable to discharge it in exoneration of the Scottish real estate of G.—*MAXWELL v. MAXWELL* (1870), L. R. 4 H. L. 506; 39 L. J. Ch. 698; 23 L. T. 325; 19 W. R. 15, H. L.; *affg. S. C. sub nom. MAXWELL v. HYSLOP* (1867), L. R. 4 Eq. 407.

535. "Estate & effects" in country other than that of domicile—Debts due in country other than that of domicile.—Testator domiciled in Great Britain bequeathed all his estate & effects in Mauritius:—*Held*: the bequest included debts due from debtors in Mauritius.—*GUTHRIE v. WALROND* (1883), 22 Ch. D. 573; 52 L. J. Ch. 165; 47 L. T. 614.

Annotations:—*Folld. Re Clark, McKecknie v. Clark*, [1904] 1 Ch. 294. *Reid. Re Prater, Desing v. Beare* (1887), 56 L. J. Ch. 925. *Mentd. Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408; *Re Clements, Clements v. Pearsall*, [1894] 1 Ch. 685; *Re Lord & Fullerton* (1895), 65 L. J. Ch. 184; *Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309; *Frewen v. Law Life Assce. Soc.*, [1896] 2 Ch. 511; *Re Lysons, Beck v. Lysons* (1912), 107 L. T. 146; *Re Eyre, Johnson v. Williams*, [1917] 1 Ch. 351.

536. Personal estate & effects "in Natal & Orange Free State & elsewhere in South Africa"—Bearer bond of South African company—Testator domiciled in England.—Testator domiciled in England by his will bequeathed all his personal estate in the United Kingdom to certain persons, whom he called his "home trustees," upon certain trusts, & he bequeathed all his personal estate & effects in Natal & the Orange Free State & elsewhere in South Africa to certain other persons, whom he called his "foreign trustees" upon other trusts. At the time of his decease testator was possessed of the bonds payable to bearer of a waterworks co. in South Africa & of the shares of mining cos. in South Africa. The bonds were only payable in South Africa. The mining cos. were constituted according to the laws of the Transvaal & Orange Free State, & had their head offices in South Africa, where the register of shareholders was kept & the directors met, but they also had an office in London, where a duplicate register was kept & shares could be transferred. Testator's name was on the London register of the cos., & all his bonds & share certificates were at his bankers in London:—*Held*: the bonds passed under the bequest to the "foreign trustees," but the shares passed under the bequest to the "home trustees."—*Re CLARK, McKECKNIE v. CLARK*, [1904] 1 Ch. 294; 73 L. J. Ch. 188; 89 L. T. 736; 52 W. R. 212; 20 T. L. R. 101; 48 Sol. Jo. 130.

Annotation:—*Reid. Re Lazarus, Lazarus v. Lazarus* (1919), 121 L. T. 491.

(c) Election.

See, generally, EQUITY.

537. Will invalid to pass immovables but valid to pass movables—Whether heir of foreign immovables put to election—What amounts to sufficient indication of intention.—The heir-at-law of heritable property in Scotland, being a legatee of

PART VI. SECT. 2, SUB-SECT. 3.—D. (c).

537 i. Will invalid to pass immovables but valid to pass movables—Whether heir of foreign movables put to election—Indication of intention—How ascertained.—Deceased, who had been domiciled in E., left an E. will which fell to be executed in E., & was incapable of carrying heritable bonds belonging to him over property in S.:—*Held*: the question whether his heir-at-law could take the heritable bonds & also certain movable succession provided to him by will, & whether there was not such intention to pass the bonds as to put him to his

election, must be decided according to E. law, as ascertained by the opinion of E. counsel.—*MURRAY v. SMITH* (1828), 6 Sh. (Ct. of Sess.) 690.—*SCOT.*

537 ii. ————.—A native of S. domiciled in I., but who possessed heritable bonds in S., as well as personal property there & in I., executed a will in I., ineffectual to carry S. heritage; a question having arisen, whether his heir-at-law, who claimed the heritable bonds as heir, was also entitled to a share of the movables, as legatee under the will:—*Held*: the construction of the will, as to whether it expressed an intention

to pass the heritable bonds, & the legal consequence of that construction, must be determined by the law of England.—*TROTTER v. TROTTER* (1829), 3 Wils. & S. 407.—*SCOT.*

537 iii. ————.—*CAMPBELL v. MUNRO* (1836), 15 Sh. (Ct. of) 310.—*SCOT.*

m. ————.—A Scotsman, by a S. deed of settlement, conveyed to all the property, heritable & movable, of which he might be possessed at his death; he thereafter purchased a property in I. of M., where he went to reside; by the law of which island landed property not specially disposed of divides equally

personal property in England, must be put to election; the marital rights of the husband are not affected.—*BRODIE v. BARRY* (1813), 2 Ves. & B. 127; 35 E. R. 267.

Annotations:—*Consd.* *Johnson v. Telford* (1830), 1 Russ. & M. 244. *Distd.* *Allen v. Anderson* (1846), 5 Haro, 163; *Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705; *Cust v. Goring* (1854), 18 Beav. 383. *Folld.* *Dewar v. Maitland* (1866), 12 Jur. N. S. 699. *Consd. & Folld.* *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492. *Refd.* *Ker v. Wauchope* (1819), 1 Bl. 1; *Dundas v. Dundas* (1830), 2 Dow & Cl. 349; *Birtwhistle v. Vardill* (1835), 2 Cl. & Fin. 571; *Baring v. Ashburton* (1886), 54 L. T. 463. *Mentd.* *Freeman v. Freeman* (1854), Kay, 479; *Hance v. Truwhitt* (1862), 2 John. & H. 216.

538. — Mere general expressions.]

—An heir is not put to his election between a Scottish estate & benefits given to him by a will by the force of mere general expressions, especially if the uses of the will are not applicable to Scottish property.

A testator by a codicil, reciting that he had purchased certain freeholds since the date of his will, devised them to trustees upon the trusts expressed in his will, & directed that, if any hereditaments purchased by him at any time or times should happen to be conveyed after the date & publishing thereof, his heir-at-law, or other real representatives, & every other person in whom same should be vested, should forthwith upon his decease convey & assure same to his trustees upon the trusts of his will. He purchased other estates afterwards:—*Held*: as to the estates subsequently purchased a case of election was not raised against the heir taking benefits under the will.—*JOHNSON v. TELFORD* (1830), 1 Russ. & M. 244; 8 L. J. O. S. Ch. 94; 39 E. R. 94.

Annotations:—*Folld.* *Maxwell v. Maxwell* (1852), 16 Beav. 106. *Refd.* *Allen v. Anderson* (1846), 5 Haro, 163; *Orrell v. Orrell* (1871), 6 Ch. App. 302. *Mentd.* *Schroder v. Schroder* (1854), 3 Eq. Rep. 97; *Hance v. Truwhitt* (1862), 2 John. & H. 216.

539. — Universality of language of gift.]—A Scotsman, domiciled in England, & having real & personal estates here, & also real estate (heritable bonds) in Scotland, made his will in this country & in the English form, by which, by virtue of every right, power or authority enabling him in his behalf he devised & bequeathed all his real & personal estate whatsoever & wheresoever upon certain trusts for the benefit of his children. It appeared that the will was wholly inoperative to pass real estate according to the law of Scotland:—*Held*: the eldest son, the heir-at-law according to the Scottish law, was not put to his election, whether he would take the benefits given to him as one of the children of testator in the real & personal estate in England, or would take the Scottish real property.—*MAXWELL v. MAXWELL* (1852), 2 De G. M. & G. 705; 22 L. J. Ch. 43; 20 L. T. O. S. 86; 16 Jur. 982; 1 W. R. 2; 42 E. R. 1048, L. JJ.

Annotations:—*Folld.* *Maxwell v. Hyslop* (1867), L. R. 4 Eq. 407. *Consd.* *Orrell v. Orrell* (1871), 6 Ch. App. 302; *Baring v. Ashburton* (1886), 54 L. T. 463. *Mentd.* *Pomfret v. Perring* (1854), 24 L. T. O. S. 123; *Dickinson v. Stidolph* (1861), 11 O. B. N. S. 341; *Hance v. Truwhitt* (1862), 2 John. & H. 216.

540. — After-acquired property.]—A domiciled Englishman executed a trust disposition & settlement in the Scottish form of an estate in Scotland. He then made an English will declaring that it should not affect the previous settlement of his Scottish estate, & charged his residuary real & personal estate with payment of his debts. He subsequently charged the Scottish estate with £14,000 by means of a

Scottish heritable bond. After the date of his will testator purchased other freehold property in Scotland, which passed by intestacy to his heir:—

Held: the heir was not bound to elect, but had the same right to that property which he would have had if there had been no will.—*MAXWELL v. HYSLOP* (1867), L. R. 4 Eq. 407; 16 L. T. 660; *affd.* on other grounds, *sub nom.* *MAXWELL v. MAXWELL* (1870), L. R. 4 H. L. 506, H. L.

541. — — — — —]—Testatrix of French birth made her will dated in 1878 in the French language. The will was, however, in English form, & testatrix's domicile was English. Testatrix gave legacies & annuities to various persons, including her only daughter, & a specific legacy of articles of *vertu* to her only son. Testatrix then declared that, after the deduction of all the above bequests, together with the necessary sums to secure the payment of the annuities, the residue of her fortune should belong to her grandson. The only real estate which testatrix possessed was situate in France. Her personal property was not quite sufficient to pay all her debts & legacies. The question was whether testatrix's real estate in France, devolving to her French heirs, could be taken as intended by testatrix to be comprised in her will, & to be subjected by her to same obligation of contributing to the payment of debts & legacies, in which event the French heirs could be put to their election:—*Held*: according to the authorities the universality of a gift of property contained in a will was not sufficient to demonstrate or create a ground of inference that testator meant it to extend to property which was incapable, although his own, of being given by the particular instrument, & therefore testatrix could not be said to have intended to affect her French real estate, there being nothing in the will from which the ct. could infer any such intention so as to take the case out of the rule above stated.—*BARING v. ASHBURTON* (1886), 54 L. T. 463.

542. — — — — — “All my real estate situate in any part of United Kingdom or elsewhere.”]—Testator by his will made in 1867 devised all the residue of his real estate situate in any part of the United Kingdom, or elsewhere, to trustees upon trust for sale & to hold the proceeds upon certain trusts. At the time of his death he was seised of real estate in England & in Scotland. According to the law of Scotland the will was inoperative to pass real estate situate there, & that estate descended to the testator's heir-at-law:—*Held*: the heir-at-law must elect between the benefits conferred upon him by the will & his rights as heir-at-law in the Scottish estates.—*ORRELL v. ORRELL* (1871), 6 Ch. App. 302; 40 L. J. Ch. 539; 24 L. T. 245; 19 W. R. 370, L. JJ.

Annotations:—*Consd.* *Baring v. Ashburton* (1886), 54 L. T. 463. *Folld.* *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492.

543. — Foreign immovables disposed of by express words of gift.]—Testatrix died domiciled in England, having made testamentary disposition of realty in Paraguay upon trust for charity. By Paraguayan law that disposition was valid only as to one-fifth, four-fifths being the portion of the obligatory heirs. She bequeathed to those heirs benefits out of property in England. In an action to administer the English estate:—*Held*: the heirs must elect between what they took by the invalidity of the gift to charity under

between the widow & children of deceased:—*Held*: his widow could not claim a provision under the trust

settlement, & also take her share of the M. property, which the deed was incapable of effectually carrying to the

trustees.—*ALEXANDER v. BENNETT'S TRUSTEES* (1829), 7 Sh. (Ct. of 817; 25 Fac. Coll. 1112.—*SCOT.*

Sect. 2.—To movables: Sub-sect. 3, D. (c), E. & F.; sub-sect. 4, A. (a).]

Paraguayan law & what testatrix gave them.—*Re OGILVIE, OGILVIE v. OGILVIE*, [1918] 1 Ch. 492; 87 L. J. Ch. 363; 118 L. T. 749.

544. — *Whether heir of English real estate put to election.*—D., domiciled in Scotland, & possessed of a real estate in England, & of heritable & movable property in Scotland, died leaving a trust disposition of the whole of his subject, heritable & movable, in favour of trustees, in which they were directed to turn the whole into money, & divide the proceeds equally among his four children, & the deed was executed in the Scottish form attested by two witnesses. This not being sufficient to convey the English real estate, although it was clear that it was the intention of the disposer to convey it along with the rest of his property to the trustees, the eldest son & heir-at-law insisted that it was a nullity as to the English estate, & that he was entitled to take that as heir-at-law to his father, & also to take his fourth share of the Scottish property:—*Held*: the heir-at-law was put to his approbate or reprobate (election), & must waive all objections, & allow the trust disposition to have full effect as to the whole property according to the intent of the disposer, or take nothing under the disposition.—*DUNDAS v. DUNDAS* (1830), 2 Dow & Cl. 349; 6 E. R. 757, H. L.

Annotations:—*Consd. Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492. *Reid. Brown v. Gregson*, [1920] A. C. 860. *Mentd. Pitman v. Crum-Ewing* (1911), 80 L. J. P. C. 178.

545. — *Where by a foreign will not so executed as to pass real estate in England real estate in England is devised away from the heir & personal estate is bequeathed to the heir, the heir is not bound to elect between the real & personal estates, but takes both.*

A testatrix resident & domiciled in Italy in 1890 made an Italian will purporting to give real estate in England to V. absolutely, & her residuary real & personal estate to R. The will was not so executed as to be effectual to pass real estate in England. R. was testatrix's heiress-at-law. In 1901 testatrix by deed settled the English real estate upon trust for V. for life with remainder for his children in tail, & an ultimate remainder to the use of herself in fee. V. died not having had children:—*Held*: R. was entitled to both the English realty as heiress-at-law & the personalty as residuary legatee, & was not put to her election between the two.—*Re DE VIRTE, VAIANI v. DE VIRTE*, [1915] 1 Ch. 920; 84 L. J. Ch. 617; 112 L. T. 972.

Annotation:—*Reid. Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492.

546. — *Acts amounting to election by heir of foreign immovables.*—A will attested by two witnesses contained a devise of freeholds in England to A., testator's son & heir, for life with remainder to trustees, & a devise to them of estates in St. K. upon trust to sell & to invest the proceeds in estates in England to be held upon the same trusts. A. was in possession of the English, & he received the rents of the St. K., estates during his life, & with his concurrence the trustees made efforts, though ineffectual, to sell the latter. After the death of A. intestate the trustees contracted to sell one of the St. K. estates, but the purchaser refused to complete, on the ground that the will was inoperative in the island, & that the estates descended upon the heir:—*Held*: A. had elected to take under the will & his infant heir was bound by his acts, & was a trustee under Trustee Act, 1850 (c. 60), for the person claiming

under the will.—*DEWAR v. MAITLAND* (1866), L. R. 2 Eq. 834; 14 L. T. 853; 12 Jur. N. S. 699; 14 W. R. 958.

E. Payment of Legacies.

547. Governed by lex domicilii.—A legacy given to a married woman to be settled on her in Italy was ordered to be paid to a banker in Italy on his giving security that it should be settled, according to the law of Italy, on the wife for her separate use.—*BROWN v. TATNALL* (1837), 6 L. J. Ch. 371.

548. Time of payment—Legacy to infant domiciled abroad.—A legacy bequeathed to an infant domiciled abroad may be paid when the infant comes of age by the law of England, or of the place of domicile, whichever first happens, & in the meantime must be dealt with in the usual way as an infant's legacy, although by the law of the place of domicile the guardian of the infant may be entitled to receive the legacy.—*Re HELLMAN'S WILL* (1866), L. R. 2 Eq. 363; 14 W. R. 682.

Annotation:—*Reid. Re Chartard's Settlement*, [1899] 1 Ch. 712.

549. Currency in which payable—No currency specified—Other legacies in specified currency.—Testator who lived in Jamaica gave legacies to be paid in sterling money in the first place, & the two legacies immediately following generally, without saying in sterling money, & at the end of his will several more to be paid in sterling money:—*Held*: pltf. must take his legacy in Jamaican money, for his expressing himself differently showed a different intention.—*SAUNDERS v. DRAKE* (1742), 2 Atk. 465; 26 E. R. 681, L. C.

Annotations:—*Consd. Lansdowne v. Lansdowne* (1820), 2 Bl. 60. *Reid. Malcolm v. Martin* (1790), 3 Bro. C. C. 50; *Bourke v. Ricketts* (1804), 10 Ves. 330.

550. — *Legacies, no fund being described, other legacies being expressly to be paid in English money, are to be paid in the currency of the country where the will is made.*—*PIERSON v. GARNET* (1786), 2 Bro. C. C. 38; 29 E. R. 20, H. L.

Annotations:—*Reid. Malcolm v. Martin* (1790), 3 Bro. C. C. 50. *Mentd. Clarke v. Blake* (1788), 2 Bro. C. C. 320; *Sprange v. Barnard* (1789), 2 Bro. C. C. 585; *Brown v. Higgs* (1803), 8 Ves. 561; *Bourke v. Ricketts* (1804), 10 Ves. 330; *Morice v. Durham* (1805), 10 Ves. 522.

551. — *Testator living in Antigua gave legacies described to be sterling, then another without that description, the interest to be paid to the children of J. & L. for life, then the principal to be divided among the grandchildren of J. & L.:—Held*: (1) the latter legacy was only a legacy of current money of Antigua; (2) the interest to be paid to the children for life should be at 4 per cent., not Antigua interest; (3) there being no children of J. the children of L. should take the whole interest for their lives, nothing passing to the grandchildren till the death of all.—*MALCOLM v. MARTIN* (1790), 3 Bro. C. C. 50; 29 E. R. 402.

Annotations:—*As to* (1) *Reid. Bourke v. Ricketts* (1804), 10 Ves. 330. *As to* (3) *Reid. Arrow v. Mellish* (1847), 1 De G. & Sm. 355; *Doe d. Patrick v. Royle* (1849), 13 Q. B. 100; *Abrey v. Newman* (1853), 16 Beav. 431. *Generally, Mentd. Tanliere v. Pearkes* (1825), 2 Sim. & St. 383; *Pearce v. Edmeades* (1838), 3 Y. & C. Ex. 246; *Penny v. Allen* (1857), 3 Jur. N. S. 273; *Wills v. Wills* (1875), L. R. 20 Eq. 342.

552. Rate of interest payable—No currency specified—Legacy payable out of foreign fund.—*MALCOLM v. MARTIN*, No. 551, *ante*.

553. — *Currency specified—Legacy payable out of foreign fund.*—A legacy of a sum of money & Jamaican currency was decreed with Jamaican interest from the death of testator.—*RAYMOND v. BRODBELT* (1800), 5 Ves. 199; 31 E. R. 545, L. C. *Annotation*:—*Consd. Bourke v. Ricketts* (1804), 10 Ves. 330.

554. — Legacy payable out of English fund.]—Legacies in the currency of Jamaica where testator resided, were bequeathed. Testator had assets & exors. in both countries:—*Held*: the legatees living in this country were not entitled to Jamaican interest.—*BOURKE v. RICKETTS* (1804), 10 Ves. 330; 32 E. R. 872.

Annotation:—*Folld. Hamilton v. Dallas* (1878), 38 L. T. 215.

Rate of exchange at which payable.]—See CONTRACT; EXECUTORS & ADMINISTRATORS; MONEY & MONEY LENDING.

Sums charged on immovables—Currency at which payable.]—See Part IV., Sect. 6, *ante*.

Rate of interest payable.]—See Part IV., Sect. 6, *ante*.

Payment of interest under contract.]—See Part VII., Sect. 3, *post*.

Rate of exchange at which payable.]—See CONTRACT; MONEY & MONEY LENDING.

F. Revocation.

555. By marriage—Governed by lex domicilii at date of marriage—Changed domicil recognising revocation by marriage immaterial.]—Testator being domiciled in Scotland in anticipation of his marriage, which subsequently took place in Scotland, executed a deed of settlement, which he also intended should operate as his will. By the law of Scotland such a document as a disposition of property at death would not be revoked by the marriage of the contracting parties. Testator after his marriage became domiciled in England:—*Held*: as the settlement was valid by the law of domicil as a testamentary disposition at the time of execution, as also subsequently to the marriage & at the moment when testator left the country, it continued valid notwithstanding the change of domicil.—*In the Goods of REID* (1866), L. R. 1 P. & D. 74; 35 L. J. P. & M. 43; 13 L. T. 681; 12 Jur. N. S. 300; 14 W. R. 316.

556. — Effect of Wills Act, 1861 (c. 114), s. 3.]—The operation of Wills Act, 1861 (c. 114), s. 3, in spite of the expression "British subjects" in the title, is not limited to British subjects, & enables probate to be granted in this country of the will of an alien testator in spite of his or her marriage since the date of execution of the will, such marriage, according to the law of the domicil at the time, not effecting a revocation.

A Dutch subject domiciled in Holland made her will & afterwards married, which by the law of the domicil effected no revocation of her will. She subsequently became domiciled here, whilst retaining Dutch allegiance, & died here:—*Held*: her will was entitled to probate in England, in spite of the marriage subsequent to its execution but before the change of domicil.—*In the Estate of GROOS*, [1904] P. 269; 73 L. J. P. 82; 91 L. T. 322.

557. — Application of Wills Act, 1837 (c. 26), s. 18, to wills of foreigners domiciled abroad.]—*Re MARTIN, LOUSTALAN v. LOUSTALAN*, No. 145, *ante*.

558. — Revivor by codicil made after marriage.]—*Re CAITHNESS (EARL)*, No. 450, *ante*.

559. By change of domicil—Wills Act, 1861

(c. 114), s. 3, not limited to British subjects.]—*In the Estate of GROOS*, No. 556, *ante*.

560. By subsequent instrument—English will—Dealing with English realty—Subsequent Italian will with general revocation clause.]—Testator, who had exchanged an English for an Italian domicil, left two wills, one executed in England, & a later one in Italy in the form prescribed by the Italian law. The first dealt with realty & personalty, & nominated an exor. The second did not touch the realty; it nominated testator's wife sole heiress, & it contained the following passage: "I erase, revoke, & annul every other act or last will which I may have made:."—*Held*: both by the English & the Italian law the first will was revoked by the second, & the probate which had been granted of it should be revoked.—*COTTRELL v. COTTRELL* (1872), L. R. 2 P. & D. 397; 41 L. J. P. & M. 57; 26 L. T. 527; 36 J. P. 567; 20 W. R. 590.

Annotation:—*Mentd. Re Westminster's S. E., Westminster v. Shaftesbury*, [1921] 1 Ch. 585.

561. — Spanish codicils—Subsequent instrument in England confirming earlier English will—Whether revocation of codicils.]—Testator, by birth a British subject but domiciled in Spain at his death, executed a will in England, & subsequently several codicils valid by the law of Spain. Lastly he executed a paper in England which confirmed the English will in whatever it did not clash or interfere with the contents of the codicil, which was to be considered as his last & deliberate will:—*Held*: the Spanish codicils were not revoked by the last-mentioned paper, but, as forming part of the will which did not clash with such paper, were confirmed by it.—*In the Goods of DE LA SAUSSAYE* (1873), L. R. 3 P. & D. 42; 42 L. J. P. & M. 47; 28 L. T. 368; 37 J. P. 312; 21 W. R. 549.

Annotations:—*Consd. In the Goods of Howden* (1874), 43 L. J. P. & M. 26. *Mentd. Green v. Tribe* (1878), 9 Ch. D. 231; *Follett v. Pettman* (1883), 23 Ch. D. 337.

SUB-SECT. 4.—PROBATE AND LETTERS OF ADMINISTRATION.

A. Wills of Persons dying domiciled Abroad.

(a) In General.

562. General rule.]—(1) Before probate in common form of a foreign will can be obtained, it is necessary to show, either that the will has been recognised as valid by a ct. of the foreign country, or that it is a valid will according to the law of the foreign country, & that testator was domiciled in the foreign country.

(2) In order to show that a foreign will has been recognised as valid by a ct. of competent jurisdiction of the foreign country, a notarial certificate is not sufficient. A duly authenticated copy of the act or sentence of the foreign ct. recognising its validity should be produced.

(3) If probate is sought of a foreign will, originally written in the English language, as having been recognised as valid by the ct. of the foreign country, a re-translation of the translation so recognised in the foreign country should be produced. But if probate is sought of such a

PART VI. SECT. 2, SUB-SECT. 3. —F.

555 i. By marriage—Governed by lex domicilii at date of marriage.]—*DAVIES v. DAVIES* (1915), 31 W. L. R. 396; 8 W. W. R. 803.—CAN.

n. — Domiciled Englishwoman married in England to domiciled Scotsman.]—*Held*: a will dealing with movable property, which was duly

executed in E. by a spinster domiciled in E. at the date of its execution, was not revoked by her subsequent marriage in E. to a domiciled Scotsman.—*WESTERMAN'S EXECUTOR v. SCHWAB* (1905), 8 F. (Ct. of Sess.) 132; 43 Sc. L. R. 161; 13 S. L. T. 594.—SCOT.

560 i. By subsequent instrument—will—Subsequent Swedish will.]

—A British subject executed a will in France according to E. law on July 1, 1892, & afterwards, Oct. 2, 1892, in Sweden, executed another will according to Swedish law, which contained a complete disposition of her property:—*Held*: the Swedish will revoked the English will.—*In the Goods of KALLING* (1897), 32 I. L. T. 131.—IR.

Sect. 2.—To movables: Sub-sect. 4, A. (a) & (b).]

will as being valid according to the law of the foreign country, a copy of the original should be produced.—*In the Goods of DESHAIS, In the Goods of DE VIGNY (COUNTESS)* (1865), 4 Sw. & Tr. 13; 34 L. J. P. M. & A. 58; 12 L. T. 54; 13 L. T. 246; 29 J. P. 233, 247; 13 W. R. 640; 164 E. R. 1419.

(b) Where Court of Domicil has pronounced.

563. Extent to which English court follows foreign court—General rule.]—In decreeing probate the ct. is usually regulated by the grant of the Ct. of Probate where the party was domiciled, i.e., the competent jurisdiction in this instance the Ct. of Supreme Jurisdiction at Fort William, Bengal.—*LARPENT v. SINDRY* (1828), 1 Hag. Ecc. 382; 162 E. R. 620.

Annotations:—Reid. Price v. Dewhurst (1838), 4 My. & Cr. 76; *In the Goods of Earl* (1867), L. R. 1 P. D. 450.

564. ——— English court will not act contrary to English law.]—The ct. will not follow the grant of the country of domicil when it would by so doing be acting in contradiction to the law of this country. An application for a grant of letters of administration to a minor, assisted by his uncle, his curator, lawfully appointed according to the law of the domicil, will be refused.—*In the Goods of D'ORLEANS (DUCHESS)* (1859), 1 Sw. & Tr. 253; 28 L. J. P. & M. 129; 32 L. T. O. S. 261; 5 Jur. N. S. 104; 7 W. R. 269; 164 E. R. 716.

Annotations:—Consd. In the Goods of Earl (1867), L. R. 1 P. & D. 450. *Expld. In the Goods of Meatyard*, [1903] P. 125. *Consd. In the Goods of Rankine*, [1918] P. 134.

565. ———.]—*ENOHIN v. WYLIE*, No. 456, ante.

566. ——— English court will not investigate grounds of decision.]—Where a testator dies domiciled in a foreign country, & probate has been granted in that country, this ct. will indorse that grant without examining the grounds on which it was based.—*In the Goods of SMITH* (1868), 16 W. R. 1130.

Annotation:—Reid. Miller v. James (1872), L. R. 3 P. & D. 4.

567. ———.]—*MILLER v. JAMES*, No. 462, ante.

568. ———.]—D., a Persian subject, was by a decree of a Persian ct. declared entitled to certain property in this country. The decree though founded partly upon a will made no mention of it, & the ct. which had custody of the will refused to give a copy of it:—*Held*: (1) letters of administration, limited to the property mentioned in a duly authenticated copy of the decree, should be granted; (2) the law applicable to the case might be proved by a Persian Ambassador.—*In the Goods of DOST ALY KHAN* (1880), 6 P. D. 6; 49 L. J. P. 78; 29 W. R. 80.

569. ——— Limited to orders actually made

PART VI. SECT. 2, SUB-SECT. 4.—
A. (b).

566 i. Extent to which foreign court follows court of domicil—Foreign court will not investigate grounds of decision.]—Testator, who died domiciled in Mich., U.S., leaving property there & in O., appointed exors., making them also trustees of a portion of his estate, & the proper ct. in Mich. granted probate to them in 1900. In 1903 they tendered to that ct. their resignation as executors, though not as trustees, & requested & obtained the appointment of a trust co. as administrators *de bonis non* with will annexed in their place. In 1904 they resumed an application, which had remained suspended since 1900, to an O. ct.

for ancillary probate, which was opposed by the beneficiaries of the estate in O., who asked for administration *de bonis non* to be granted to the trust company or its nominee:—*Held*: the O. ct. ought to follow the Mich. grant to the trust co., & could not look into any circumstances which led up to it.—*Re MEDBURY, LOTHROP v. MEDBURY* (1906), 11 O. L. R. 429; 7 O. W. R. 890.—CAN.

o. ——— As to whom probate or letters of administration granted—Court of domicil followed—Grant obtained by fraud.]—*IRWIN v. BANK OF MONTREAL* (1876), 38 U. C. R. 375.—CAN.

was resident in N.Z. & married there,

—Not applicable where proceedings taken but no order made.]—*Re COCQUEREL*, No. 513, ante.

570. ——— As to whom probate or letters of administration granted—Foreign court followed—Sister preferred to widow not married for period prescribed by foreign law.]—By the law of Scotland a widow is not entitled to any share of the property of her husband, nor to letters of administration, unless at the time of his death she has been married to him one year & a day.

Following a decree of the Commissary Ct. of Perthshire:—*Held*: letters of administration should be granted to the sister of deceased in preference to the widow.—*In the Goods of SHOOLBRAID* (1854), 1 Ecc. & Ad. 246; 164 E. R. 146.

571. ——— Foreign decree that executor's authority had expired.]—(1) By the French law the will of a domiciled Frenchman executed in a foreign country according to the forms required by the law of that foreign country is a valid will.

(2) The appointment by a domiciled Frenchman in a holograph will of an "*exécuteur testamentaire*" is subject to the rules of the French law, even as respects personal property out of France.

Where the French ct. had decreed that the time limited by the French law for the execution of such an exorship. had passed, & that the exor. had no more right to intermeddle in the estate of testator, & that the parties beneficially entitled were the only persons who had a right to intermeddle:—*Held*: the ct. was bound by such decree, & probate, with respect to personalty in England, should not be granted to such an exor.

Semble: the law of the country of the domicil at the time of death as to what constitutes the last will of deceased is binding on other countries.—*LANEUVILLE v. ANDERSON* (1860), 2 Sw. & Tr. 24; 30 L. J. P. M. & A. 25; 3 L. T. 304; 6 Jur. N. S. 1260; 9 W. R. 74; 164 E. R. 899.

Annotation:—Consd. Hood v. Barrington (1868), L. R. 6 Eq. 218.

572. ——— Grant to provisional executor so long as foreign appointment unrescinded.]—The Ct. of Probate will make a grant to a provisional exor., appointed by the proper ct. of the domicil of deceased, but it will limit it for such time as the appointment by the ct. of domicil remains unrescinded & in force.—*In the Goods of STEIGERWALD (DECEASED)* (1864), 10 Jur. N. S. 159.

573. ——— Foreign grant to party entitled in his own right to administration.]—Where administration of the estate of an intestate, who dies domiciled abroad, is granted by the foreign ct. to a person entitled in his own right to administration, the Ct. of Probate will follow the foreign grant, but it will not do so where the foreign grant is made to a nominee of the person entitled except upon the express consent of the latter.—*In the*

but afterwards left his family & went to C., where he died after being resident there about 3 years. Whilst in N.Z. he made a will leaving his property to his wife. Subsequently, whilst still in N.Z., he purported to cancel this will, but not so as effectually to revoke it in accordance with Wills Act, s. 20. He at the same time wrote in the margin in his own writing, "I leave everything to my children only," & signed the words. Probate of these words was granted in C. as a holograph will. His widow applied in N.Z. for probate of the original will:—*Held*: (1) there was no evidence upon which the ct. in N.Z. could hold that the place of residence of testator at the date of his death was not his domicil, as it had been assumed to be

Goods of WEAVER (1866), 36 L. J. P. & M. 41; 15 L. T. 331; 15 W. R. 199.

574. — Foreign grant as executor according to tenor to party not so entitled by English law.]—Testator at the time of his death was domiciled in New South Wales, & the ct. of New South Wales granted probate of his will to A. as extrix. according to the tenor. A. was not entitled to the grant as extrix. according to the tenor by the law of England:—*Held*: under Ct. of Probate Act, 1857 (c. 77), administration with the will annexed should be decreed to A. as the person entitled to administer under the grant of the ct. of the country of domicile.—*In the Goods of EARL* (1867), L. R. 1 P. & D. 450; 36 L. J. P. & M. 127; 16 L. T. 799.

Annotations:—*Expld.* *In the Goods of Bricseman*, [1894] P. 260. *Reid.* *Miller v. James* (1872), L. R. 3 P. & D. 4; *In the Goods of Meatyard*, [1903] P. 125. *Mentd.* *Hewson v. Shelley*, [1914] 2 Ch. 13.

575. — Foreign grant de bonis non to party having no interest.]—A died domiciled in the United States, & appointed B., her father, her exor. & residuary legatee. B. died leaving a portion of A.'s estate unadministered. At the request of B.'s exors., the American ct. made a grant *de bonis non* of A.'s estate to C., who had no interest:—*Held*: following the grant of the American ct., a grant should be made to C. of A.'s personal estate in this country.—*In the Goods of HILL* (1870), L. R. 2 P. & D. 89; 39 L. J. P. & M. 52; 23 L. T. 167; 34 J. P. 567; 18 W. R. 1005.

576. — Foreign grant of letters of administration on renunciation by executor.]—(1) Where administration with the will annexed has been granted abroad by a foreign ct. subject to such orders as may from time to time be made by that ct., the ct. here need not before granting such administration to an attorney of the foreign administrator inquire whether orders have been made by the foreign ct. modifying or cancelling the foreign grant.

(2) Where a testator domiciled abroad has disposed by his will of all his property without qualification as to its situation, & the exor. of the will has renounced probate abroad, the ct. here may grant letters of administration with the will annexed to an administrator appointed by the foreign ct. without requiring express renunciation by the exor. of probate in this country.—*In the Goods of SCARR (DECEASED)* (1899), 80 L. T. 296.

577. — Foreign court not followed—Foreign grant to party personally disqualified by English law—Infant.]—*In the Goods of D'ORLEANS (DUCHESS)*, No. 564, *ante*.

578. —]—The ct. will follow the grant of the foreign domicile, unless the administrators appointed by the foreign ct. are by the law

& practice of this country personally disqualified from taking a grant here.

Where a testator died domiciled in Belgium leaving a will & codicil in English form appointing exors., & also leaving a Belgian will, the ct. made a grant of administration with all three documents annexed in favour of two persons who had been appointed administrators of deceased's estate abroad in accordance with the law of the domicile.—*In the Goods of MEATYARD*, [1903] P. 125; 72 L. J. P. 25; 89 L. T. 70.

Annotation:—*Distd.* *In the Goods of Cocquerel* (1917), 87 L. J. P. 47.

579. — Foreign grant not giving full effect to testator's intentions.]—The English Ct. of Probate follows the grant of the ct. of testator's domicile as to the document which that ct. has admitted to probate, but not as to the person to whom the grant is made.

A testator domiciled in the Isle of Man executed a deed conveying the whole of his property to a trustee upon trust after his decease to realise & invest it, & to pay the annual income to his widow for her life, & upon her death to divide it amongst his children. This document was duly executed as a will, & the Ecclesiastical Ct. of the Isle of Man granted probate of it to the trustee as exor. according to the tenor:—*Held*: (1) the Isle of Man grant should be followed so far as to admit the document to probate, without any inquiry as to whether or not it was testamentary, but not so far as to make the grant to the trustee as exor. according to the tenor; (2) it appearing that testator intended to deprive the widow who was primarily entitled to the grant of any control over the administration of the estate, administration with the will annexed should be decreed to the trustee under Ct. of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of COSNAHAN* (1866), L. R. 1 P. & D. 183; 35 L. J. P. & M. 76; 14 L. T. 337; 14 W. R. 969.

Annotation:—*As to* (2) *Distd.* *In the Goods of Meatyard*, [1903] P. 125.

580. — Foreign grant to nominee of party entitled.]—*In the Goods of WEAVER*, No. 573, *ante*.

581. — Foreign grant of will & revoked codicil—Followed.]—Testator died domiciled in India leaving a will & two codicils, one of which had been revoked. The Indian ct. granted probate of the will & both codicils:—*Held*: probate might be granted here of the exemplification probate granted in India, notwithstanding that it comprised a revoked codicil.—*In the Goods of GURBOY* (1899), 80 L. T. 808.

582. — Foreign grant subject to future orders—Duty of English court to inquire whether orders made.]—*In the Goods of SCARR*, No. 576, *ante*.

How foreign law ascertained generally, see Sect. 2, sub-sect. 1, B., *ante*.

by the ct. in C.; (2) a holograph will being a good testamentary instrument according to C. law, probate of the original will must be refused.—*Re PEAT (DECEASED)* (1903), 22 N. Z. L. R. 997.—N.Z.

q. — Court of domicile not followed—Grant to creditor—Next of kin not cited.]—D. dying domiciled abroad, R., a creditor of deceased's estate, obtained letters of administration there. Subsequently S., as appointee of R. & with his consent, applied in O. for letters of administration to be granted to him. E., residing in O., as next of kin to D., also applied in O. for administration to D.'s estate:—*Held*: inasmuch as the next of kin did not appear to have been cited before the ct. of domicile, the status of the creditor who obtained

administration there, or of his appointee, was not such as to compel the ct. here to pass over the next of kin.—*Re O'BRIEN* (1883), 3 O. R. 326.—CAN.

r. Where two wills — Probate granted of English will in England—Separate probate of colonial will.]—R. being domiciled in E. made a will there relating exclusively to property in Great Britain & appointed exors. in E. He then came to V. & made a second will relating exclusively to property in V. & T. & appointed exors. of it resident in V. The ct. of probate in England having granted probate of the first will without referring to the second, the V. ct. granted probate of the second will without referring to the first.—*In the Goods of RUFFHEAD* (1864), 1

W. W. & A'B. 70.—AUS.

s. — Probate granted to both wills.]—Testatrix left two wills—one Feb. 5, 1900, by which she disposed of all her real & personal property in N.Z. & E., & a subsequent one, June 16, 1905, purporting to dispose of her personal estate in U.K. Probate was granted to N.Z. exors., including both instruments, conditional on an exemplification of E. probate, which had been already granted as to the second will, being lodged.—*Re MORSHEAD (DECEASED)* (1910), 29 N. Z. L. R. 1023.—N.Z.

t. Whether Quebec "letters of verification" equivalent to "letters of administration" in Saskatchewan when tendered for resealing.]—*Re DUNLOP ESTATE* (1916), 34 W. L. R. 427.—CAN.

Sect. 2.—To movables: Sub-sect. 4, A. (b), (c), (d) & (e), B., C. & D.; sub-sect. 5, A

583. — Limited foreign grant—Full grant under Probate Act, 1857 (c. 77), s. 73.]—In a case where the ct. of the domicil of a deceased person, part of whose assets consisted of personal estate in England, had made a grant of administration limited in time:—*Held*: under Probate Act, 1857 (c. 77), s. 73, a general grant should be made to the foreign administrator.—*In the Estate of LEVY*, [1908] P. 108; 77 L. J. P. 57; 52 Sol. Jo. 193.

Foreign judgments generally.]—See Part XIV., post.

584. How decree of foreign court proved.]—*In the Goods of DESHAIS, In the Goods of DE VIGNY (COUNTESS)*, No. 562, ante.

585. In what court probate of codicils granted—Probate of will granted abroad.]—If a will has been proved abroad, probate of the codicils, if any, must be granted by the ct. which granted probate of the will.—*In the Goods of MILLER* (1883), 8 P. D. 167; 52 L. J. P. 93; 31 W. R. 956.

(c) *Where Court of Domicil has not pronounced.*

586. Granted by English court according to *lex domicilii*—On proof of such law.]—Probate of the will of a married woman, a native of, & domiciled in, Spain, was granted according to the law of Spain to one of her sons as exor., on affidavits as to the law of Spain & the identity of the parties.—*In the Goods of MARAVER* (1828), 1 Hag. Ecc. 498; 162 E. R. 658.

Annotation:—Refd. Price v. Dewhurst (1838), 4 My. & Cr. 76.

587. — — —.]—A domiciled Frenchman having by his will appointed an exor. but no residuary legatee, & administration *cum testamento annexo*, granted after citing the exor. to the son's attorney in 1828, being brought in:—*Held*: on justifying security & on the French Consul-General's certificate, confirmed by an affidavit, that by the French law the next of kin was entitled to the residue, administration should be granted to the son without citing the nude exor., he having never applied for the grant, though deceased died upwards of thirteen years before.—*In the Goods of DORMOY* (1832), 3 Hag. Ecc. 767; 162 E. R. 1338.

Annotation:—Consd. Laneville v. Anderson (1860), 2 Sw. & Tr. 24.

588. Disposition of property of Russian Imperial family.]—By the law of Russia all testamentary instruments executed by members of the Imperial family were disregarded, & the disposition of the property of such persons after their death was within the exclusive power of the Emperor of Russia. A., a member of the Russian Imperial family, died in Russia, having executed a will by which he appointed B., his son, as his exor. After A.'s death a meeting of the members of his family was held, & an arrangement for the disposition of his property in accordance with the terms of his will was agreed to, & was embodied in a document termed an "*Acte Définitif*," which was subsequently confirmed by the Emperor of Russia,

& by the terms of the "*Acte Définitif*" B. was constituted the sole & entire owner of certain shares held by deceased in a railway co. having its offices in England. Upon a certificate from the Russian Ambassador in England with the seal of the Russian Embassy reciting that the law of Russia was as stated above, & that under the "*Acte Définitif*" B. was the sole & entire owner of the railway shares:—*Held*: a grant should be made to the attorney of B. of letters of administration with the "*Acte Définitif*" annexed, limited to the property of deceased in England.—*In the Goods of OLDENBURG (PRINCE)* (1884), 9 P. D. 234; 53 L. J. P. 46; 49 J. P. 104; 32 W. R. 724.

589. — — — With powers as near as possible to those conferred by will.]—A person domiciled in Germany made a will appointing persons in England to realise his property in England, & pay over the proceeds to his exors. in Germany:—*Held*: administration should be granted to these persons for the use & benefit of the exors. in Germany, on the ground that such grant would enable them to perform in England the duties imposed on them according to German law by the instrument appointing them.—*In the Goods of BRIESEMANN*, [1894] P. 260; 63 L. J. P. 159; 71 L. T. 263; 6 R. 558.

Annotations:—Consd. In the Goods of Von Linden, [1896] P. 148; *In the Goods of Meatyard*, [1903] P. 125.

590. — — —.]—The will of a German subject domiciled in the kingdom of Wurtemberg at his death had been proved in Wurtemberg in accordance with the requirements of local law & deposited with a notary, who by the law of the country was forbidden to allow it to leave his custody. It contained a direction that during her lifetime the widow should have the unrestricted right of administration & usufruct of testator's estate without giving security, which according to the local law was equivalent to appointing her extrix., & entitled her to collect the personal estate as though she were the owner thereof. Part of the personal estate was in England:—*Held*: probate might be granted to the widow of a copy of the original will properly proved, limited to such time as might elapse before the original will itself should be brought in.—*In the Goods of VON LINDEN*, [1896] P. 148; 65 L. J. P. 87; 44 W. R. 448.

591. — — —.]—Testator died domiciled in Chili leaving a will appointing two exors., one of whom died without taking probate. The other was believed to be in Bolivia, but no response had been obtained to repeated applications made to him. The only property in this country of any value consisted of a debt which it was desired to collect:—*Held*: the affidavit of a notary, who was not a qualified Chilean lawyer, as evidence of the law of Chili should be accepted, & upon his evidence that the powers & duties of an exor. in that country would only extend to seeing that the estate was duly administered by the acting heiress, who in this case was testator's widow, a grant of administration with the will annexed should be

PART VI. SECT. 2, SUB-SECT. 4. — A. (c).

586 i. Granted by foreign court according to *lex domicilii*—On proof of will's validity.]—Testator, resident in N.S.W., but domiciled abroad at the date of his death, made a will valid according to the law of domicil:—*Held*: probate or letters of administration with the will annexed would be granted in N.S.W. on proof that the will was valid according to the law of domicil.—*In the Goods of ROLLAND* (1893), 14 N. S. W. L. R. (B. & P.) 102.—AUS.

u. Ancillary probate—Not granted.]—A will executed by a person when domiciled in Quebec, in accordance with the law of Q., not acted upon or proved in any way before any ct. there, is not within 51 Vict. c. 9.—*Re MACLAREN* (1895), 22 A. R. 18.—CAN.

v. Where no proof of *lex domicilii*—Absence of evidence as to estate & next of kin—Refusal to grant letters by court of *lex loci*.]—Deceased died in M., having his place of abode in D., both in U.S. Part of the estate was land

situated in S. in Can. The *locus in quo* of the rest of the estate was not disclosed, nor was there evidence as to whether or not letters of administration had been granted to the estate of the intestate in the U.S., nor any proof of next of kin in N.D., who would be entitled to administer there, or that letters of administration would be granted to his widow there. She applied for letters in S.:—*Held*: administration could not be granted.—*Re COOK* (1909), 11 W. L. R. 70.—CAN.

made to her.—*In the Goods of WHITELEGG*, [1899] P. 267; 68 L. J. P. 97; 81 L. T. 234.

How foreign law proved.]—See EVIDENCE.

592. — Application for probate—Evidence of validity according to *lex domicilii*—Necessity for.]—An application for probate of a testamentary instrument executed by a person when domiciled abroad should be supported by evidence that according to the law of the domicile such instrument is a good will.—*In the Goods of STODDART* (1862), 2 Sw. & Tr. 356; 31 L. J. P. M. & A. 195; 5 L. T. 766; 164 E. R. 1034.

593. — Foreign ambassador's certificate.]—The certificate of the Hanoverian Ambassador under the seal of the Legation was admitted as evidence of the law of Hanover as to the validity of a testamentary paper.—*In the Goods of KLINGEMANN* (1862), 3 Sw. & Tr. 18; 32 L. J. P. M. & A. 16; 8 L. T. 172; 27 J. P. 263; 11 W. R. 218; 164 E. R. 1178.

594. — *Lex domicilii* applying English law.]—Testator died domiciled in Belgium. He left certain testamentary papers executed not according to the forms required of Belgian subjects, but the law of Belgium under the particular circumstances of the case determined the validity of the testamentary instruments according to the laws of testator's own country:—*Held*: effect should be given to the papers, they being valid instruments by the law of this country, in which deceased was previously domiciled.—*COLLIER v. RIVAZ* (1841), 2 Curt. 855; 163 E. R. 608.

Annotations:—*Consd.* *Hoskins v. Matthews* (1855), 25 L. T. O. S. 78. *Distd.* *Bremer v. Freeman* (1857), 10 Moo. P. C. C. 306. *Refd.* *Maltass v. Maltass* (1844), 3 Notes of Cases, 257; *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. C. 286; *Crookenden v. Fuller* (1859), Sea. & Sm. 3.

595. —]—Although by Naturalisation Act, 1870 (c. 14), s. 10 (1), the wife of a foreign subject is deemed to be herself a foreigner by French law the act of naturalisation is purely personal, & effects a change of status solely in regard to the person naturalised.

Where testatrix had married a British subject, a native of Mauritius, & by a settlement made upon the marriage & declaring the English domicile power was given to her to appoint by will or codicil the income & corpus of the settled fund, & after her husband had become a naturalised Frenchman she, while on a temporary visit to this country, made her will in English form pursuant to the power her thereto enabling, & died domiciled in France:—

Held: upon evidence that the will, though not made in accordance with the law of France, would be operative in that country, probate thereof should be granted to the exors. therein named.—*Re BROWN-SÉQUARD (DECEASED)* (1894), 70 L. T. 811; 6 R. 565.

Annotation:—*Refd.* *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821.

Lex domicilii applying other law generally, see Sect. 2, sub-sect. 1, B., ante.

PART VI. SECT. 2, SUB-SECT. 5.—A.

598 i. *Power created by settlement in English form—Application of English law.*]—By marriage settlement, made in 1853, real estate in Ireland & moneys were vested in trustees by the intended husband upon trust to sell the real estate, & to hold the proceeds of sale & the moneys upon trust, in the events, which happened, of there being no child of the marriage, & of the husband dying in the lifetime of his wife, for such person or persons, for such estates or interests, & in such

manner as he should by deed, or by his last will & testament, in writing, appoint. The husband died in 1865, having made his will in S. in 1862, by which he gave all the rest of his property to his wife for life & appointed her residuary legatee. In 1866 probate of the will, in common form, was granted to A., who had been appointed executor & trustee. In 1897 the wife died, having made a will appointing B. exor. and residuary legatee. The husband was a domiciled Scotsman. His will was duly executed according to Wills Act, 1837, but invalid accord-

ing to S. law. The real estate remained unsold. An action having been brought to revoke the probate of the will of the husband:—*Held*: (1) the real estate was, notwithstanding the trust for conversion, to be regarded as land; & the residuary gift was a good appointment of the beneficial interest in the lands to the wife; (2) the residuary gift was also a good appointment of the trust moneys, inasmuch as the intention of the settlement was that the trust funds were to be disposed of by a will made according to E. law; (3) the probate in common form should

(d) *To whom Grant made.*

On death intestate.]—See Nos. 487-490, ante.

Where court of domicile has pronounced.]—See Nos. 570-580, ante.

Where court of domicile has not pronounced.]—See Nos. 586-591, 595, ante.

(e) *Form of Grant.*

See EXECUTORS & ADMINISTRATORS.

B. Wills of British Subjects since Wills Act, 1861
(c. 114).

See Nos. 506-520, ante.

C. Wills disposing of Property Abroad.

See EXECUTORS & ADMINISTRATORS.

D. Wills made in pursuance of Powers.

See Sub-sect. 5, post.

SUB-SECT. 5.—EXECUTION OF POWERS BY WILL.

A. By what Law governed.

596. *Power created by Scottish Instrument—Appointment of money charged on land in Scotland—Reference to Scottish court.*]—Where a power of appointment was created by a Scottish deed over a sum of money charged on estates in Scotland:—*Held*: (1) the validity of appointments made under it should not be decided without first ascertaining the law of Scotland on the subject; (2) for that purpose a case should be stated for the opinion of the Ct. of Session pursuant to British Law Ascertainment Act, 1859 (c. 63).—*TOPHAM v. PORTLAND (DUKE)* (1863), 1 De G. J. & Sm. 517; 1 New Rep. 496; 32 L. J. Ch. 257; 8 L. T. 180; 46 E. R. 205, L. JJ.; *subsequent proceedings, sub nom.* *PORTLAND v. TOPHAM* (1864), 11 H. L. Cas. 32, H. L.

Annotations:—*As to* (1) *Consd.* *Cooper v. Cooper* (1869), 5 Ch. App. 203. *Refd.* *Eglinton v. Lamb* (1867), 15 L. T. 657; *A.-G. v. Richmond*, [1908] 2 K. B. 729. *Generally, Mentd.* *Re Huish's Charity* (1870), L. R. 10 Eq. 5; *Roach v. Trood* (1874), 31 L. T. 666; *Roach v. Trood* (1876), 3 Ch. D. 429; *Whelan v. Palmer* (1888), 39 Ch. D. 648; *Viant v. Cooper* (1897), 76 L. T. 768; *Cloutte v. Storey*, [1911] 1 Ch. 18; *Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595.

597. — *Exercised by domiciled Englishman.*]

—The distribution by an Englishman of a fund passing under a general power of appointment created by a Scottish will is regulated by Scottish law, whatever may be the domicile of the appointor.—*Re BALD, BALD v. BALD* (1897), 66 L. J. Ch. 524; 76 L. T. 462; 45 W. R. 490; 41 Sol. Jo. 490.

Annotations:—*Consd.* *Re Mègret, Tweedie v. Maunder*, [1901] 1 Ch. 547. *Distd.* *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286.

598. *Power created by settlement in English form—Application of English law.*]—On the marriage of an Englishwoman with a domiciled Frenchman English personal property was settled in English form with English trustees on such

Sect. 2.—To movables: Sub-sect. 5, A. & B.]

trusts as the intended wife should by will appoint, & subject thereto for her separate use:—

Held: the settlement was governed by English law, & subject to the payment of separate debts of the wife, the settled property passed under the will of the wife notwithstanding limitations imposed by French law on testamentary disposition.—*Re MEGRET, TWEEDIE v. MAUNDER*, [1901] 1 Ch. 547; 70 L. J. Ch. 451; 84 L. T. 192.

Annotations:—*Consd. Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578. *Distd. Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286. *Refd. Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

599. ———.]—*Re MACKENZIE, MACKENZIE v. EDWARDS-MOSS*, No. 224, *ante*.

Marriage settlements, *see, further*, Part XII., Sect. 2, *post*.

B. Validity.

See, generally, POWERS.

600. Will not executed in accordance with *lex domicilii*—*Requisites of power complied with*.]—A will disposing of personal estate situate in this country, made in pursuance of a power of appointment & executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicile of the party making it.—*TATNALL v. HANKEY* (1838), 2 Moo. P. C. C. 342; 12 E. R. 1036, P. C.

Annotations:—*Expld. Barnes v. Vincent* (1846), 5 Moo. P. C. C. 201; *In the Goods of Alexander* (1860), 29 L. J. P. M. & A. 93; *In the Goods of Hallyburton* (1866), L. R. 1 P. & D. 90. *Refd. D'Huart v. Harkness* (1865), 34 L. J. Ch. 311; *In the Goods of Huber*, [1896] P. 209. *Mentd. Brechley v. Lynn* (1852), 2 Rob. Eccl. 441.

601. ———.]—*CROOKENDEN v. FULLER*, No. 22, *ante*.

602. ———.]—The will of a person who dies domiciled abroad disposing of personal estate situate in this country, if made in pursuance of a power of appointment & executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicile of testator.—*In the Goods of ALEXANDER* (1860), 29 L. J. P. M. & A. 93; 2 L. T. 56; 6 Jur. N. S. 354; 8 W. R. 451.

Annotations:—*Expld. D'Huart v. Harkness* (1865), 34 Beav. 324. *Folld. In the Goods of Hallyburton* (1866), L. R. 1 P. & D. 90. *Dbtd. but Folld. In the Goods of Huber*, [1896] P. 209. *Refd. In the Goods of Tréfond*, [1899] P. 247; *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442.

603. ———.]—A will made in Scotland in the English form by a married woman domiciled in Scotland, purporting to be made under a power & disposing of property in England:—*Held*: the will was entitled to probate, although not valid according to the law of Scotland.—*In the Goods of HALLYBURTON* (1866), L. R. 1 P. & D. 90; 35 L. J. P. & M. 122; 14 L. T. 136; 12 Jur. N. S. 416.

Annotations:—*Distd. Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442. *Expld. In the Goods of Vannini*, [1901] P. 330. *Refd. In the Goods of Huber*, [1896] P. 209. *Mentd. In the Goods of Tréfond*, [1899] P. 247.

604. ———.]—Testatrix, who at the time of her death had a French domicile, executed in pursuance of a power of appointment a will in the English form, invalid according to French law:—*Held*: administration with the will annexed should be granted.—*In the Goods of HUBER*, [1896]

P. 209; 65 L. J. P. 119; 75 L. T. 453; 12 T. L. R. 499.

Annotations:—*Distd. Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442. *Refd. In the Goods of Tréfond*, [1899] P. 247; Pouey v. Hordern, [1900] 1 Ch. 492.

605. ———.]—*Limitation of grant*.]—Testatrix died domiciled in France, having been for many years separated from her husband. She left a will not duly executed according to French law, but which was, notwithstanding, a valid execution of a power under her marriage settlement:—*Held*: a general grant of administration with the will annexed should be made to the extrix, as appointee under the settlement, subject to the consent of the husband being obtained, & failing such consent, the grant should be limited to such property as deceased had power to appoint:—*In the Goods of TRÉFOND*, [1899] P. 247; 68 L. J. P. 82; 81 L. T. 56.

Annotation:—*Expld. In the Goods of Vannini*, [1901] P. 330.

606. ———.]—*Exercise of special power*.]—A domiciled Frenchwoman having under an English settlement a special power of appointment by will over funds in England, can exercise the power in such a way as to dispose of the property in a manner inconsistent with her position under the law of France. The exercise of such a power is not a disposition of property belonging to testatrix.—*POUEY v. HORDERN*, [1900] 1 Ch. 492; 69 L. J. Ch. 231; 82 L. T. 51; 16 T. L. R. 191.

Annotations:—*Expld. & Folld. Re Mègret, Tweedie v. Maunder*, [1901] 1 Ch. 547. *Distd. Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286. *Mentd. Re Hayes, Turnbull v. Hayes* (1900), 69 L. J. Ch. 691.

607. ———.]—*Wills Act, 1837 (c. 26), not complied with—Whether appointment valid as deed*.]—*Re DALY'S SETTLEMENT*, No. 219, *ante*.

608. ———.]—*Will valid by English law*.]—*Re MEGRET, TWEEDIE v. MAUNDER*, No. 598, *ante*.

609. ———.]—Under a settlement dated 1846 in contemplation of the marriage of G. & M., power was given to the latter, if she should survive the former, notwithstanding the trusts & provisions in favour of the children of the marriage, by deed or will in writing to direct, limit or appoint, give or bequeath all or any part or parts not exceeding one-half of the trust property, to, or in favour of, such person or persons & for such interests & purposes & generally in such manner in all respects as she should think proper or expedient. She survived her husband & died in 1905 having resided many years in Switzerland & acquired a domicile in that country. A will made by her shortly before her death, executed & attested in accordance with English law, but invalid according to the law of Switzerland, after making certain specific bequests, concluded as follows: "Any other property whatsoever of which I am or may be possessed I bequeath in equal shares to all my grandchildren." A summons was taken out by the trustees of the settlement raising the question whether the will was a valid exercise of the power of appointment:—*Held*: (1) the will complied in form with all the requisites for a proper exercise of the power; & the only question arose from the Swiss domicile of testatrix; (2) the most reasonable principle to apply was that the will should be construed, not according to hypothetical constructions which might be placed upon it by foreign cts., but wholly with reference to English law, & that being the case Wills Act, 1837 (c. 26), s. 27, was clearly applicable, & the power was therefore

be revoked, & liberty given to R. to apply for a grant limited to the real estate & trust moneys, the subject-matter of the power of appointment.—*MURRAY v. CHAMPERNOWNE*, [1901] 2 L. R. 232; 35 L. L. T. 68.—*IR.*

w. Execution in English form of will in pursuance of power—Testatrix domiciled abroad.]—Where a will is executed under a power, such will may be good for the purposes of the

appointment if executed according to the law of this country, though not according to the law of the domicile of testatrix.—*MURPHY v. DEICHLER* (1909), 43 L. L. T. 235.—*IR.*

exercised by the will.—*Re BAKER'S SETTLEMENT TRUSTS, HUNT v. BAKER*, [1908] W. N. 161.

610. ——— **Limitation of grant.]**—an English power of appointment by will is exercised by a will executed in English form, though the appointor be domiciled abroad & the will be not validly executed according to the law of domicile, the document may be admitted to probate as a will for the purpose of the appointment, though not admissible for other purposes.—*MURPHY v. DEICHLER*, [1909] A. C. 446; 78 L. J. P. C. 159; 101 L. T. 143; 25 T. L. R. 719; 53 Sol. Jo. 671, H. L.

611. Will complying with lex domicilii—Unattested—English law not complied with.]—Personal property was held under an English will in trust for such person as an English lady should by her last will in writing, duly executed, appoint. She afterwards married a Frenchman & died domiciled in France having appointed the property by an unattested will valid according to the law of her domicile & admitted to probate in this country:—*Held*: this will was a valid execution of the power.—*D'HUART v. HARKNESS* (1865), 34 Beav. 324; 5 New Rep. 440; 34 L. J. Ch. 311; 11 Jur. N. S. 633; 13 W. R. 513; 55 E. R. 660.

Annotations:—*Consd. In the Goods of Huber*, [1896] P. 209; *Hummel v. Hummel*, [1898] 1 Ch. 642. *Apprvd. & Follid. Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442. *Consd. Re Scholefield, Scholefield v. St. John, Re Young, Smith v. St. John*, [1905] 2 Ch. 408. *Apprvd. & Follid. Re Simpson, Coutts v. Church Missionary Soc.*, [1916] 1 Ch. 502. *Follid. Re Wilkinson's Settlement, Butler v. Wilkinson*, [1917] 1 Ch. 620. *Distd. Re Wernher, Wernher v. Belt*, [1918] 1 Ch. 339. *Refd. Barretto v. Young*, [1900] 2 Ch. 339; *Pouey v. Horderm*, [1900] 1 Ch. 492.

612. ——— **Whether defective execution aided by court.]**—The donee of a power of appointment amongst his children exercisable by deed or will having one son & one daughter, by will in 1862 made a valid appointment to the daughter of the whole fund subject to the power. By a French settlement not under seal made in 1866 upon the marriage of his daughter, he purported to appoint the whole fund to her, reserving to himself the power of disposing of a life interest in a portion of the fund in favour of his second wife, & by a holograph codicil, dated in 1871, made in France & unattested, after reciting an arrangement made when his daughter was married between himself, his daughter & her intended husband, that such second wife should have such provision, he in effect appointed that if his daughter & her husband should carry out this arrangement they should have the whole of the fund. This codicil was admitted to probate under Wills Act, 1861 (c. 114):—*Held*: (1) though admitted to probate the codicil was invalid as a testamentary exercise of the power, Wills Act, 1837 (c. 26), ss. 9, 10 not being repealed by Wills Act, 1861 (c. 114), & did not revoke the appointment by will; (2) the codicil could not be treated as a defective attempt to exercise the power by deed, which the ct. would aid; (3) the appointments by the settlement & codicil were frauds upon the power; (4) the arrangements made by the settlement & codicil involved a threat to revoke the will if they were not carried into effect, & consequently the will, being an ambulatory instrument, was vitiated & became a fraud upon the power although at the date of its execution it was not open to objection.—*Re KIRWAN'S TRUSTS* (1883), 25 Ch. D. 373; 52 L. J. Ch. 952; 49 L. T. 292; 32 W. R. 581.

Annotations:—*As to* (1) *Follid. Hummel v. Hummel*, [1898] 1 Ch. 642. *Consd. Barretto v. Young*, [1900] 2 Ch. 339. *Expld. & Distd. Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442. *Consd. Re Wilkinson's Settlement, Butler v. Wilkinson*, [1917] 1 Ch. 620. *Refd. Re Simpson, Coutts v. Church Missionary Soc.*, [1916] 1 Ch. 502; *Re Lyne's Settlement*.

Trusts, Re Gibbs, Lyne v. Gibbs, [1919] 1 Ch. 80. *As to* (4) *Refd. Pouey v. Horderm*, [1900] 1 Ch. 492.

613. ——— **—.]**—The defective execution of a power of appointment will be aided by the ct. even though there has been a prior valid appointment by will.

A domiciled Scotswoman, having a power to appoint among children by will or codicil attested by two witnesses, appointed the whole fund by will to her three daughters. Subsequently by codicil, which was unattested, but which was valid according to the law of Scotland she appointed part of the fund to her sons:—*Held*: the ct. would aid the defective execution of the codicil in favour of the sons, & so as to revoke the will to the extent to which the codicil effectively interfered with the disposition of the will.—*Re WALKER, MACCOLL v. BRUCE*, [1908] 1 Ch. 560; 77 L. J. Ch. 370; 98 L. T. 524; 52 Sol. Jo. 280.

614. ——— **General power of appointment.]**—A daughter of a testator had under his will a general power of appointment by will over a share of his residuary estate. The daughter died in France, having while residing there made a disposition of her property by a writing signed by her but not attested, the writing being in form a valid will according to French law:—*Held*: the writing, even if admissible to probate under Wills Act, 1861 (c. 114), did not operate as an execution by the daughter of her general power of appointment by will, since it had not been attested by two or more witnesses as required by Wills Act, 1837 (c. 26), ss. 9, 10.—*HUMMEL v. HUMMEL*, [1898] 1 Ch. 642; 67 L. J. Ch. 363; 78 L. T. 518; 46 W. R. 507.

Annotations:—*Consd. Re Wilkinson's Settlement, Butler v. Wilkinson*, [1917] 1 Ch. 620. *Refd. Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; *Re Simpson, Coutts v. Church Missionary Soc.*, [1916] 1 Ch. 502; *Re Lyne's Settlement, Trusts, Re Gibbs, Re Lyne v. Gibbs*, [1919] 1 Ch. 80.

615. ——— **—.]**—(1) A will of a domiciled foreigner, which is valid by the law of testator's domicile, & has been recognised as a valid will in this country by the Probate Division, is capable of operating as an execution of a power of appointment by will over personal estate under an English instrument, although the formalities required by Wills Act, 1837 (c. 26), ss. 9, 10, have not been observed.

(2) Although as a general rule a will is to be construed according to the law of testator's domicile, this rule does not apply where there are indications on the face of the will that testator wrote it with reference to the law of some other country.

A domiciled French subject having a general power of appointment over a fund under an English instrument left all her property to her husband by a holograph will made in French form & unattested. The will was valid by the law of France, & letters of administration with the will annexed were granted in this country. The will contained the following words: "This will amends all others & it shall thus be considered in England the same as in France":—*Held*: it was competent for testatrix to execute the power by a will in this form, notwithstanding Wills Act, 1837 (c. 26), ss. 9, 10, & the same rules of construction ought to be applied to it as would be applied to an English will in same terms & of same date, including the rule of construction introduced by s. 27 of the Act; the general bequest operated as a valid execution of the power in favour of the husband.—*Re PRICE, TOMLIN v. LATTER*, [1900] 1 Ch. 442; 69 L. J. Ch. 225; 82 L. T. 79; 48 W. R. 373; 16 T. L. R. 189; 44 Sol. Jo. 242.

Annotations:—*As to* (1) *Consd. Barretto v. Young*, [1900] 2 Ch. 339. *Distd. Re D'Este's Settlement, Trusts, Poulter v. D'Este*, [1903] 1 Ch. 898. *Consd. Re Baker's Settlement*.

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Trusts, *Hunt v. Baker*, [1908] W. N. 161. **Folld.** *Re Wilkinson's Settlement*, *Butler v. Wilkinson*, [1917] 1 Ch. 620. **Apld.** *Re Wernher*, *Wernher v. Belt*, [1918] 2 Ch. 82. **Refd.** *Pouey v. Hordern*, [1900] 1 Ch. 492; *Re Walker*, *MacColl v. Bruce*, [1908] 1 Ch. 560; *Re Simpson*, *Coutts v. Church Missionary Soc.*, [1916] 1 Ch. 502. **As to (2) Consd.** *Re D'Este's Settlement*, *Trusts*, *Poulter v. D'Este*, [1903] 1 Ch. 898; *Re Scholefield*, *Scholefield v. St. John*, *Re Young*, *Smith v. St. John*, [1905] 2 Ch. 408. *Re Baker's Settlement*, *Trusts*, *Hunt v. Baker*, [1908] W. N. 161; *Re Simpson*, *Coutts v. Church Missionary Soc.*, [1916] 1 Ch. 502.

616. **Terms of power not complied with.]**—Where the donee of a testamentary power of appointment is a foreigner with foreign domicile, & special formalities for the execution of the power are required by the instrument creating it, it is not enough for the valid execution of the power that the instrument purporting to execute it is a will according to the law of the domicile, but such will must comply with the formalities required by the power.

A donee of a general power to appoint by will created by a will antecedent to Wills Act, 1837 (c. 26) was a domiciled Frenchwoman. She executed a holograph will in French, which was valid by the law of France, & purported to be an exercise of the power. This will, although unattested was admitted to probate in England. The power by the terms of the will which created it was to be executed by the donee in the presence of, & attested by, two or more credible witnesses:—**Held:** the requirements for execution specified by the power not having been satisfied, the power was not well executed.—**BARRETTO v. YOUNG**, [1900] 2 Ch. 339; 69 L. J. Ch. 605; 83 L. T. 154.

617. ————**]**—A domiciled French lady having a general power of appointment by deed or will in default of children over a fund settled by her upon her marriage, appointed the fund by a will, expressed in the French language & valid according to French law, but not valid according to English law as it was an unattested document. By it she appointed her husband general & universal legatee, & bequeathed to him all her property, but in the event of there being children she bequeathed him one-fourth absolutely & the usufruct in another fourth. There was no issue of the marriage. The lady died in 1902, & the will was admitted to probate in England. On a summons asking whether it was a valid exercise of the power of appointment:—**Held:** although a testamentary power contained in an English instrument might be exercised by the will of a domiciled foreigner valid according to foreign law & admitted to probate in this country, yet if such will did not effectually exercise the power apart from Wills Act, 1837 (c. 26), s. 27, there being no reference to either property or power in the will, s. 27 could be introduced as a rule of construction for the purpose of rendering the will a valid exercise of the power when the rules of construction according to foreign law would have to be applied, & therefore the will was not a valid execution of the power.—**Re D'ESTE'S SETTLEMENT TRUSTS**, **POULTER v. D'ESTE**, [1903] 1 Ch. 898; 72 L. J. Ch. 305; 88 L. T. 384; 51 W. R. 552; 47 Sol. Jo. 353.

Annotations:—**Folld.** *Re Scholefield*, *Scholefield v. St. John*, *Re Young*, *Smith v. St. John*, [1905] 2 Ch. 408. **Expld.** *Re Baker's Settlement*, *Trusts*, *Hunt v. Baker*, [1908] W. N. 161. **Consd.** *Re Simpson*, *Coutts v. Church Missionary Soc.*, [1916] 1 Ch. 502; *Re Wilkinson's Settlement*, *Butler v. Wilkinson*, [1917] 1 Ch. 620; *Re Lewal's Settlement*, *Trusts*, *Gould v. Lewal*, [1918] 2 Ch. 391.

]—The general rule of construction introduced by Wills Act, 1837 (c. 26), s. 27, which provides that a general testamentary power of appointment may be exercised

by a general bequest not referring either to the property or to the power, does not apply to a foreign will not executed in accordance with the provisions of the Act, though valid according to the law of testator's domicile & admitted to probate in this country, unless the will contains on its face an indication that it is to be construed according to English rules of construction.

A testatrix domiciled in France, in whom was vested a general testamentary power of appointment over personalty under an English instrument, by an unattested will, which was admitted to probate as complying with the law of France, created her niece universal legatee of her property in England as well as in France. The will contained no reference either to the power or to the property, but certain unsigned memoranda in the handwriting of testatrix referred to the property comprised in the power, & showed a clear intention to appoint in favour of the niece. Powers of appointment were unknown in France, but according to the expert evidence by the law of France the will would pass everything which testatrix could dispose of, & the unsigned memoranda would be admissible as evidence of her intention:—**Held:** the question of the exercise of the power was to be determined upon evidence admissible by the law of England, & the will did not operate as a valid exercise of the power.—**Re SCHOLEFIELD**, **SCHOLEFIELD v. ST. JOHN**, *Re YOUNG*, **SMITH v. ST. JOHN**, [1905] 2 Ch. 408; 74 L. J. Ch. 610; 93 L. T. 122; 54 W. R. 56; 21 T. L. R. 675; *on appeal*, [1907] 1 Ch. 664, C. A.

Annotations:—**Consd.** *Re Baker's Settlement*, *Trusts*, *Hunt v. Baker*, [1908] W. N. 161; *Re Simpson*, *Coutts v. Church Missionary Soc.*, [1916] 1 Ch. 502. **Dbtd. & Distd.** *Re Wilkinson's Settlement*, *Butler v. Wilkinson*, [1917] 1 Ch. 620. **Refd.** *Re Lewal's Settlement*, *Trusts*, *Gould v. Lewal*, [1918] 2 Ch. 391.

619. ————**]**—In considering the question of the execution of a power of appointment by will made abroad but admitted to probate in England, the ct. will have regard to the rule of construction contained in Wills Act, 1837 (c. 26), s. 27, both in regard to the wills of British subjects & of foreigners, & a gift, which according to the law of the domicile amounts to a general bequest of personal estate, operates as an execution of a general power of appointment unless a contrary intention appear by the will.

A testatrix domiciled in France, who had a general testamentary power of appointment over personalty, executed an unattested will, valid according to French law & admitted to probate in England. The will contained no specific reference to the power, but testatrix bequeathed all property and rights comprised on her estate to certain persons & cancelled any testamentary or other disposition which she might have made previously. Testatrix died in 1912:—**Held:** testatrix had sufficiently indicated an intention to execute the power & to invoke the aid of English law, but apart from such indications, s. 27 of the Act would apply & the power would have been duly executed, had the will contained nothing but a general bequest.—**Re SIMPSON**, **COUTTS & CO. v. CHURCH MISSIONARY SOCIETY**, [1916] 1 Ch. 502; 85 L. J. Ch. 329; 114 L. T. 835.

Annotations:—**Apprvd. & Folld.** *Re Wilkinson's Settlement*, *Butler v. Wilkinson*, [1917] 1 Ch. 620. **Apld.** *Re Lewal's Settlement*, *Trusts*, *Gould v. Lewal*, [1918] 2 Ch. 391.

620. ————**]**—By a marriage settlement of English personal property made in 1855 the property was given to trustees in trust for such of the children of the marriage as (in the events that happened) W. should by will appoint. W. died in 1914 in Italy, having acquired an

Italian domicil, & having by her will expressed the desire that the unmarried children should have equal shares in the money that was left, naming the items of the settled property, & any other property which she could have the power & the right to dispose of. The will was valid according to Italian law, but there were no attesting witnesses to it. Letters of administration with the will annexed were granted out of the Probate Division of the High Ct. in England:—*Held*: the will was a valid execution of the power.—*Re WILKINSON'S SETTLEMENT, BUTLER v. WILKINSON*, [1917] 1 Ch. 620; 86 L. J. Ch. 511; 117 L. T. 81; 33 T. L. R. 267; 61 Sol. Jo. 414.

Annotations:—*Appld. Re Lewal's Settlement. Trusts, Gould v. Lewal*, [1918] 2 Ch. 391. *Consd. Re Wernher, Wernher v. Belt*, [1918] 1 Ch. 339.

621. —.]—By an unattested holograph will made in France in 1907 the English wife, aged nineteen, of a Frenchman domiciled & resident in France appointed him her *legataire universel*. At the time of her death in 1917 & in the events which had happened the wife had under her marriage settlement, made in England & duly sanctioned under the Infant Settlement Act, 1855 (c. 43), a general power of appointment over the settled funds by will or codicil executed in such manner as to be valid according to the law of her domicil or by any writing purporting to be a will or codicil executed in such manner that same would be valid as such according to the law of England if she were at the time of her death domiciled in England. The settlement contained a declaration that it should be construed, & the rights of all parties thereunder should in all respects be regulated, according to the law of England. Administration with the will annexed had been granted in England to the husband's attorney. According to the law of France the document was a valid will, but inasmuch as at the time of making it the wife was a married woman over sixteen, but under twenty-one, years of age, she was competent to dispose by will of only one-half of the property of which she would have been able to dispose if she had been twenty-one years of age:—*Held*: (1) the effect of the declaration was not to restrict the testamentary capacity of the wife to full age according to the law of England, & the will, being a good will according to the law of France, was within the contemplation of the settlement as an instrument by which the power could be exercised, notwithstanding that the wife was under twenty-one when she made it; (2) Wills Act, 1837 (c. 26), s. 27, could be invoked for the purpose of interpreting the French will, & the power had been effectually exercised by the disposition therein contained of the wife's estate in general words; (3) inasmuch as by French law the testamentary capacity of the wife was in the circumstances limited to one-half only of the property of which she could have disposed if she had been twenty-one years of age at the time of making her will, her will only operated on one-half of the property subject to the power, & the other half went as in default of appointment.—*Re LEWAL'S SETTLEMENT TRUSTS, GOULD v. LEWAL*, [1918] 2 Ch. 391; 87 L. J. Ch. 588; 119 L. T. 520; 34 T. L. R. 538; 62 Sol. Jo. 702.

622. Effect of restrictions imposed on exercise of power by lex domicilii—Will valid by English law. —On Dec. 20, 1881, prior to the marriage, solemnised in England, of a domiciled Englishwoman, a widow, with a domiciled Spaniard, real estate in England of the intended wife was vested by her in a trustee in fee, to such uses as the intended wife should by deed or will appoint, & subject thereto,

to the use of the intended wife, for her separate use. The settlement was made with the approbation of the intended husband, & the deed contained a statement that this approbation was given in consideration of a renunciation the same day executed by the intended wife of any rights which she would otherwise have acquired by her marriage in respect of the property of the intended husband accordingly to the law of Spain. The deed also contained a declaration that it was to take effect and be construed according to the law of England. The marriage was solemnised on the next day. On Feb. 23, 1882, the wife, being then domiciled in Spain, executed a deed-poll in accordance with the provisions of the settlement, whereby she, in exercise of the power given to her by the settlement, appointed the real estate to the use of herself in fee for her separate use. By another deed executed the same day, to which the husband was party, she, with the consent of the husband appointed & conveyed, & the husband conveyed the real estate to the use of a trustee in fee, upon trust for sale, & out of the proceeds of sale to pay certain specified debts, & subject thereto, in trust for such person or persons as the wife should at any time or times thereafter by any writing or writings from time to time appoint, & in default of any appointment, & subject thereto, in trust for the wife absolutely for her separate use. Under this deed the trustees sold the property & out of the proceeds of sale paid the specified debts, & there then remained a surplus in his hands. The wife died on June 1, 1882, having by a will, executed immediately after her marriage, & which purported to be made in exercise of the powers reserved to her by her marriage settlement, & of all other powers enabling her, directed, appointed & declared that the real & personal estate over which she had any disposing power at the time of her death should be held & applied in the payment of certain legacies & annuities, & subject thereto, she gave four-fifths of her real & personal estate, in case she should leave no children, to her husband absolutely. She gave the remaining one-fifth of her property, charged with the before-mentioned annuities & legacies, to her brother & sisters, or to the children *per stirpes* of such of them as should die before her leaving children. Testatrix died without issue. The husband survived her. According to the law of Spain under such circumstances two-thirds of her property belonged to her father & mother, notwithstanding that she had left a will:—*Held*: whether the will was or was not a good exercise of the power reserved by the deed of Feb. 1882, it was a valid testamentary disposition by virtue of the limitation in default of appointment to the separate use of testatrix, & it took effect according to English law, & the legatee named in it, including the husband, were entitled to the benefits given to them by it.

Semble: the will was a valid exercise of the power of appointment given by the deed of Feb. 1882.—*Re HERNANDO, HERNANDO v. SAWTELL* (1884), 27 Ch. D. 284; 53 L. J. Ch. 865; 51 L. T. 117; 33 W. R. 252.

Annotations:—*Appld. Re Mégret, Tweedie v. Maunder* (1901), 70 L. J. Ch. 451; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578.

623. — — —.]—*Re MÉGRET, TWEEDIE v. MAUNDER*, No. 598, *ante*.

624. — — —.]—Under the will of her father an English lady had a general power of appointment by will over certain funds in England. She married a Dutch gentleman, & acquired a domicil in Holland. By Dutch law her power of disposition was limited to seven-eighths of her property, her

Sect. 2.—To movables: Sub-sect. 5, B. Sects. 3 & 4. Part VII. Sects. 1 & 2: Sub-sect. 1, A.]

mother, in the events which happened, being entitled to one-eighth as "legitimate portion." By her will, which was in Dutch form but admitted to probate in England, she appointed her husband as sole heir of the whole of which the law in force at the time of her death should allow her to dispose in his favour, & also appointed him exor. with all requisite powers, including the right to take possession of all her real & personal properties according to law. According to Dutch law the exercise of the power had the effect of making the appointed property her assets for all purposes:—*Held*: by English law also the lady had by exercising the power made the appointed property her assets for all purposes, & her power of disposition over it was no greater than over property to which she was absolutely entitled, & consequently her husband was only beneficially entitled to seven-eighths of the appointed property.—*Re PRYCE, LAWFOORD v. PRYCE*, [1911] 2 Ch. 286; 80 L. J. Ch. 525; 105 L. T. 51, C. A.

625. ———.]—*Re LEWAL'S SETTLEMENT TRUSTS, GOULD v. LEWAL*, No. 621, *ante*.

626. Over money in court in England—Appointment by will proved abroad—Necessity for proof of will in England.]—Testator died in New Zealand, having by his will appointed to his son in exercise of a power the proceeds of sale of certain English leaseholds, which had been taken by a local board of works, & the proceeds paid into ct. The will appointing the proceeds of sale was proved in the Supreme Ct. of New Zealand:—*Held*: the will must also be proved in England before payment out of ct. to the appointee could be directed.—*Re VALLANCE, Ex p. TIMEHOUSE BOARD OF WORKS* (1883), 24 Ch. D. 177; 52 L. J. Ch. 791; 48 L. T. 941; 32 W. R. 387.

SECT. 3.—ADMINISTRATION OF ASSETS.

627. In what court.]—*How (LADY) v. KILMANSEG (COUNT)*, No. 447, *ante*.

628. ——— In country where possession taken under lawful authority.]—*PRESTON v. MELVILLE*, No. 455, *ante*.

629. ——— In country where deceased domiciled at death.]—*ENOHIN v. WYLIE*, No. 456, *ante*.

630. ———.]—*EWING v. ORR EWING*, No. 349, *ante*.

631. ——— In country where property situated.]—*CRUIKSHANK v. ROBERTS* (1821), 6 Madd. 104; 56 E. R. 1031.

632. ———.]—Where a person died domiciled in Ireland, leaving property in Ireland & England, & the same exors. in both countries:—*Held*: an Irish judgment has priority over English simple contract creditors against Irish property remitted to England by the exors. & being there administered.—*COOK v. GREGSON* (1854), 2 Drew.

PART VI. SECT. 3.

631 i. In what court—In country where property situated.]—The foundation of the jurisdiction of the Ct. of Probate is, that there are assets of deceased to be distributed within its jurisdiction.—*In the Goods of BUTSON* (1882), 9 L. R. Ir. 21.—IR.

631 ii. ———.]—The Ct. of Probate in Ireland has jurisdiction to grant probate of the will of a testator whose assets were in I., although his domicile was English.—*ROBINSON v. PALMER*, [1901] 2 I. R. 489.—IR.

635 i. By what law governed—*Lex loci—Costs of administration suit.*]—Deceased died domiciled in N.B., leaving personal property there & in M.; administration of the estate was taken out in both countries. The proceeds of the M. property were brought by the administratrix to N.B. Deceased was indebted to creditors in both countries. An administration suit was brought in N.B. against the administratrix by N.B. creditors. By a decree of M. Probate Ct. M. assets were ordered to be distributed among deceased's creditors in accord-

286; 2 Eq. Rep. 1132; 23 L. J. Ch. 734; 23 L. T. O. S. 86; 2 W. R. 401; 61 E. R. 729.

Annotations.—*Consd. Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416; *Re Kloebe, Kannreuther v. Geiselbrecht* (1884), 28 Ch. D. 175. *Reid. Blackwood v. R.* (1882), 8 App. Cas. 82.

633. ——— & where parties resident.]—Testator died domiciled in Jersey leaving a widow & two infant children. By his will he gave the whole of his personal property, subject to a certain annuity to his wife, to his children. He died possessed of £13,000 of English Consols, & also of certain property in Jersey. The principal part of the latter consisted of a share in the property of a certain partnership, which had since his death become insolvent. His widow & two others were his extrix. & exors. A gentleman resident in Jersey was shortly after testator's death appointed *tuteur* of the infant children, in accordance with the law of Jersey. The widow married again, & with the two children came to reside in England. An action was commenced in the Ch. Div. by the infant children for administration of testator's real & personal estate, & for the appointment of guardians. Leave was given for service of the writ out of the jurisdiction on the *tuteur* & exors. in Jersey, but after service, & before appearance, they moved to discharge the order, on the ground that the proceedings were wrongly instituted in this country:—

Held: inasmuch as plffs. were resident in England, & the bulk of the property was in England, there was no reason why the action should not be brought there.—*Re LANE, LANE v. ROBIN* (1886), 55 L. T. 149.

634. ———.]—An Englishwoman married an Italian & was left a widow & a domiciled Italian subject. She made no will, but signed a letter said to constitute a holograph will in Italian law, & died leaving personal property the bulk of which was in England, & some in Italy. Her sisters issued a writ in the Probate Division as next of kin for a grant of letters of administration of her estate. Other persons, claiming under the holograph, then commenced proceedings in Italy & applied in the probate action for a stay of all the proceedings in that action. There was no dispute as to the Italian law. Upon appeal from an order staying the proceedings, the only question of substance in dispute was on the construction of the holograph letter:—*Held*: the English ct. had jurisdiction to make an administration order & to decide any question with regard to the assets of deceased, & the question, being only of construction of English words, ought to be decided in the English cts.—*Re BONNEFOI, SURREY v. PERRIN*, [1912] P. 233; 82 L. J. P. 17; 107 L. T. 512; 57 Sol. Jo. 62, C. A.

635. By what law governed—*Lex loci.*]—A Dutchman possessing personal estate in Holland & in England made his will in Holland, by the laws of which country there was no distinction between real & personal estate, both being equally liable to testator's debts. After testator's death the

ance with a M. statute. The effect would be that M. creditors would be paid their share of the whole estate without contributing to the costs of the administration suit in N.B.:—*Held*: the costs of the administration suit could be charged against M. assets, & their distribution must be in accordance with M. law.—*WARNER v. GIBBERSON* (1894), 1 N. B. Eq. Rep. 65.—CAN.

635 ii. ———.]—In the administration of the O. estate of a deceased domiciled abroad, foreign creditors

Dutch creditors seized houses in Holland specifically devised. The exor. proved the will in England & possessed himself of all testator's effects there. The devisees of the houses in Holland sued the exor. & residuary legatee to have repaid to them out of the assets in England the value of the houses seized in Holland:—*Held*: such account & satisfaction should be granted.—*BOWAMAN v. REEVE* (1721), Prec. Ch. 577; 24 E. R. 259, L. C.

636. ———.]—*BLACKWOOD v. R.*, No. 457, ante.

637. ——— *Lex domicilii*.]—The personal estate of a testator must be administered according to the law of his domicile.—*WILSON v. DUNSANY (LADY)* (1854), 18 Beav. 293; 2 Eq. Rep. 706; 23 L. J. Ch. 492; 23 L. T. O. S. 73; 18 Jur. 762; 2 W. R. 288; 52 E. R. 115.

Annotation:—*Dbtd. Re Kloebe, Kannreuther v. Geiselbrecht* (1884), 28 Ch. D. 175. There seems to be some mistake in

the case of *Wilson v. Dunsany (Lady)*; it is unfortunate that the case was ever reported (PEARSON, J.).

638. Probate granted in England of will of domiciled Scotsman—*Jurisdiction of English court*—*To authorise trustees to apply to Scottish court*—*For leave to sell*.]—An English ct. can authorise the trustees of the will of a domiciled Scotswoman proved in England to apply to the Ct. of Sess. for leave to sell, the English ct. having construed the will as giving the trustees an implied power of sale & being of opinion that a sale would be beneficial & in the interests of infants.—*Re GEORGES, BUCKLE v. CARTER* (1921), 65 Sol. Jo. 311; 56 L. Jo. 55; 151 L. T. Jo. 94.

SECT. 4.—ESTATE DUTIES.

See ESTATE & OTHER DEATH DUTIES.

Part VII.—Contracts.

SECT. 1.—JURISDICTION WITH REGARD TO CONTRACTS.

Limitations of jurisdiction of English Courts in foreign matters generally.]—See Part I., Sect. 1, ante.

Enforcement of contracts.]—See Sect. 2, sub-sect. 5, post.

Contracts relating to foreign immovables.]—See Part IV., Sect. 2, sub-sect. 4, ante.

Seamen's wages on foreign ships.]—See ADMIRALTY, Vol. I., p. 137, No. 450, *et seq.*

SECT. 2.—LAW GOVERNING CONTRACTS.

SUB-SECT. 1.—DETERMINED BY INTENTION OF PARTIES.

A. Intention of Parties expressed.

Agreement to refer disputes to foreign tribunal.]—See ARBITRATION, Vol. II., pp. 363, 364, Nos. 324, 329–331.

639. *Agreement for contract to be construed according to English law.*]—The ct. has discretionary jurisdiction to restrain the prosecution of proceedings in a foreign ct. by an English

person, if the bringing of those proceedings is in breach of a contract made in this country.

Where, therefore, a contract provided that same should be construed & take effect as a contract made in England & in accordance with the law of England, & that the rights, duties or liabilities of the parties thereto should be referred to arbn. in conformity with the provisions of Arbn. Act, 1889 (c. 49), the award of the arbitrators to be a condition precedent to any liability of either party:—*Held*: an injunction to restrain one of the parties from continuing or prosecuting, except under or in pursuance of an award under the contract, proceedings commenced by that party against the other in a foreign ct. should be granted.—*PENA COPPER MINES, LTD. v. RIO TINTO CO., LTD.* (1911), 105 L. T. 846, O. A.

No implication that provisions of foreign Act binding.]—An investment co., incorporated in England, advanced to an American Railway co., incorporated under the laws of the United States, the sum of £500,000, & the railway co. agreed to pay interest thereon in London at the rate of five per cent. By a deed, dated Nov. 24, 1905, & made between the railway co., the investment co., therein called the trustees, &

are entitled to dividends *pari passu* with O. creditors.—*MILNE v. MOORE* (1894), 24 O. R. 456.—CAN.

635 iii. ———.]—The North American Life Assurance Co., with head office at T., issued a policy on life of M., payable to his mother should his death occur within the investment period thereof, otherwise to his estate. The mother predeceased her son within the investment period, dying intestate:—*Held*: (1) the proceeds of the policy went to the estate of the mother; (2) the insurance being payable within & subject to the law of Manitoba, the administrator must distribute the proceeds in accordance with that law.—*Re MCGREGOR* (1909), 10 W. L. R. 435.—CAN.

635 iv. ———.]—Where assets are being distributed, the law governing the distribution is the law of the country in which the distribution takes place.—*Ex p. GIBSONS, LTD. (LIQUIDATOR OF)*, [1918] W. L. D. 113.—S. AF.

PART VII. SECT. 2, SUB-SECT. 1.—A.

639 i. *Agreement for contract to be construed according to foreign law*—*Duty to plead & prove foreign law.*]—

Where the bill of lading stipulates that it shall be governed by foreign law, the party desiring to avail himself of such law is bound to state in his pleadings what it means & to prove it by expert testimony, otherwise the ct. will assume that there is no difference between our law & the foreign law.—*RENDELL v. BLACK DIAMOND S.S. CO.* (1896), Q. R. 10 S. C. 257.—CAN.

y. ——— *Validity of.*]—A stipulation in a bill of lading, executed in a foreign country, that "all disputes regarding this bill of lading are to be settled according to the law of G., & decided before the H. law cts.," is not contrary to public order.—*NICHOLSON v. HAMBURG AMERICAN PACKET CO.* (1904), Q. R. 25 S. C. 34.—CAN.

z. ———.]—A stipulation in a contract that it shall be governed by the laws of a foreign country is valid & binding.—*CANADA SUGAR REFINING CO. v. FURNESS-WITHY CO., TELLIER v. FURNESS-WITHY CO., DOBELL v. FURNESS-WITHY CO.* (1905), Q. R. 27 S. C. 502.—CAN.

a. ———.]—A stipulation in a contract that it shall be governed by the laws of a foreign country is

valid & binding.—*BROSSEAU v. BERGEVIN* (1905), Q. R. 27 S. C. 510.—CAN.

b. ———.]—A contract was made in O., between parties there domiciled, & the money made payable in that province. All parties desired that the case be decided on the law of the province of O., & had signed an agreement to that effect:—*Held*: the agreement was valid.—*Re NAUBERT* (1920), 46 O. L. R. 210.—CAN.

c. ——— *Effect of.*]—A firm of grain merchants in S. were authorised by telegram in general terms from defender who resided in B.C. to buy wheat. They accordingly contracted with pursuers in London as principals though it was known they were acting for a foreign principal. The written contract stipulated that for the purpose of proceedings, either legal or by arbitration, the contract was to be deemed made in England & to be performed there. Pursuers took a bill for the price, but on the arrival of the cargo this was not met. Defender's name & address were then for the first time disclosed:—*Held*: (1) by agreeing that the contract was to be treated as a contract made in E.

Sect. 2.—Law governing contracts: Sub-sect. 1, A. & B. (a).]

deft. co., also incorporated in England, the latter co. guaranteed the payment of the interest on the sum of £500,000, in case of default in payment by the railway co. It was provided that the deed should be construed, & the rights of all persons claiming thereunder should be regulated, by the law of England. In 1916 & 1917 the United States of America passed income tax laws imposing, *inter alia*, an income tax of two per cent. upon income received from all sources within the United States by every individual, a non-resident alien, & by every corp., joint stock co. or assocn. organised, authorised or existing under the laws of any foreign country, including interest on bonds, notes or other interest bearing obligations of non-residents, corporate or otherwise. The railway co. deducted the tax from their payment of the interest. In an action by the trustees against the guarantors for the amount of this deduction:—**Held:** the contract being an English contract, & the parties thereto having expressly agreed that it should be construed according to English law, & there being no implication therein that the provisions of an American Taxing Act should be enforceable in England, the railway co. were not entitled to deduct the tax, & the guarantors were liable for the amount unpaid by the railway co.—**INDIAN & GENERAL INVESTMENT TRUST, LTD. v. BORAX CONSOLIDATED, LTD.**, [1920] 1 K. B. 539; 89 L. J. K. B. 252; 122 L. T. 547; 36 T. L. R. 125; 64 Sol. Jo. 225.

B. Intention of Parties not expressed.

(a) In General.

641. General rule.]—(1) The rights of parties under a contract not expressly provided for thereby, but arising incidentally within the sphere of the relation created by it, are to be determined by that general law which the parties intended to govern the transaction, or rather by which they may justly be presumed to have bound themselves.

(2) *Primâ facie*, the law of the place where a contract is made is that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, & such law ought to prevail in the absence of circumstances indicating a different intention.

(3) A contract of affreightment made between a charterer & owners of the ship, being persons of different nationalities, in a place where both of

them were foreigners, to be performed partly there by the ship breaking ground in order to start for the port of loading, a place where both parties would also have been foreigners, partly at the latter port, by taking the cargo on board, & partly on board the ship at sea, subject there to the laws of the country of the ship, & partly by final delivery at the port of discharge, is to be construed by the law of the nation of the ship.—**LLOYD v. GUIBERT** (1865), L. R. 1 Q. B. 115; 6 B. & S. 100; 35 L. J. Q. B. 74; 13 L. T. 602; 2 Mar. L. C. 283; 122 E. R. 1134, Ex. Ch.

Annotations:—As to (1) **Consd.** *The Patria* (1871), L. R. 3 A. & E. 436; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589; *Re Missouri S.S. Co.* (1889), 42 Ch. D. 321; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354. **Refd.** *The Empire of Peace* (1869), 39 L. J. Adm. 12; *Ellis v. McHenry* (1871), L. R. 6 C. P. 228; *Cohen v. S. E. Ry.* (1877), 25 W. R. 475; *Chamberlain v. Napier* (1880), 15 Ch. D. 614; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521; *The Industrie*, [1894] P. 58; *Abdul Aziz Khan Sahib v. Commercial Bank of India* (1903), 20 T. L. R. 46; *Krell v. Henry*, [1903] 2 K. B. 740; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; *R. v. Naguib*, [1917] 1 K. B. 359; *Blackburn Bobbin Co. v. Allen* (1918), 87 L. J. K. B. 1085. As to (2) **Consd.** *Chamberlain v. Napier* (1880), 15 Ch. D. 614. **Appld.** *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1882), 9 Q. B. D. 118. **Consd.** *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589. **Appld.** *Shrichand v. Lacon* (1906), 22 T. L. R. 245. **Refd.** *The Empire of Peace* (1869), 39 L. J. Adm. 12; *Moore v. Harris* (1876), 1 App. Cas. 318; *Re Missouri S.S. Co.*, *Monroe's Claim* (1888), 58 L. T. 377; *Nouvelle Banque de l'Union v. Ayton* (1891), 7 T. L. R. 377. As to (3) **Consd.** *Droege v. Stuart*, *The Karnak* (1869), L. R. 2 P. C. 505; *The M. Moxham* (1876), 46 L. J. P. 17. **Appld.** *The Gaetano & Maria* (1882), 7 P. D. 137. **Consd.** *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521; *Re Missouri S.S. Co.*, *Monroe's Claim* (1888), 58 L. T. 377. **Appld.** *The August*, [1891] P. 328. **Consd.** *The Industrie*, [1894] P. 58. **Refd.** *The Bahia* (1864), Brown. & Lush. 292; *The Nina* (1867), 17 L. T. 391; *The San Roman* (1872), L. R. 3 A. & E. 583; *Nugent v. Smith* (1875), 1 C. P. D. 19; *De Clermont v. Brasch* (1885), 1 T. L. R. 370. **Generally.** *Mentd. James v. South Western Ry.* (1872), L. R. 7 Exch. 287.

642. —.]—(1) A party to a contract made & to be performed in England is not discharged from liability under such contract by a discharge in bkpcy. or liquidation under the law of a foreign country in which he is domiciled.

(2) The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract, not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say "applicable to it as a contract," to exclude mere matters of

& to be performed there, parties settled for themselves the *locus* of the contract; (2) independently of agreement it was an E. contract.—**GIRVIN, ROPER & CO. v. MONTEITH** (1895), 3 S. L. T. 148; 23 R. (Ct. of Sess.) 129.—**SCOT.**

d ———.]—A bill of lading which formed the contract for the carriage of goods by deft. from H. to L., & their delivery there to a steamer of the C. line, to be carried to a port in I., contained a condition that any claim or dispute should be determined according to E. law in E. Deft. delivered the goods to a steamer of another line, on account of which the contract of purchase was cancelled. An action claiming damages was brought in H.:—**Held:** the ct. had no jurisdiction & the action must be dismissed.—**HART & SON, LTD. v. FURNESS, WITBY & CO., LTD.** (1904), 37 N. S. R. 74.—**CAN.**

e. ———.]—Deft., in writing, ordered an engine from plts. The order contained a provision that any

action for the price of the engine might be entered, tried, & finally disposed of in any ct. having jurisdiction where the head office of defts. was situated. Plts. sued deft. in M., & recovered judgment for the price of the engine; & then sued deft. in S. upon the judgment so recovered:—**Held:** as deft. had contracted to submit himself to the forum in which judgment was obtained, plts., in suing in M., acted within their rights, & were entitled to judgment in S. for the amount of judgment recovered in M.—**MANITOBA PUMP CO. v. McLELLAND** (1911), 16 W. L. R. 283; 4 S. W. L. R. 127.—**CAN.**

f. ———.]—A bill of lading for the carriage of goods from E. to N.Z., made in E., contained a clause that the contract should be governed by E. law:—**Held:** E. law governed such contract.—**NEW ZEALAND SHIPPING CO. LTD. v. TYRER** (1912), 31 N. Z. L. R. 825.—**N.Z.**

—A contract made

between L. corp. in I., & C., a co. registered & carrying on business in E., provided that the contract should be construed & operate as an E. contract, & in conformity with E. law. The contract was made in I., & the works to be done under it were to be erected there. An action for breach of the contract having been instituted in I. by L. corp. against C.:—**Held:** the action should be stayed.—**LIMERICK CORPN. v. CROMPTON**, [1910] 2 I. R. 416.—**IR.**

h. ———.]—Change in beneficiary under insurance policy.—**BINDING.]—****BUNNELL v. SHILLING** (1897), 28 O. R. 336.—**CAN.**

PART VII. SECT. 2, SUB-SECT. 1.—
B. (a).

641 i. General rule.]—The *lex fori* must be presumed to be the law governing a contract, unless the *lex loci* be proved to be different.—**CANADIAN FIRE INSURANCE CO. v. ROBINSON** (1901), 22 O. L. T. 8; 31 S. C. R. 488.—**CAN.**

procedure, which do not affect the contract as such, but relate merely to the procedure of the ct. in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bkpcy. law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, & the facts be such as to bring that law into operation, such law would be a law affecting the contract, & would be applicable to it in the country where the action is brought (LORD ESHER, M.R.).—GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX (1890), 25 Q. B. D. 399; 59 L. J. Q. B. 510; 63 L. T. 503; 6 T. L. R. 393, C. A.

Annotations:—As to (1) **Consd.** New Zealand Loan & Mercantile Agency Co. v. Morrison, [1898] A. C. 349. **Refd.** Cooke v. Vogeler Co., [1901] A. C. 102; Taylor v. Hollard, [1902] 1 K. B. 676; Re Nelson, Ex p. Dare & Dolphin, [1918] 1 K. B. 459.

643. —.]—Where a contract is entered into between parties residing in different countries, where different systems of law prevail, it is a question in each case, with reference to what law the parties contracted & according to what law it was their intention that their rights either under the whole or any part of the contract should be determined.

A contract between an English & a Scottish firm, signed in London but to be performed in Scotland, contained this stipulation: "Should any dispute arise out of this contract, same to be settled by arbn. by two members of the London Corn Exchange, or their umpire, in the usual way." In an action raised by the Scottish firm in Scotland for implement of the contract & for damages, the English firm pleaded that the action was excluded by the arbn. clause:—**Held**: the contract was governed by English law, according to which the arbn. clause was valid, & deprived the Scottish cts. of jurisdiction to decide upon the merits of the case, unless the arbn. proved abortive.—HAMLYN & CO. v. TALISKER DISTILLERY, [1891] A. C. 202; 71 L. T. 1; 58 J. P. 540; 10 T. L. R. 479; 6 R. 188, II. L.

Annotations:—**Consd.** Crosland v. Wrigley (1895), 73 L. T. 60; South African Breweries v. King, [1899] 2 Ch. 173. **Apid.** Royal Exchange Assce. Corpn. v. Sjöforsakrings Akt. Vega, [1902] 2 K. B. 384; Hansen v. Dixon (1906), 96 L. T. 32; British South Africa Co. v. De Beers Consolidated Mines, [1910] 1 Ch. 354. **Consd.** Pena Copper Mines v. Rio Tinto Co. (1911), 105 L. T. 846. **Refd.** Spurrier v. La Cloche, [1902] A. C. 446; Hicks v. Maxton (1907), 1 B. W. C. C. 150; Re Mackenzie, Mackenzie v. Edwards-Moss, [1911] 1 Ch. 578; Cameron v. Cuddy, [1914] A. C. 651. **Mentd.** Déchêne v. City of Montreal (1894), 11 R. 319.

644. —.]—(1) Where the parties to a contract reside in different countries in which different systems of law prevail, their intention is the true criterion to determine by what law its interpretation & effect are to be governed.

(2) Where a fire policy made in Jersey was nevertheless an English contract:—**Held**: no action could be brought upon it until the amount according to the condition contained therein, had been settled by arbn. in accordance with Arbn. Act, 1889 (c. 49).—SPURRIER v. LA CLOCHE, [1902] A. C. 446; 71 L. J. P. C. 101; 86 L. T. 631; 51 W. R. 1; 18 T. L. R. 606, P. C.

645 i. *Intention gathered from whole contract & circumstances.*—The right of parties under a contract must be interpreted according to the law contemplated by the parties at the time of contracting. The intention of the parties is to be gathered from the circumstances of each case.—CASTLE MAIL PACKETS CO. v. MITHERAN &

645. *Intention gathered from whole contract & circumstances.*—(1) There is a general maritime law administered alike by English & foreign cts., having admly. jurisdiction, distinct from the municipal laws of nations.

(2) By the laws of England & of the North German Confederation a bill of lading was decisive as between shipowner & consignee, & the North German code, although providing a form of bill of lading, did not prevent a special form of contract. The master of a North German vessel, owned by German Subjects, under a North German charter-party, gave a bill of lading for goods shipped on board his vessel in South America as part of a general cargo to be delivered in North Germany to English consignees. The English language, form, money & weight were used in the bill of lading, which contained the proviso, "the damages of the sea only excepted." The master of the vessel, on her arrival at Falmouth, refused to proceed on account of the outbreak of war between France & Germany. **Held**: whether the contract was governed by English, general maritime or North German law, the master was bound to proceed, as the bill of lading was precise in its terms, & contemplating the happening of certain events, exempted him in only one event.

(3) *Seemle*: as the rights & obligations of the parties to a contract are to be determined by the law which they have declared themselves to intend, & as where there is no express declaration of intention, the presumption as to the law contemplated by the parties must be gathered from the circumstances of the case, in this case the English law applied to the contract as between the shipowner & consignee.—THE PATRIA (1871), L. R. 3 A. & E. 436; 41 L. J. Adm. 23; 24 L. T. 849; 1 Asp. M. L. C. 71.

Annotations:—As to (2) **Consd.** Giovanni Daputo v. Wyllie, The Pieve Superiore (1874), L. R. 5 P. C. 482. **Apid.** Baumvoll Manufactur von Scheibler v. Gilchrest & Furness (1891), 60 L. J. Q. B. 605. **Refd.** The San Roman (1872), L. R. 3 A. & E. 583.

646. *Enforced accordingly unless contrary to morality or positive law.*—When a contract is made in one country to be performed wholly or partially in another, *prima facie* the contract is to be construed & enforced according to the *lex loci contractus*, but the ct. will look at all the circumstances to ascertain by the law of which country the parties intended the contract to be governed & will enforce the contract accordingly, unless it should contain stipulations contrary to morality or expressly forbidden by positive law.

A contract was made in Massachusetts between an American citizen & a British co. of shipowners, by which the co. undertook to carry certain cattle from Boston to England in a British ship. The contract contained a clause that the co. should not be liable for the negligence of the master or crew of the ship. Such a clause is valid by English law, but void by the law of Massachusetts as being against public policy. The cattle were lost by the negligence of the master & crew, & the shipper claimed against the co. for the loss:—**Held**: the contract itself showed that the parties intended it to be governed by English law, & the stipulation exempting the co. from liability through the negligence of their master & crew, not being immoral

TOTERAM (1892), 13 N. L. R. 199.—S. AF.

645 ii. —.]—SUJAN SINGH v. GUNGA RAM (1881), 1 L. R. 8 Calo. 337 L. R. 9 Ind. App. 58.—IND.

j. — *Place of payment.* —FINCHAM v. SPENCER (1901), 26 V. L. R. 665.—AUS.

k. *Contract between English trade union & members.*—A contract between an English trade union & its members is governed by the law of England, when there is nothing to show that the contract is to be performed out of England.—ROGERS v. UNITED SOCIETY OF BOILERMAKERS, ETC., [1910] T. L. 195.—S. AF.

Sect. 2. Law governing contracts: Sub-sect. 1, B.
(a)

or forbidden by positive law, but only void under the law of Massachusetts as being against public policy, would be enforced by an English ct., & the claim should be dismissed.—*Re MISSOURI S.S. Co.* (1889), 42 Ch. D. 321; 58 L. J. Ch. 721; 37 W. R. 696; *sub nom. Re MISSOURI S.S. Co., MONROE'S CLAIM*, 61 L. T. 316; 5 T. L. R. 438; 6 Asp. M. L. C. 423, O.A.

Annotations:—*Consd.* South African Breweries v. King, [1899] 2 Ch. 173. *Apld.* Royal Exchange Assco. Corp'n. v. Sjöforsakrings Akt. Vega, [1901] 2 K. B. 567. *Consd.* Kaufman v. Gerson, [1903] 2 K. B. 114; Moulis v. Owen, [1907] 1 K. B. 746. *Distd.* Dynamit Act. v. Rio Tinto Co., [1918] A. C. 292; Trinidad Shipping Co. v. Alston, [1920] A. C. 888. *Reid.* British South Africa Co. v. De Beers Consolidated Mines, [1910] 2 Ch. 502. *Mentd.* Re Bankes, Reynolds v. Ellis, [1902] 2 Ch. 333; Royal Exchange Assco. Corp'n. v. Sjöforsakrings Akt. Vega (1902), 71 L. J. K. B. 739; Spiers v. Hunt, [1908] 1 K. B. 720; Saxby v. Fulton, [1909] 2 K. B. 208.

647. —.]—The rule that the law applicable to the construction of a contract is the law of the country where the contract was made, is based on the intention of the parties & where the circumstances of the case clearly show that the parties intended otherwise, the cts. of this country will not apply the law of the country where the contract was made in construing the contract.

A policy of reinsurance on a ship was executed in Sweden by a Swedish corp'n. according to Swedish law. It was in the English language & in the ordinary Lloyd's form, being substantially identical with the original policy on the ship & an earlier policy of reinsurance, both of which were made in England & governed by English law. It contained a clause providing that all claims & losses should be payable in London, & that in case of any dispute under the policy defts. should be bound in all things by the jurisdiction & decision of the English law cts.:—*Held*: the policy must be construed by English law, as the circumstances showed such to be the intention of the parties.—*ROYAL EXCHANGE ASSURANCE CORPN. v. SJÖFORSÄKRINGS AKT. VEGA*, [1901] 2 K. B. 567; 70 L. J. K. B. 874; 85 L. T. 241; 50 W. R. 25; 17 T. L. R. 599; 45 Sol. Jo. 597; 9 Asp. M. L. C. 233; 6 Com. Cas. 189; *affd.* on other grounds, [1902] 2 K. B. 384, C. A.

Annotations:—*Mentd.* Empress Assco. Corp'n. v. Bowring (1905), 11 Com. Cas. 107; Glasgow Assco. Corp'n. v. Symondson (1911), 104 L. T. 254.

648. — **Partnership contract—Governed by law of place where business carried on.**—A., a resident in England, & the sole member of a L. firm, entered into a partnership with B. & C., residents in Hayti, in a business to be carried on at Hayti. The L. firm acted as the agents of the Haytian firm. B. was admitted as a partner in the L. firm. C. died, & the winding up of the Haytian firm was committed by agreement to A. & B. Then A. died, leaving B. sole survivor in each firm. B. & the Haytian legal representative of C. engaged in cross-suits in Hayti, in which certain settled accounts were established. The representative of A., whose assets were all in England, was not a party to the Haytian suit:—*Held*: (1) there was jurisdiction in the Ct. of Ch. to wind up the partnership in Hayti, & to take the accounts of that firm & of the agency of the L. firm; (2) the law of Hayti was to regulate the transactions of the Haytian firm.—*MAUNDER v. LLOYD* (1862), 2 John. & H. 718; 1 New Rep. 123; 11 W. R. 141; 70 E. R. 1248.

Annotations:—*As to* (1) *Distd.* Matthaei v. Galitzin (1874), L. R. 18 Eq. 340. *Reid.* Steele v. Stuart (1863), 1 Hem. & M. 793.

See, further, PARTNERSHIP.

649. **Contracts of shareholders of foreign company—Business carried on abroad—Governing body in England.**—A co. consisting of Englishmen was founded in Turkey for making & maintaining a railway. The Turkish Govt. granted to the co. certain powers & privileges & guaranteed the payment of certain interest on capital. Some of the shareholders being dissatisfied with the conduct of the directors appointed a committee of investigation. E., the secretary of the committee, wrote letters to the English Foreign Secretary making grave imputations on the directors, & urging the English Govt. not to influence the Turkish Govt. in their favour. The directors commenced a criminal prosecution of E. for libel & charged the co. with the costs thereby incurred. Accounts including so much of those costs as had been paid, were sanctioned by a half-yearly meeting of the shareholders. Attention was expressly called to the item, & pltf. alone dissented from its approval. Pltf. filed this bill for himself & all other shareholders to restrain the directors from paying any further costs of the prosecution out of the funds of the co. & to compel them to refund those already paid:—*Held*: the payment was *ultra vires*, & the injunction should be granted, but no order should be made for repayment of the costs already paid, the directors having acted *bonâ fide* in accordance with the wishes of a very large majority of the shareholders, & the ct. having a discretion.

The assocn. in this case was one of which the rights of the members as between themselves must be taken to be governed by Turkish law. The assocn. is created by the Sultan's firman & regulated by statutes which were submitted to & sanctioned by the Turkish Govt. The contracts of the shareholders were no doubt actually executed in various places, but the bond between them was intended to be Turkish, & the corp'n. was to have its seat in the Turkish dominions, & to carry on its operations there, though its governing body was to be in England. The rights of the members of the assocn. as between themselves are, therefore, to be determined by Turkish law (*WICKENS, V.-C.*).—*PICKERING v. STEPHENSON* (1872), L. R. 14 Eq. 322; 41 L. J. Ch. 493; 26 L. T. 608; 20 W. R. 654.

Annotations:—*Mentd.* Studdert v. Grosvenor (1886), 33 Ch. D. 528; Tomkinson v. S. E. Ry. (1887), 35 Ch. D. 675; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; Cullerne v. London & Suburban General Permanent Benefit Bldg. Soc. (1890), 25 Q. B. D. 485; *Re Liverpool Household Stores Assocn.* (1890), 59 L. J. Ch. 616; *Re Sharpe, Re Bennett, Masonic & General Life Assco. v. Sharpe*, [1892] 1 Ch. 154; *Breay v. Royal British Nurses' Assocn.* (1897), 76 L. T. 735; *Peel v. L. & N. W. Ry.*, [1907] 1 Ch. 5.

See, generally, COMPANIES.

650. — **English solicitor employed by English subjects—Retainer sent from England—Bill taxed according to English law.**—Where a solr. is an English solr. & employed by English subjects by a retainer sent from England, it must be taken that his bill was subject to taxation according to English law.—*Re MAUGHAM (A SOLICITOR)* (1885), 2 T. L. R. 115, C. A.

See, further, SOLICITORS.

(b) *Application of Lex loci contractus.*

651. General rule.—If a contract be made in Paris it shall be tried either by the common law, or by the law of France, & if it be tried here, then those of France shall write to the Justices of England, & shall certify same unto them.—*GREENWAY & BARKER'S CASE* (1612), Godb. 260; 78 E. R. 151.

652. —.]—Contracts are to be adjudged according to the law of the place where they were made.—*YORK BUILDINGS CO. v. MEERS* (1728), 2 Eq. Cas. Abr. 476; 5 Vin. Abr. 511, pl. 22; 22 E. R. 405.

653. —.]—(1) In an action on a contract where the question at issue has no relation to the manner of performing the contract, or to the consequences of non-performance, & relates entirely to the effect of the transaction at the place where it was entered into, the liability of deft. must be determined by the *lex loci contractus*.

(2) Where an action is brought on a judgment obtained in a foreign ct. the pendency of an appeal in the foreign ct. against that judgment is no bar to the action, although it may afford ground for the equitable interposition of the English ct., in which the action is brought, to prevent the possible abuse of its process, & on proper terms to stay execution.

(3) The judgment of a foreign ct. having jurisdiction over the subject-matter cannot be questioned here, on the ground that the foreign ct. has mistaken the law of its own country, or has come on the evidence to an erroneous conclusion as to the facts.

In an action on a judgment obtained by pltf. against deft. in the Supreme Ct. of New York, deft. pleaded that the judgment was erroneous according to the law of New York, & was liable to be reversed, & that he was prosecuting proceedings in appeal, which were then pending. He set out the record of the proceedings in the original suit there, by which it appeared that the cause had been referred by order of the ct., not to a private arbitrator selected by the parties, but to an officer of the ct. directed to ascertain the facts, who found certain facts, with a certain conclusion of law from them, & judgment was given accordingly in favour of pltf., although the same conclusion would not have followed by the English law had the same facts been found to have occurred here:—*Held*: the plea was no answer to the action.—*SCOTT v. PILKINGTON* (1862), 2 B. & S. 11; 6 L. T. 21; 8 Jur. N. S. 557; 121 E. R. 978; *sub nom.* *MUNROE v. PILKINGTON*, *SCOTT v. PILKINGTON*, 31 L. J. Q. B. 81.

Annotations:—As to (1) *Reid*. *Gardiner v. Houghton* (1862), 2 B. & S. 743. As to (2) *Reid*. *Re Henderson*, *Nouvion v. Freeman* (1887), 35 Ch. D. 704. As to (3) *Reid*. *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228. *Generally*, *Mentd.* *Re Agra & Masterman's Bank*, *Ex p. Asiatic Banking Corp'n.* (1867), 2 Ch. App. 391.

654. — *Primâ facie* presumption.] — *LLOYD v. GUIBERT*, No. 641, *ante*.

655. —.]—*Re* *MISSOURI S.S. Co.*, No. 646, *ante*.

656. Contract by agent of English principal—Made in & sought to be enforced in Scotland—Governed by Scottish law—Restrictions in statute relating to England not applicable.]—Before 6 Geo. 1, c. 18, by which the monopoly of insuring

marine risks in partnership was given to two cos., the R. & the L. Cos., was repealed, the A. Co., of London, by an agent at Glasgow, agreed with certain persons at Glasgow for a general insurance on a steamboat, without any mention of an exception of sea risk, & paid the full premium. The agent, although apprised by the secretary of the A. Co. that they did not consider themselves at liberty to insure marine risks, never communicated that circumstance to the assured, & never delivered the actual policy, in which the exception of sea risk was inserted. The steamboat was lost by fire at sea, & an action was brought in the Scottish cts. on the original contract, concluding in the alternative for a policy conformable to the contract, without exception of the sea risk, or for payment of the sum for which the steamboat was insured:—*Held*: the assured were entitled to judgment on the ground that that part of the statute which gave the monopoly of marine risks to the two cos., the R. & the L., did not extend to Scotland, & the contract being made in Scotland, & the action being founded on that contract, the restriction in the statute did not apply.—*PATTISON v. MILLS* (1828), 1 Dow & Cl. 312; 2 Bli. N. S. 519; 6 E. R. 553, H. L.

657. Contract to carry goods made abroad—Consignees suing in England for damage in transitu.]—*DE CLEREMONT v. BRASCH*, No. 13, *ante*.

658. Contract in German made & executed in Germany—Governed by German law—Not determined on outbreak of war.]—G. was appointed manager of a branch in England of a German bank by a contract of 1911 between the bank & himself for five years, & afterwards subject to a year's notice. The contract was in German, made & executed in Berlin. On war being declared with Germany on Aug. 4, 1914, the branch was closed by the British Govt., but was re-opened on Aug. 10 under licence pursuant to Aliens Restriction Act, 1914 (c. 12), for defined purposes & under supervision. In 1918 it was ordered to be wound up under Trading with the Enemy Amendment Act, 1916 (c. 52). G., who had acted as manager with the approval of the head office at Berlin, was, on July 29, 1918, notified by the controller that his further services were dispensed with & his salary to that date was paid:—*Held*: the contract & the rights of the parties to it were governed by German law, & according to that law the contract was not determined by the outbreak of war, but remained in full force.

Qu.: whether the contract was cognisable in an English ct.—*Re* *ANGLO-AUSTRIAN BANK*, *Re* *DRESDNER BANK*, *Re* *DIRECTION DER DISCONTO GESELLSCHAFT*, [1920] 1 Ch. 69; 89 L. J. Ch. 86.

Personal status governed by.]—*See* No. 924, *post*.

On interpretation of contracts.]—*See* Sub-sect. 4, A., *post*.

PART VII. SECT. 2, SUB-SECT. 1.— B. (b).

652 i. *General rule*.]—A contract made in C., & mentioning no place for payment, must be governed by C. law.—*NIAGARA FALLS INTERNATIONAL BRIDGE CO. v. GREAT WESTERN RY. CO.* (1863), 22 U. C. R. 592.—CAN.

652 ii. —.]—Parties to a contract are presumed to adopt the law of the place where it is made as governing the nature of the obligations that spring from it & the incidents which arise in the course of its development.—*GERMAN SAVINGS BANK v. TETRAULT* (1904), Q. R. 27 S. C. 447.—CAN.

652 iii. — *Validity*.]—The validity

of a contract depends upon the *lex loci contractus*.—*MORROW (JOHN) SCREW & NUT CO. v. HANKIN* (1919), 58 S. C. R. 74.—CAN.

652 iv. —.]—A contract having been made in Q., between parties there domiciled & the money being payable there:—*Semble*: the law of that province should govern.—*Re* *NAUBERT* (1920), 46 O. L. R. 210.—CAN.

652 v. — *Contract limiting liability*.]—If there is a contract limiting responsibility, it is to be construed according to the law of the place where it was made.—*CANADIAN PACIFIC RY. CO. v. PARENT* (1914), Q. R. 24 K. B. 193; *on appeal*, [1917] A. C. 195.—CAN.

1. *Contract by agent of English principal—Governed by English law*.]—A domiciled Scotsman made proposals for an insurance upon the life of a Scotsman with an English insurance co., through their agents in S., & thereafter received a policy, which was prepared at the head office in London, & then transmitted to their agents, by whom it was delivered to him, & to whom also he made payments of the premiums. In an action against the insurance co.:—*Held*: the contract was English, & must be regulated by the law of E.—*PARKEN v. ROYAL EXCHANGE ASSURANCE CO.* (1846), 8 Dunl. (Ct. of Sess.) 365; 18 Sc. Jur. 147.—SCOT.

Sect. 2.—Law governing contracts: Sub-sect. 1, B. (c); sub-sects. 2 & 3.]

(c) Application of Lex loci solutionis.

659. Contract to be performed in England—Made abroad—Governed by English law.]—The ground for alleging the contract in this case to be French is, that the English house rejected the first proposal of the French house, & made another proposal, which was accepted by the French house in their letter from Calais of May 21, 1837, & that Calais was therefore the place of the contract. But it is not always the place where the contract is signed that gives a character to the contract; the most material point is, where the contract is to be performed. If it was the intention of the parties that the contract in this case should be performed in England, it is then an English, & not a French, contract, & the English law applies (ERSKINE, C.J.).—*Re TRYE, Ex p. GUILLEBERT* (1837), 2 Deac. 509, Ct. of R.

660. ———.]—Where there were two parties to a contract relating to English matters, & one of such parties resided at Brussels, the other in England, & the latter went to Brussels to complete, & did complete, the contract there:—*Held*: the contract was an English contract.—*BURGESS v. RICHARDSON* (1861), 29 Beav. 487; 4 L. T. 316; 7 Jur. N. S. 1178; 9 W. R. 512; 54 E. R. 716.

661. ——— Conditional offer accepted abroad—Intention that English law should prevail.]—In an action for breach of promise of marriage, in addition to the evidence given by pltf., a Danish lady, of the oral promise in Denmark, a letter was put in evidence written by deft. in England to pltf. in Denmark, in which he said: "If I were well would you marry me, little girl? Do tell me all now." Evidence of a Danish barrister was read at the trial to the effect that there was no remedy in that country for a breach of promise of marriage unless circumstances existed which were admittedly absent from the present case. Deft. came to this country some time ago, & set up in business here, subsequently turning the business into a co., which was registered & had its chief offices in this country. He was living in this country, & intended to remain here. He wrote to pltf. in the English tongue, & pltf. replied in the same language. Pltf. was an employee first of deft. & then of the co., although she was living in Denmark. Deft. knew nothing of Denmark, except that he had visited it several times & had employed pltf. there, & he knew nothing of the Danish law or language. It was intended that the marriage should take place in England & that the married home was to be there:—*Held*: (1) the

letter was a conditional offer that was accepted by pltf., & there was evidence under the hand of deft. of the offer; (2) the intention of the parties was that the English law should prevail; (3) even if this were not so & the contract was to be governed by Danish law, there was nothing in the law of that country to show that the contract was not a valid & binding contract, but the evidence showed that there was only no remedy; (4) that being so, it was a question of procedure & the *lex fori* applied. & the action was maintainable in this country.—*HANSEN v. DIXON* (1906), 96 L. T. 32; 23 T. L. R. 56.

662. Contract to be partly performed in England—Made in foreign warship by foreigner domiciled in England—Remedy governed by lex fori.]—Pltf., a foreign medical man domiciled here, made an agreement on board a foreign man-of-war in the Thames with deft., also a foreigner, to attend, prescribe for & supply medicines to the crew in deft.'s absence:—*Held*: as the contract was not to be entirely performed on board & as pltf. was domiciled here, the contract was not entirely governed by the foreign law, & the *lex fori* governed the remedy.—*DE LA ROSA v. PRIETO* (1864), 16 C. B. N. S. 578; 4 New Rep. 463; 33 L. J. C. P. 262; 10 L. T. 757; 10 Jur. N. S. 851; 12 W. R. 1029; 2 Mar. L. C. 67; 143 E. R. 1253.

Annotation:—*Mentd. Howarth v. Brearley* (1887), 19 Q. B. D. 303.

663. Contract to be performed abroad—Made abroad—In English form & language—Governed by lex loci solutionis.]—By an agreement in writing executed at J. in the South African Republic, & made between a co. having its registered office in London, but carrying on business in South Africa, & a British subject resident at J., the latter agreed to serve the co. as brewer or otherwise in its business carried on at J. & in the Colony of Natal & elsewhere in South Africa, & provision was made for his residence in J. The agreement was framed in the English language & was in English form:—*Held*: the rights of the parties under the agreement ought to be governed by the law of the South African Republic.—*SOUTH AFRICAN BREWERIES, LTD. v. KING*, [1900] 1 Ch. 273; 69 L. J. Ch. 171; 82 L. T. 32; 48 W. R. 289; 16 T. L. R. 172; 44 Sol. Jo. 228, C. A.

SUB-SECT. 2.—CAPACITY TO CONTRACT.

664. Of infant—Governed by lex loci contractus.]—When the cause of action accrued in Scotland, & infancy was pleaded:—*Held*: deft. must show that infancy was a legal defence to

PART VII. SECT. 2, SUB-SECT. 1.—B. (c).

m. General rule.]—A contract made in one country to be performed in another is governed by the law of the latter.—*BROWN CANADIAN PACIFIC RY. CO.* (1887), Man. L. R. 396.—CAN.

n. ——— Applied where Crown party to contract.]—The doctrine that where a contract made in one province is to be performed in another, then the proper law governing the contract is the law of the province where the performance is to take place, may be invoked against the Crown as a party to a contract.—*R. v. OGILVIE* (1897), 6 Exch. C. R. 21; on appeal, 29 S. C. R. 299.—CAN.

o. ——— Mode of payment.]—*Held*: the place where money is payable under a contract governs the question as to how it is to be paid.—*CRAWFORD v. BEARD* (1864), 14 C. P. 87.—CAN.

p. Contract to be performed within jurisdiction—Made abroad.]—*Held*: a contract between a Scotsman & a Frenchman, made in F., which did not set forth a specific place of performance, but was admittedly based on a prior contract signed at the same time, & to be performed in S., was a Scottish contract.—*VALERY v. SCOTT* (1876), 13 Sc. L. R. 622.—SCOT.

q. Contract to be performed abroad—Made within jurisdiction—Governed by lex loci solutionis.]—*STEWART v. RYALL* (1887), 5 S. C. 146.—S. AF.

PART VII. SECT. 2, SUB-SECT. 2.

r. General rule.]—By English law, the capacity of a person to enter into a contract is decided by the law of the person's domicile. This principle is adopted by Contract Act, s. 11.—*KASHIBA v. SHUPAT NARSHIV* (1894), 1 L. R. 19 Bom. 697.—IND.

s. ———.]—In ordinary commercial contracts the contractual capacity of the parties is decided by the law of the place where the contract is made.—*KENT v. SALMON*, [1910] T. P. D. 637.—S. AF.

t. ———.]—The doctrine that in certain cases the *lex loci solutionis*, & not the *lex contractus*, governs the validity of a contract rests on an inference that the parties agreed to be bound in all questions touching its validity by the *lex loci solutionis*. The doctrine cannot apply where at the time they professed to contract, one of the parties was both by the *lex domicilii* & the *lex contractus* incapable of contracting.—*HUISCHER v. VOOR-SCHOTKAS VOOR ZUID AFRIKA*, [1908] T. S. 542.—S. AF.

664 i. Of infant—Governed by lex loci contractus.]—A minor, whose domicile was Irish & whose father resided in I., took service with a firm in S. He

the demand, by proving the law of that country in that respect.—**MALE v. ROBERTS** (1790), 3 Esp. 163, N. P.

Annotations:—**Refd.** Sottomayer v. De Barros (1879), 5 P. D. 94; **Ogden v. Ogden**, [1908] P. 46.

665. Of married woman—Disposal of reversionary interest in trust money—Governed by lex domicilii.—(1) A married woman domiciled in France entered into a contract in England respecting her reversionary interest in trust money invested in the English funds, which was substantially valid according to French law, although invalid according to English law; but the contract was not entered into in the manner prescribed by French law, which required that there should be as many original instruments as there were distinct parties to the contract:—**Held**: the French law gave capacity to make the contract, but the English law regulated the form of it, & the contract was valid, & would be enforced by decree.

(2) In a conflict of evidence as to the law of France on a point relating to the rights of a married woman in personalty in reversion no presumption can be derived from the law of England.

(3) *Locus regit actum* is a canon of general jurisprudence, & must be assumed, in the absence of contrary evidence, to apply to a system of foreign law.—**GUEPRATTE v. YOUNG** (1851), 4 De G. & Sm. 217; 64 E. R. 804.

Annotation:—**As to** (1) **Foll.** *Re Barnard*, **Barnard v. White** (1887), 56 L. T. 9.

666. — Trust for separate use with restraint on anticipation—Restraint disregarded by lex domicilii—Anticipation not allowed by court.—Testator bequeathed personal estate in trust for the separate use of a *feme covert*, & without power of anticipation. The legatee was at the date of the will domiciled abroad, & had continued so ever since. By the law of her domicile, the restraint against anticipation was disregarded:—**Held**: effect should not be given to a beneficial arrangement made by her anticipating her income.—**PEILLON v. BROOKING** (1858), 25 Beav. 218; 53 E. R. 620.

667. — Agreement to mortgage foreign realty—Surety for husband—Governed by lex situs.—By the law of the Transvaal Colony a lady could not effectually be bound as a surety unless she specifically renounced the benefits of the *Senatus Consultum Velleianum*, & also the benefits of another rule, *de authenticâ*. Where powers of attorney were executed here by a married woman authorising mtge. bonds upon her immovable property in J. in the Transvaal Colony as security for her husband's debts:—**Held**: effect could not be given to the powers of attorney, there not being evidence that, although she understood the nature of the transaction, she formally renounced her privileges by the *lex situs*, which is the Roman-Dutch law, the deeds not having been read over, & their effect explicitly explained to her, previous to her execution of them.—**BANK OF AFRICA, LTD. v. COHEN**, [1909] 2 Ch. 129; 78 L. J. Ch. 767; 100 L. T. 916; 25 T. L. R. 625, C. A.

Annotation:—**Mentd.** *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502.

was injured by an accident in the course of his employment, for which he agreed, without consulting his father, to accept compensation:—**Held**: his capacity as a minor to enter into the agreement was to be determined by the *lex loci contractus*.—**M'FEETRIDGE v. STEWARTS & LLOYDS**, [1913] S. C. 773; 50 Sc. L. R. 505; 1 S. L. T. 325.—**SCOT.**

u. — European British subject not domiciled in India—Governed by ex domicilii.—**ROHILKHAND &**

KUMAON BANK v. ROW (1884), 1 L. 6 All. 468.—**IND.**

PART VII. SECT. 2, SUB-SECT. 3.

w. General rule.—The law of the country where a contract is entered into governs in all matters pertaining to the solemnities of the contract, or the formalities surrounding its creation.—**SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNERLAND** (1913), 24 W. L. R. 587; 4 W. W. R. 564, 944; 11 D. L. R. 243.—**CAN.**

Capacity to marry.—See Part IX., Sect. 1, sub-sect. 2, *post*.

Capacity to enter into marriage settlements & contracts.—See Part XII., Sect. 2, sub-sect. 1, B., *post*.

SUB-SECT. 3.—FORMALITIES OF CONTRACTS.

668. Necessity of stamp—Governed by lex loci contractus.—Pltf. cannot recover upon a written contract made in Jamaica, which by the laws of that island was void for want of a stamp.—**ALVES v. HODGSON** (1797), 7 Term Rep. 241; 2 Esp. 527; 101 E. R. 953.

Annotation:—**Consd.** *Bristow v. Sequeville* (1850), 5 Exch. 275.

669. — — ——If a stamp is necessary to the validity of an agreement made in a foreign country, an agreement made there, unless it has such stamp, cannot be received in evidence in our cts. But it is incumbent upon the party who objects to the validity of the agreement, to prove the law requiring the stamp, by an authenticated copy, if it be in writing, & if not, by the testimony of a witness acquainted with the laws of the foreign country.—**CLEGG v. LEVY** (1812), 3 Camp. 166, N. P.

Annotation:—**Refd.** *Do Bodo's Case* (1845), 8 Q. B. 208.

670. — — ——A document will not be rejected as evidence on the ground that it had not been stamped in the manner required by the law of a foreign country; but where the law of a foreign country renders a contract invalid unless stamped in a particular way a contract not so stamped cannot be enforced here.—**BRISTOW v. SEQUEVILLE** (1850), 5 Exch. 275; 19 L. J. Ex. 289 14 Jur. 674; 155 E. R. 118.

Annotations:—**Refd.** *Rowley v. L. & N. W. Ry.* (1873), L. R. 8 Exch. 221; *In the Goods of Bonelli* (1875), 1 P. D. 69.

— **On negotiable instruments.**—See Vol. VI., p. 439, No. 2820, *et seq.*

671. Necessity of writing—Governed by lex fori—Contract within Statute of Frauds—Insufficient delivery of goods to dispense with writing.—Where a party in England refuses to accept goods which he has agreed to buy abroad, the delivery of them abroad, on board a ship chartered by him, is not a sufficient delivery to render unnecessary a memorandum of the bargain in writing, as required by Stat. Frauds.—**ACEBAL v. LEVY** (1834), 10 Bing. 376; 4 Moo. & S. 217; 3 L. J. C. P. 98; 131 E. R. 949.

Annotations:—**Refd.** *Goodman v. Griffiths* (1857), 1 H. & N. 574; *Fitzmaurice v. Bayley* (1860), 9 H. L. Cas. 79; *McCullin v. Gilpin* (1881), 6 Q. B. D. 516. **Mentd.** *Lamond v. Devalle* (1847), 16 L. J. Q. B. 136.

672. — — — Not to be performed within a year.—An action will not lie in the cts. of this country to enforce an oral agreement made in France, & valid there, which, if made here, could not by reason of Stat. Frauds have been sued upon.—**LEROUX v. BROWN** (1852), 12 C. B. 801; 22 L. J. C. P. 1; 20 L. T. O. S. 68; 16 Jur. 1021; 1 W. R. 22; 138 E. R. 1119.

Annotations:—**Consd.** *Gibson v. Holland* (1865), L. R. 1 C. P. 1; *Jones v. Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314. **Refd.** *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S.

y. Necessity of stamp—Governed by lex fori.—It is not necessary for Indian cts. to consider whether a power of attorney issued in England, but intended to operate in British India, complies with the requirements of the stamp laws in E. It is sufficient if such power of attorney is stamped according to the laws of British India.—*In the Goods of MCADAM* (1895), 1 L. R. 23 Calc. 187.—**IND.**

z. — — ——**Held**: a contract made in France, admittedly based on

Sect. 2.—Law governing contracts: Sub-sects. 3 &

154; *Corringan v. Woods* (1866), 15 W. R. 318; *Britain v. Rossiter* (1879), 11 Q. B. D. 123; *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. **Mentd.** *Williams v. Wheeler* (1860), 8 C. B. N. S. 299; *Branley v. S. E. Ry.* (1862), 12 C. B. N. S. 63; *Scott v. Seymour* (1862), 1 H. & C. 219; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *Rawley v. Rawley* (1876), 1 Q. B. D. 460; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84; *Royal Exchange Assco. Corp'n. v. Sjörforsakrings Akt. Vega*, [1901] 2 K. B. 567; *Morris v. Baron*, [1918] A. C. 1.

Bills of exchange, promissory notes & negotiable instruments.]—See Vol. VI., p. 428, Nos. 2773–2775.

Contracts relating to immovables.]—See Part IV., Sect. 3, ante.

Procedure generally.]—See Part XVI., post.

SUB-SECT. 4.—INTERPRETATION OF CONTRACTS.

A. In General.

673. General rule.]—LANSLOWNE v. LANS-
DOWNE, No. 402, ante.

674. —.]—An instrument executed by foreigners in a foreign country must, on a demurrer, be construed according to the obvious import of its terms, unless there are allegations in the bill that, according to the law of the country in which it was executed, the true construction of it is different.—*SPAIN (KING) v. MACHADO* (1827), 4 Russ. 225; 6 L. J. O. S. Ch. 61; 38 E. R. 790, L. C.; *subsequent proceedings* (1828), 4 Russ. 560.

Annotations:—**Consd.** *Goodwin v. Roberts* (1876), 1 App. Cas. 476. **Refd.** *Brunswick v. Hanover* (1844), 13 L. J. Ch. 107. **Mentd.** *Wade v. Cox* (1835), 4 L. J. Ch. 105; *Davies v. Quarterman* (1840), 4 Y. & C. Ex. 257; *Suisse v. Lowther* (1842), 7 Jur. 808; *Gloucester Corp'n. v. Wood* (1843), 3 Hare, 131; *Garcias v. Ricardo* (1845), 1 Ph. 498; *Doyle v. Muntz* (1846), 5 Hare, 509; *Clay v. Rufford* (1849), 8 Hare, 281.

675. —.]—ANSTRUTHER v. ADAIR, No. 989, post.

676. —.]—When a contract is made in a foreign country & in a foreign language, an English ct., having to construe it, must obtain (a) a translation of the instrument, (b) an explanation of the terms of art, if any, (c) evidence of the foreign law applicable to it, & (d) evidence of any peculiar rules of construction which may exist in that law, & must then itself interpret the instrument on ordinary principles of construction.—*DI SORA v. PHILLIPPS* (1863), 10 H. L. Cas. 624; 2 New Rep. 553; 33 L. J. Ch. 129; 11 E. R. 1168, H. L.

Annotations:—**Consd.** *Copin v. Adamson, Copin v. Strachan* (1874), 31 L. T. 242. **Refd.** *Stearine, Etc., Co. v. Heintzmann* (1864), 17 C. B. N. S. 56; *U.S.A. v. McRae* (1867), 3 Ch. App. 79; *Pickering v. Stephenson* (1872), L. R. 14 Eq. 322; *Great Western Collieries Co. v. Trafalgar Colliery Co.* (1887), 3 T. L. R. 724; *Re Harman, Lloyd v. Tardy*, [1894] 3 Ch. 607.

a prior contract signed at the same time, & to be performed in Scotland, being a Scottish contract, the ct. could not entertain the objection that by French law the contract was void for want of stamp.—*VALERY v. SCOTT* (1876), 13 Sc. L. R. 622.—**SCOT.**

a. Necessity of writing—Governed by lex loci contractus.]—A contract, valid where it is made, though not in writing, is enforceable in Canada.—*GREEN v. LEWIS* (1867), 26 U. C. R. 618.—**CAN.**

b. Necessity of registration—Conditional sale made abroad—Limit of operation of foreign law.]—A. sold B. a piano in W., U.S.A., on a conditional sale agreement, which agreement became an absolute sale according to the law of W., unless registered in ten days. The agreement was not registered. B. brought the piano to

Alberta and sold it to C. A. in default of payment by B., claimed the piano in Alberta from C., under the conditional sale agreement.—**Held:** the law of W., making the sale an absolute sale unless registered within ten days, was limited in operation to purchasers in W., & could not be extended so as to protect purchasers in Alberta.—*CLINE v. RUSSELL* (1909), 10 W. L. R. 666; 2 Alta. L. R. 79.—**CAN.**

PART VII. SECT. 2, SUB-SECT. 4.—A.

677 i. Governed by lex loci contractus.]—In determining the validity, interpretation & effect of a contract, & the rights & obligations of the parties to it, the law of the country in which it was entered into & in which it was to be performed should be applied, in an action upon it in another country.—**SCANDINAVIAN AMERICAN NATIONAL**

677. Governed by lex loci contractus.]—The rule applicable to contracts made in one country & put in suit in the cts. of law of another, is this: the interpretation of the contract must be governed by the law of the country where the contract was made, & the mode of suing, & the time within which the action must be brought, by the law of the country in which it is sought to be enforced.

Where a promissory note was made by deft. in France, & indorsed in blank by the payee in that country, the maker & payee both at the times of making & indorsing the note being domiciled there:—**Held:** as no action could have been maintained upon the note in the French cts. in the name of the indorsee, the indorsement according to the law of France operating as a procuration only, & not as a transfer, so no action could be maintained by him in our cts.—*TRIMBEY v. VIGNIER* (1834), 1 Bing. N. C. 151; 4 Moo. & S. 695; 3 L. J. C. P. 246; 131 E. R. 1075.

Annotations:—**Consd.** *Rothschild v. Currie* (1841), 1 Q. B. 43; *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *Bradlaugh v. De Rin* (1870), L. R. 5 C. P. 473; *Smallpage's & Brandon's Cases* (1885), 30 Ch. D. 598. **Refd.** *Alivon v. Furnival* (1834), 4 Tyr. 751; *Scott v. Pilkington* (1862), 2 B. & S. 11; *De Greuchy v. Wills* (1879), 43 J. P. 818; *Alcock v. Smith*, [1892] 1 Ch. 238.

678. —.]—The law of the country where a contract is made, or is to be performed, furnishes the rules for expounding the nature & extent of its obligations; but the law of the country where it is sought to enforce performance of a contract governs all questions as to the remedy & mode of proceeding, including lapse of time.—*FERGUSON v. FYFFE* (1841), 8 Cl. & Fin. 121; 8 E. R. 49, H. L.

Annotations:—**Mentd.** *Crosskill v. Bower* (1863), 32 Beav. 86; *Williamson v. Williamson* (1869), 20 L. T. 389; *Barfield v. Loughborough* (1872), 8 Ch. App. 1.

679. —. Personal contracts.]—As to contracts, merely personal, it is a general rule that questions relating to the validity & to the interpretation of a contract are to be governed by the law of the country where the contract was made, & if a remedy for non-performance of a contract is sought in another country, the mode of suing, & the time within which the action must be brought, are to be governed by the law of the country in which the action is brought.—*COOPER v. WALDEGRAVE (EARL)* (1840), 2 Beav. 282; 7 L. T. 102; 48 E. R. 1189.

Annotation:—**Refd.** *Allen v. Kemble* (1848), 6 Moo. P. C. C. 314.

680. —.]—It is a principle of international law that whoever sues in a ct. of any country must take his remedy according to the law of that country alone, but a contract must be expounded by the law of the country where it was made.—*THE VERNON* (1842), 1 Wm. Rob. 316; 1 Notes of Cases 277; 6 L. T. 165; 6 Jur. 67.

Annotations:—**Consd.** *R. v. Keyn* (1876), 2 Ex. D. 63. **Refd.** *Hervey v. Fitzpatrick* (1854), 2 Eq. Rep. 444. **Mentd.** *The*

BANK OF MINNEAPOLIS v. KNEELAND (1914), 27 W. L. R. 346.—**CAN.**

677 ii. —.]—An agreement was made & executed in U.S.A.:—**Held:** its validity & meaning must be determined by U.S. law.—*SHERLOCK v. HANNAY* (1891), 18 R. (Ct. of Sess.) 663; 28 Sc. L. R. 560.—**SCOT.**

677 iii. —.]—Money lenders sought to recover on promissory notes given by deft. when resident in E. On an issue in N.S. as to whether interest charged was excessive & whether the transaction was harsh:—**Held:** the rights of parties must be determined by E. law.—*STUART & STUART LTD. v. BOSWELL* (1916), 50 N. S. R. 16.—**CAN.**

c. Admissibility of evidence of usage.]—Evidence of custom in foreign country:—**Held:** inadmissible where

Canadian (1842), 1 Wm. Rob. 343; General Iron Screw Colliery Co. v. Schurmanns (1860), 1 John & H. 180.

681. —.]—GIBBS v. FREMONT, No. 760, post.

682. —.]—(1) Importation of foreign law is in the discretion of the ct.; it should never be imported to work injustice.

(2) Though the *lex loci contractus* governs contracts & their construction, yet the *lex fori*, where they are enforced, governs the remedy.

A foreign ship having been sold by decree of the ct. in a cause of salvage, the proceeds were insufficient to meet all the claims:—*Held*: a monition should not be enforced against the consignees of the cargo to bring in the balance of freight at the suit of the foreign master, though by the foreign law the master had a lien thereon.—THE JOHANNES CHRISTOPH (1854), 2 Ecc. & Ad. 93; Spinks, 60; 6 L. T. 661; 1 Jur. N. S. 192; 164 E. R. 325.

Annotation:—As to (2) *Reid*. The Soglasie (1854), 2 Ecc. & Ad. 101.

683. —.]—In any question as to the meaning of a contract, the ct. is governed by the law of the place where it was made; whatever relates to remedies under it by the law of the place where it is enforced.

Where the mate of a ship belonging to the United States had succeeded during the voyage as master:—*Held*: he was entitled on arrival of the ship in this country to proceed to arrest the freight for wages & disbursements under Merchant Shipping Act, 1854 (c. 104), s. 191, no objection to the ct.'s jurisdiction being made by the American Consul upon receiving the usual notice.—THE MILFORD (1858), Sw. 362; 6 L. T. 661; 4 Jur. N. S. 417; 6 W. R. 554.

Annotations:—*Folld*. The Jonathan Goodhue (1859), Sw. 524. *Consd*. The Halley (1867), L. R. 2 A. & E. 3; The Nina (1867), 17 L. T. 391; R. v. Stewart, [1899] 1 Q. B. 964; Poll v. Dambe, [1901] 2 K. B. 579; The Tagus, [1903] P. 44; *Reid*. Salt Union v. Wood (1893), 41 W. R. 301. *Mentd*. Davidsson v. Hill, [1901] 2 K. B. 606.

684. —.]—If parties subjects of ruling power where contract entered into—Or owe temporary allegiance.]—(1) The rule governing the interpretation of a contract made in one country to be performed wholly or partly in another country, is, that the law of the country where the contract is made governs as to the nature of the obligation & the interpretation of it, if the parties to the contract either are subjects of a power there ruling, or as temporary residents owe that power a temporary allegiance. In either case they must be understood to submit to the law there prevailing, & to agree to its action on their contract.

(2) It is immaterial that such agreement so to be ruled by the *lex loci contractus* is not so expressed in terms; it is equally an agreement in fact presumed *de jure*, & a foreign ct. interpreting or enforcing a contract so made on any contrary rule, defeats the intention of the parties, as well as neglects to observe the recognised comity of nations.

A passenger by an English vessel belonging to an English co. from Southampton to Mauritius via Alexandria & Suez took & signed a ticket, in the body of which the engagement of the co. was stated to be subject to the conditions & regulations endorsed thereon; among which was this clause: "the co. do not hold themselves liable for damage

to, or loss, or detention of passengers' baggage." A package of baggage being lost during the voyage, the passenger sued the co. for damages for the loss:—*Held*: the contract was one to be interpreted by the law of England, the place where the contract was made.—P. & O. STEAM NAVIGATION CO. v. SHAND (1865), 3 Moo. P. C. C. N. S. 272; 6 New Rep. 387; 12 L. T. 808; 11 Jur. N. S. 771; 13 W. R. 1049; 2 Mar. L. C. 244; 16 E. R. 103, P. C.

Annotations:—As to (1) *Reid*. Jacobs v. Crédit Lyonnais (1884), 12 Q. B. D. 589; British South Africa Co. v. De Beers Consolidated Mines, [1910] 2 Ch. 502. As to (2) *Consd*. The Duero (1869), L. R. 2 A. & E. 393. *Reid*. Le Couteur v. L. & S. W. Ry. (1865), 6 B. & S. 961; Lloyd v. Guibert (1865), L. R. 1 Q. B. 115; Re Missouri S.S. Co. (1889), 42 Ch. D. 321; The Glendarroch, [1894] P. 226; Crosland v. Wrigley (1895), 73 L. T. 60. *Generally, Mentd*. Ozech v. General Steam Navigation Co. (1867), L. R. 3 C. P. 14; Leuw v. Dudgeon (1867), 17 L. T. 145; Nugent v. Smith (1875), 24 W. R. 237; Moore v. Harris (1876), 1 App. Cas. 318.

685. —.]—Though not expressly agreed to.]—P. & O. STEAM NAVIGATION CO. v. SHAND, No. 684, ante.

686. —.]—In cases arising upon contracts entered into in a foreign country the cts. of England inquire into & act upon the laws of foreign countries where by express reference or by necessary implication the foreign law is incorporated with the contract, & proof & consideration of the foreign law becomes necessary to the construction of the contract itself. But in admitting the proof of foreign law as part of the circumstances attending the execution of the contract, or as one of the facts of the existence of a tort, an English ct. applies & enforces its own law so far as it is applicable to the case established, but will not enforce a foreign municipal law, & give a remedy in the shape of damages, in respect of an act which by the English law imposes no liability on the person from whom the damage was claimed.

In a cause of collision promoted by the owners of a Norwegian barque against a British steamer, in the High Ct. of Admlty. in England, for damage done in Belgian waters alleged to have been occasioned by the negligent & improper navigation of the steam vessel, the owners of the steamship pleaded that the vessel was in charge of a pilot, whom they were compelled by the Belgian law to employ. The owners of the barque replied that by the Belgian law it is provided that the owners of a ship which has done damage to another by collision are liable for the damage, notwithstanding the vessel was in charge of a compulsory pilot, & although the damage was occasioned by his negligence or want of skill. The owners of the steamer to this plea objected that even if the article pleaded were true, they would not be liable in the Ct. of Admiralty in England:—*Held*: the claim being founded on a tort committed in the territory of a foreign state, the party claiming reparation in a British ct. was not entitled to the benefit of the foreign law against the admitted provisions of the statute law of England & the practice of the High Ct. of Admiralty in respect of compulsory pilotage, by which no such liability, as provided by the Belgian law, existed, as it was contrary to principle & authority to hold that an English ct. would enforce a foreign municipal law, & give a remedy in the shape of damage in respect of an act which, according to its own principles, imposed

the contract was made in Ontario.—WILLIAMS v. CORBY (1880), 5 A. R. 626; on appeal, 7 S. C. R. 470.—CAN.

d. —.]—Evidence of usage in Canada will not affect the construction of a contract for sale of goods abroad by parties domiciled there, unless the

latter are shown to have been cognizant of it, & can be presumed to have contracted with reference to it.—TRENT VALLEY WOOLLEN MANUFACTURING CO. v. OELRICHS (1894), 23 S. C. R. 682.—CAN.

e. —.]—*Held*: usage adopted

by the trade in Winnipeg was not admissible to explain, vary or contradict any of the terms of an Ontario contract.—SANITARY PACKING CO. LTD. v. NICHOLSON & BAIN (1916), 33 W. L. R. 594; 9 W. W. R. 1420.—CAN.

Sect. 2.—Law governing contracts: Sub-sect. 4, A.

no liability on the person from whom the damages were claimed.—*THE HALLEY* (1868), L. R. 2 P. C. 193; 5 Moo. P. C. C. N. S. 262; 37 L. J. Adm. 33; 18 L. T. 879; 16 W. R. 998; 3 Mar. L. C. 131; 16 E. R. 514, P. C.

*Annotations:—*Consd. *The Mali Ivo* (1869), L. R. 2 A. & E. 356; *The M. Moxham* (1876), 1 P. D. 107; *The Guy Mannering* (1882), 51 L. J. P. 57; *The Augusta* (1887), 57 L. T. 326; *The Mystery*, [1902] P. 115. *Refd.* *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *Redpath v. Allan, The Hibernian* (1872), L. R. 4 P. C. 511; *The Magnet, The Duke of Sutherland, The Fanny M. Carvill* (1875), 32 L. T. 129; *The Star of India* (1876), 1 P. D. 466; *Machado v. Fontes* (1897), 76 L. T. 588; *The Dallington*, [1903] P. 77; *The Penrith Castle*, [1918] P. 142. *Mentd.* *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *The Tasmania* (1888), 13 P. D. 110; *The Munster* (1896), 12 T. L. R. 264; *S.S. Beechgrove Co. v. Akt. Fjord of Kristiania*, [1916] 1 A. C. 364.

687. — Unless contrary intention shown.]—*ROYAL EXCHANGE ASSURANCE CORPN. v. SJORFOR-SAKRINGS AKT. VEGA*, No. 647, *ante*.

688. — Contract in England between merchants resident in England—For delivery in England of goods shipped by foreign company—Absence of intention to exclude *lex loci*.]—*Defts.*, a London firm, contracted in London to sell to *pltf.*s, merchants in London, 20,000 tons of Algerian esparto, to be shipped by a French co. at an Algerian port, at certain prices, according to specified qualities, on board vessels to be provided by *pltf.*s in London, & to be paid for by *pltf.*s in London by cash on or before arrival of the ship or ships at her or their port of destination, less interest at 5 per cent. *per annum* for the unexpired portion of three months from date of bill of lading, for the full amount of the invoice based on shipping weight. *Defts.* caused to be delivered & were paid for 9,000 tons of esparto, but failed to deliver the remaining 11,000 tons. In an action for this breach of contract:—*Held*: the contract was an English contract, & to be construed & dealt with according to the law of this country, & it was no answer to say that by the French law, which prevailed at the port of shipment, *defts.* were excused from performing their contract if prevented from so doing by *force majeure, viz.*, the prohibition by the constituted authorities of the export of esparto from Algeria, by reason of an insurrection & consequent hostilities in that country.—*JACOBS v. CRÉDIT LYONNAIS* (1884), 12 Q. B. D. 589; 53 L. J. Q. B. 156; 50 L. T. 194; 32 W. R. 761, C. A.

*Annotations:—*Consd. *Crosland v. Wrigley* (1895), 73 L. T. 60. *Apld.* *South African Breweries v. King*, [1899] 2 Ch. 173; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540. *Distd.* *Indian & General Investment Trust v. Borax Consolidated*, [1920] 1 K. B. 539. *Consd.* *Ralli v. Compañia Naviera Sota y Aznar*, [1920] 2 K. B. 287. *Refd.* *Re Missouri S.S. Co.* (1889), 42 Ch. D. 321; *Chatenay v. Brazilian Submarine Telegraph Co.* (1890), 60 L. J. Q. B. 295; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; *Dynamit Act. v. Rio Tinto Co.*, [1918] A. C. 292; *Naylor, Benzon v. Krainische Industrie Gesellschaft* (1918), 87 L. J. K. B. 1066. *Mentd.* *Re Sune & Sibeth, Ex p. Dever* (1887), 18 Q. B. D. 660.

689. Indian contract made in India—To be partly performed in England—English law applicable to such part.]—*DOULTON & Co. v. MADRAS CORPN.*, [1920] W. N. 221.

Remedy governed by *lex fori*.]—See Sub-sect. 5, *post*.

Whether contract to be performed within the jurisdiction — For purposes of R. S. C., Ord. 11, r. 1 (e).]—See PRACTICE & PROCEDURE.

PART VII. SECT. 2, SUB-SECT. 4.— B. (b).

1. Whether governed by law of flag
—Bill of lading made in America—

In English language & form.]—Timber was shipped from a port in America to East London in a British ship. The bills of lading contained expressions peculiar to English Law. In an action

for freight:—*Held*: the contract contained in the bills of lading must be interpreted according to E. Law.—*MITCHELL, COTTS & Co. v. RAILWAYS COMR.*, [1905] T. S. 349.—S. AF.

Foreign power of attorney.]—See AGENCY, Vol. I., pp. 296, 297, No. 246.

B. Particular Contracts.

(a) Bills of Exchange, Cheques and Promissory Notes.

See BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 428.

(b) Contracts of Affreightment.

See, generally, SHIPPING & NAVIGATION.

690. Whether governed by law of flag—Contract by foreigners abroad—To be performed partly abroad & on board ship—Partly by final delivery at port of discharge.]—*LLOYD v. GUIBERT*, No. 641, *ante*.

691. — Language, form, money for freight & consignees English—Ship, shipowners, charterparty & port of destination German—Contract precise in language.]—*THE PATRIA*, No. 645, *ante*.

692. — Charterparty partly in English & partly in German—Entered into by master of German ship with Germans abroad—To take cargo to England.]—The master of a German ship while at Constantinople by a charterparty, partly in English & partly in German, & entered into with Germans, chartered his ship to take a cargo from Taganrog to England, Havre or Hamburg:—*Held*: the contract must be construed according to German law.—*THE EXPRESS* (1872), L. R. 3 A. & E. 597; 41 L. J. Adm. 79; 26 L. T. 956; 1 Asp. M. L. C. 355.

*Annotation:—*Mentd. *The Dannebrog* (1874), 31 L. T. 759.

693. — Cargo shipped by British subjects under English bills of lading—Foreign ship—Sale of cargo at port of distress.]—Cargo was shipped by British subjects on board a German ship for carriage to England under English bills of lading. During the voyage the master had sold part of the cargo at a port of distress without instructions from the shippers & an action was commenced for short delivery:—*Held*: the master was entitled to deal with it according to the law of the flag; & such sale was justifiable by German law, as he had, after taking the best advice he could obtain, sold the cargo in the honest belief that he was acting for the best for all parties in the emergency which had arisen.—*THE AUGUST*, [1891] P. 328; 60 L. J. P. 57; 66 L. T. 32; 7 Asp. M. L. C. 110.

*Annotation:—*Consd. *The Industrie*, [1894] P. 58.

694. — Charterparty made in England—In English language & form.]—*Defts.*, who were British subjects, chartered *pltf.*'s ship, which was a German ship & was under a German captain, for the carriage of certain rice in bags from abroad to a port in England for orders. The charterparty, which was made in London, between *defts.* & the agents of *pltf.*, who was a German subject, was in the English language, & contained all the usual provisions to be found in an English charterparty, & also provided that all freight was to be paid on right delivery of cargo in the United Kingdom in cash as customary. The ship, having met with bad weather on the voyage, put into a port of distress, & the captain, acting on the advice of surveyors sold 746 bags of rice. In an action by the shipowner to recover freight on the bags of rice so sold:—*Held*: the charterparty must be treated as an English contract, & the question whether freight was payable must be determined not by

the law of the flag, but according to English law, under which no freight was recoverable in respect of cargo not delivered at the port of destination.—*THE INDUSTRIE*, [1894] P. 58; 63 L. J. P. 84; 70 L. T. 791; 42 W. R. 280; 7 Asp. M. L. C. 457; 6 R. 681, C. A.

695. Governed by *lex loci contractus*—Bill of lading made in France.]—A bill of lading made in France is governed by French law.—*BLANCHET v. POWELL'S LLANTIVIT COLLIERIES CO.* (1874), L. R. 9 Exch. 74; 43 L. J. Ex. 50; 30 L. T. 28; 22 W. R. 490; 2 Asp. M. L. C. 224.

Annotation:—*Mentd.* *Parsons v. New Zealand Shipping Co.*, [1901] 1 K. B. 548.

696. — Bill of lading made in England—By master of English ship.]—By a bill of lading made in England by the master of an English ship certain packages of tea were to be delivered from the ship's deck, where the ship's responsibility should cease, at the port of Montreal unto the G. T. Ry. Co., & by them to be forwarded thence per railway to the station nearest to Toronto, & at that station delivered to the consignees or to their assigns. The instrument contained, in addition to a long list of excepted special risks, whether arising from negligence or otherwise, the following condition: "No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." In an action in the Superior Ct. in Lower Canada against the shipowner for the value of damage done to the packages during the voyage, it appeared that same were landed, placed in certain shipping sheds, removed therefrom to railway freight-sheds in Montreal, & finally delivered to the consignees in Toronto. No notice of damage was given until thirteen days after the delivery was completed:—*Held*: (1) the condition though in its first clause limited to insurable damage, clearly applied as regards its second clause to all damage, whether apparent or latent, which could by examination of the packages, conducted with reasonable care & skill at the place of removal, have been discovered; (2) the bill of lading in this case was a contract to be governed & interpreted by English law, & no substantive defence arising from delay in making the claim could be made apart from the express condition contained therein, notwithstanding the provisions of Art. 1680 of the Canadian Civil Code.—*MOORE v. HARRIS* (1876), 1 App. Cas. 318; 45 L. J. P. C. 55; 34 L. T. 519; 24 W. R. 887; 3 Asp. M. L. C. 173, P. C.

Annotation:—*As to* (1) *Refd.* *Wiener v. Wilsons & Furness-Leyland Line* (1910), 102 L. T. 716.

697. — — — In English language & form — Given by master of ship registered in Holland & carrying Dutch flag.]—Pltfs. shipped goods on board one of defts.' ships under a bill of lading which was in the English language & form, & described defts. by their corporate name, & which excepted amongst other things collision & accidents, loss or damage from any act, neglect or default whatsoever of the pilots, master or mariners or other servants of the co. in navigating the ship. The goods were lost by the ship coming into collision on the high seas with another ship belonging to defts., & the jury found that, though both ships were in fault, the chief blame was to be attached to the second ship. Deft. co., which was composed entirely of English shareholders, in addition to being registered in England as a limited co., was also registered in Holland as a Dutch co., which was in fact a bare trustee of the ships for the English co. The ships also were registered as Dutch ships, & carried the Dutch flag. Such registration was for the purpose of trading to &

from Dutch ports. The ships were not registered under the Merchant Shipping Acts as British ships. In an action to recover the value of the goods, based, first on the contract to carry safely contained in the bill of lading, & secondly, in tort:—*Held*: (1) so far as the action was based on contract, defts., as owners of the first ship, were relieved from liability for the negligence of their servants on board that ship by reason of the exceptions in the bill of lading, which was an English contract, & must be construed accordingly; (2) defts. were not liable either expressly or impliedly under the bill of lading, which had reference only to the carrying ship, for the negligence of their servants on board the second ship; (3) defts., as owners of both ships, were liable in tort, & the action, viewed as an action of tort, came within Jud. Act, 1873 (c. 66), s. 25 (9); & the Admlty. rule as to dividing the loss when both ships in collision were to blame was applicable, so defts., as owners of both ships, would have been liable for the whole amount of the loss, but as they were exonerated by the exception in the bill of lading from the share of the loss occasioned by the negligence of those navigating the carrying ship, they were only liable for the other half of the loss occasioned by the negligence of those on board the second ship; (4) both the ships were English & not Dutch ships, notwithstanding that they were registered in Holland as Dutch ships & carried the Dutch flag, inasmuch as the nationality of a ship depended upon the question of ownership.

(5) The question of torts committed in a foreign country was discussed. (*See* No. 776, *post*).—*CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.* (1883), 10 Q. B. D. 521; 52 L. J. Q. B. 220; 48 L. T. 546; 47 J. P. 260; 31 W. R. 445; 5 Asp. M. L. C. 65, C. A.

Annotations:—*As to* (1) *Consd.* *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589. *Distd.* *The August*, [1891] P. 328. *Refd.* *The Industrie*, [1894] P. 58; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354. *As to* (3) *Consd.* *Tongariro S.S. v. Drumlanrig S.S.*, *The Drumlanrig*, [1911] A. C. 16. *Refd.* *Woodley v. Michell* (1883), 11 Q. B. D. 47. *As to* (5) *Refd.* *Davidson v. Hill*, [1901] 2 K. B. 606. *Generally.* *Mentd.* *Wilson Sons v. The Xantho* (1887), 12 App. Cas. 503; *Leduc v. Ward* (1888), 20 Q. B. D. 475; *The Englishman & The Australia*, [1894] P. 239.

698. — Charterparty made in England—In English language & form.]—*THE INDUSTRIE*, No. 694, *ante*.

699. — — — — — Partly illegal by foreign law.]—An English firm in July, 1918, chartered a Spanish steamship from the owners, who were a Spanish firm, to carry a cargo of jute from Calcutta to Barcelona at a freight of £50 per ton, one half to be paid to the owners in London on the vessel sailing from Calcutta & the balance to be paid at Barcelona by the receivers of the cargo, as to one half on arrival of the steamship & the remainder concurrently with the discharge. The freight payable at Barcelona was to be paid in cash or approved bills at charterers' option at the current rate of exchange for bankers' short bills on London. The charterparty, which was made in London, was in English & on the charterers' own form, & the charterers' liability to pay freight was thereby preserved. The charterparty also contained an arbn. clause under which disputes were to be decided by commercial men in London. The steamship sailed from Calcutta & half of the freight was duly paid. She arrived at Barcelona on Dec. 28, 1918, & a sum of money was paid in sterling by the receivers of the cargo. By a decree of the Spanish Commission of Supplies, dated July 2, 1918, confirmed by a Royal Proclamation

Annotation:—*Mentd.* Akt. General Gordon v. Cape Copper Co. (1921), 26 Com. Cas. 289.

700. Governed by lex loci solutionis—Charterparty in English language & form—Ports of call for orders & final delivery English—Foreign ship chartered abroad by Englishmen.]—A German ship while in a German port, was chartered by a charterparty in the English language by English charterers, & the ports of call for orders & of final delivery of cargo were English. On a question of delay in delivery of cargo:—*Held*: the contract must be governed by English law.—THE SAN ROMAN (1872), L. R. 3 A. & E. 583; 41 L. J. Adm. 72; 26 L. T. 948; 1 Asp. M. L. C. 347; *affd.* on other grounds, *sub nom.* ANDERSON v. SAN ROMAN (OWNERS), THE SAN ROMAN (1873), L. R. 5 P. C. 301, P. C.

(c) *Policies of Insurance.*

See generally, INSURANCE.

701. Marine Insurance—Construed according to English law—Policy effected with English underwriters by English merchant—Goods shipped in foreign ship.]—A policy of marine insurance was effected with English underwriters by an English merchant upon goods shipped in a French ship, & it was thereby provided that general average was to be payable as per judicial foreign statement. The ship was damaged by a collision, & put into port for repairs, the cargo, however, being uninjured. The master not having funds to do the necessary repairs, gave a bottomry bond on ship, freight & cargo. The ship & freight proving insufficient to satisfy the bond, the assured had to pay the deficiency in order to obtain possession of his goods:—*Held*: the policy was not to be construed

accordance with Arbitration Act, 1889 (c. 49), condition precedent.]—SPURRIER v. LA CLOCHE, No. 644, *ante*.

705. Fidelity guarantee—Governed by English law—Lloyd's policy issued on instructions from abroad—Contribution from co-insurers in England.]—Pltfs., an American insurance co., issued a policy by which they covenanted to pay an American bank for any loss or damage, occasioned by the dishonesty of any of the employes according to an amount appended to each name in a schedule. Among the employes guaranteed was one K., who was guaranteed up to 2,500 dollars. The bank also took out a policy at Lloyd's for £40,000 by which the underwriters were to be liable for loss caused by the dishonesty of employes, & also for loss sustained by the loss or destruction on the owners' premises of bonds, banknotes, etc., owing to fire or burglary. K. made defalcations to the extent of 2,680 dollars, & the bank claimed from pltfs. the full amount of the insurances, *viz.*, 2,500 dollars, leaving a balance of 180 dollars. The bank claimed 180 dollars on the Lloyd's policy, which was paid. The present action was brought by pltfs. against deft., who was one of the underwriters on the Lloyd's policy, for contribution in respect of the loss:—*Held*: (1) the case was governed by English law; (2) deft. was liable to pay a proportion of the whole loss of 2,680 dollars in the ratio of 2,680 & 2,500.—AMERICAN SURETY CO. OF NEW YORK v. WRIGHTSON (1910), 103 L. T. 663; 27 T. L. R. 91; 16 Com. Cas. 37.

(d) *Contracts relating to Immovables.*

706. Governed by lex loci contractus—English contract to give mortgage on foreign land—Treated

PART VII. SECT. 2, SUB-SECT. 4.—
B. (c).

g. General rule—*Lex loci contractus*.]—A policy having been prepared in U.S.A. where defts. were incorporated, & transmitted to their agent in Canada with whom pltf. insured:—*Held*: the law of C. should govern, the contract being in fact made in C.—MEAGHER v.

INSURANCE Co. (1861), 20 U. C. R. 607.—CAN.

708 i. Life insurance—Governed by *lex loci solutionis*.]—A contract of life insurance entered into by a co. whose head office is in O., the policy having issued from the head office & providing for payment of the insurance money there, must be construed & carried out in accordance with O. law,

although assured lived in M., & applied there to a local agent for the insurance.—NATIONAL TRUST CO. v. HUGHES (1902), 22 C. L. T. 101; 14 Man. L. R. 41.—CAN.

PART VII. SECT. 2, SUB-SECT. 4.—
B. (d).

h. Governed by lex loci contractus & lex loci rei sitæ.]—Contracts dis-

PART VII.

as English mortgage inter partes.] — **BRITISH SOUTH AFRICA CO. v. DE BEERS CONSOLIDATED MINES, LTD.**, No. 361, *ante*.

See, also, Part IV., Sect. 2, sub-sect. 3, ante.

707. — Agreement made in Scotland—For discharge of mortgage of lands in Demerara.]—An agreement made in Scotland for the discharge of a mtge. of lands in Demerara by bills payable in Scotland is a Scottish contract, & is to be interpreted according to the law of that country.

A., being resident in Demerara, mortgaged a plantation in the colony to B. for £6,000, & such further sums not exceeding £50,000, as B. might advance, such mtge. to have proportionate rank & preference with one for which A. had given an obligatory bond of prior date, & which was afterwards made, to C., a merchant at Glasgow, for £14,000, & such further sums not exceeding £50,000 as C. might advance. By an account subsequently stated between A. & C., it appeared that A. was indebted to C. in the sum of £30,000, inclusive of the original mtge. of £14,000, in payment of which A. gave C. ten bills or promissory notes, upon which C. ultimately received £15,000 & interest. No further advances were made by B., but A. being indebted to D., also a merchant at Glasgow, an agreement was entered into for the payment of B.'s mtge. by D., to whom a transfer thereof was made. The estates of A. having been sold pursuant to an order of the Supreme Ct., & all claimants advertised to come in, C. put in his claim for £15,000, the balance due on his mtge. with interest. The representatives of D. also put in their claim for £59,766, the amount of advances made by D. to the mtgor. inclusive of the £6,000 & interest:—*Held*: the representatives of D. were only entitled under the security assigned to him to the amount of £6,000 & interest, & B. was entitled to rank *pari passu* with that security to the amount of £14,000, there being no evidence of appropriation by A. of the sums already paid, which were therefore indefinite payments.—**CAMPBELL v. DENT** (1838), 2 Moo. P. C. C. 292; 12 E. R. 1016, P. C.

Annotation:—Mentd. Bank of Africa v. Cohen, [1909] 2 Ch. 129.

Jurisdiction of court over contracts relating to immovables.]—*See Part IV., Sect. 2, sub-sect. 4, ante.*

(e) *Other Contracts.*

Marriage settlement.]—*See Part XII., Sect. 2, sub-sect. 1, E., post.*

Bottomry bond.]—*See ADMIRALTY, Vol. I., pp. 124–126, Nos. 304–314, 316, 317; SHIPPING & NAVIGATION.*

General average—Construction & effect of foreign adjustment clause.]—*See INSURANCE.*

Carriage — Of passengers' luggage.] —*See CARRIERS, Vol. VIII., p. 56, No. 368.*

— Of goods—By forwarding agent.] —*See CARRIERS, Vol. VIII., p. 7, No. 11.*

posing of real estate or immovables are governed, as to their validity, by the law of the country in which the estate is situated, & by the law of the place where the contract was made.—**RELANGER v. MANN** (1885), 11 Q. L. R. 71.—**CAN.**

J. Governed by *lex loci rei sitæ*—Lease of land.]—Pltfs. leased, by a deed made in N.S.W., certain lands situated in F. to deft. Both parties were resident & domiciled in N.S.W. The lease was not registered in accordance with the law of F.:—*Held*: the lease being governed by the *lex loci rei sitæ*, was void for non-registration.—**JOHNSON v. BILLYARD** (1890), 11 N. S. W. L. R. 319; 7 N. S. W. W. N.

27. AUS.

k. — Construction of terms of offer.]—**WHITE CLIFFS OPAL MINES, LTD. v. MILLER** (1904), 4 S. R. N. S. W. 150; 21 N. S. W. W. N. 55.—**AUS.**

l. Trust settlement in Scottish form—Estate in Scotland.]—Where a trust settlement was executed according to Scots form by a Scotsman possessed of a landed estate in S., the trustees being all resident in S., & the trust being intended to be carried out there:—*Held*: the deed must be construed according to the law of S., although testator was designed therein as resident at Vienna & had not been in S. for many years before his death.—**RAINFORD v.**

By sea.] SHIPPING & NAVIGATION.

Sale of goods.]—*See SALE OF GOODS.*

SUB-SECT. 5.—ENFORCEMENT OF CONTRACTS.

708. Jurisdiction of court to enforce—Contract to be performed in England—Submission to jurisdiction—Effect of prior decree by foreign court.]—(1) A decree for an account in a ct. of concurrent jurisdiction abroad is not a bar to a suit in this country.

Pltf., a domiciled Englishman, in Nov., 1852, entered into a contract at Genoa with defts., a Sardinian Societa Anonima, whereby his firm was to procure in England shares in deft. co. for the purpose of building ships to ply between Genoa & the Brazils. Pltf.'s firm were to build seven ships, with a commission of £5 per cent. on the cost of construction, & defts. were to exonerate the English shareholders from the amounts coming due from them, which were to be devoted to the building of the ships. In Nov., 1857, pltf.'s firm dishonoured some of defts.' bills, whereupon defts. commenced proceedings in the Tribunal of Commerce at Genoa, to which pltf. appeared. At that time four vessels had been built. In 1859 proceedings were commenced by pltf.'s firm against agents of defts. in London in respect of a sum of £7,000 as insurance money on one of the ships, & in 1860 defts. filed a bill against pltf., claiming this sum, & in that suit an arrangement was made whereby pltf. was at liberty to proceed with the action, & the money was ordered into ct. This bill charged that the Tribunal of Commerce at Genoa was not a fitting or satisfactory tribunal for the determination of the dispute, & prayed for an account of all transactions between the parties, & consequential relief. Deft. co. were in course of liquidation abroad:—*Held*: (2) defts. could not withdraw this suit from the jurisdiction of the ct.; although the contract was executed abroad it was to be performed in this country; all the materials for taking an account were here, & although defts. were beyond the jurisdiction of the ct., they had appeared, & had so far submitted to its jurisdiction; (3) pltf. was entitled to compensation for loss of contract.—**PIETRONI v. TRANS-ATLANTIC CO.** (1867), 17 L. T. 303, L. C.

709. — Agreement in English for purchase of foreign ship.]—An Englishman entered into a contract in the English language in Hamburg with a native of Hamburg for the purchase of a Hamburg vessel then on a voyage, whose port of discharge was in this country, a deduction from the price to be made for any damage over the ordinary wear & tear. On the ship's arrival at its port of discharge, deft. refused to comply with the terms of the contract:—*Held*: the ct. had jurisdiction in the matter & specific performance of the contract

MAXWELL (1852), 14 Dunl. (Ct. of Sess.) 450; 24 Sc. Jur. 221; 1 Stuart, 398.—**SCOT.**

m. Lease of sporting over Scottish estate—In English form.]—A Scots proprietor let shooting & fishing rights over his estate to an Englishman:—*Held*: the lease, although executed in England, in English form, was to be construed according to Scots law, & it was inadmissible to refer to extrinsic facts to show that the parties intended it to be construed according to English law.—**MACKINTOSH v. MAY** (1895), 22 R. (Ct. of Sess.) 345; 32 Sc. L. R. 259; 2 S. L. T. 471.—**SCOT.**

Sect. 2.—Law governing contracts: Sub-sects. 5

could be decreed, & pltf. was entitled to an injunction restraining deft. from removing or otherwise disposing of the vessel.—**HART v. HERWIG** (1873), 8 Ch. App. 860; 42 L. J. Ch. 457; 29 L. T. 47; 21 W. R. 603; 2 Asp. M. L. C. 63, L. JJ.

Annotation:—Mentd. Burn v. Herlofson & Slemensen, The Faust (1887), 56 L. T. 722.

Enforcement of illegal contracts.]—See Sub-sect. 6, post.

Procedure governed by lex fori.]—See Part XVI., post.

710. Remedy governed by lex fori.]—TRIMBEY v. VIGNIER, No. 677, ante.

711. —.]—(1) The law of a country, where a contract is to be enforced, must govern the enforcement of such contract.

Where bills were drawn & accepted, & became due in France, but the acceptor, a Scotsman, before such bills became due, returned to Scotland, & there continued till his death:—**Held:** more than six years having elapsed between the time of the bills becoming due & the action being brought, the Scottish law of prescription applied, & its effect was not prevented by the fact that the payee had taken legal proceedings in France during the absence of the debtor, & had obtained judgment against him.

(2) A ct., which is called on to enforce a foreign judgment, may examine into that judgment to see whether it has been rightfully obtained or not.—**DON v. LIPPMANN** (1837), 5 Cl. & Fin. 1; 7 E. R. 303, H. L.

Annotations:—As to (1) Consd. The Vernon (1842), 1 Wm. Rob. 316; The Milford (1858), Sw. 362; Liverpool Marine Credit Co. v. Hunter (1868), 3 Ch. App. 479. **Apld.** Hansen v. Dixon (1906), 96 L. T. 32. **Refd.** Fergusson v. Fyffe (1841), 8 Cl. & Fin. 121; Bain v. Whitehaven & Furness Ry. (1850), 3 H. L. Cas. 1; Duncan v. Canman (1854), 18 Beav. 128; Jefferys v. Boosey (1854), 4 H. L. Cas. 815; The Johannes Christoph (1854), 2 Ecc. & Ad. 93; The Zollverein (1856), 27 L. T. O. S. 160; Ex p. Kidd (1861), 3 De G. F. & J. 640; De La Rosa v. Prieto (1864), 16 C. B. N. S. 578; Liverpool Marine Credit Co. v. Hunter (1868), 37 L. J. Ch. 386; The M. Moxham (1875), 1 P. D. 43; Hamlyn v. Talisker Distillery, [1894] A. C. 202. **Mentd.** Harris v. Quine (1869), 10 B. & S. 644. **As to (2) Refd.** Aboulloff v. Oppenheimer (1882), 52 L. J. Q. B. 1. **Generally, Mentd.** Cope v. Doherty (1858), 2 De G. & J. 614; Gurdial Singh v. Faridkote, [1894] A. C. 670; Emanuel v. Symon, [1908] 1 K. B. 302.

712. —.]—COOPER v. WALDEGRAVE (EARL), No. 679, ante.

713. —.]—FERGUSON v. FYFFE, No. 678, ante.

714. —.]—THE VERNON, No. 680, ante.

715. —.]—THE JOHANNES CHRISTOPH, No. 682, ante.

716. — Breach of negative covenants in foreign contract—Injunction to restrain granted.]—A lady, not of age, & her father by writing signed in a foreign country agreed with a theatrical manager to sing at his theatre for a definite period. By a clause subsequently acceded to & signed by her agent, & to which she & her father afterwards assented, she engaged not to use her talents at any other theatre, nor in any concert or reunion, public

or private, without the written authorisation of the manager. The lady engaged with the manager of a rival theatre to sing at his theatre within the defined period, & her debut was announced in the usual public advertisements. Upon motion in a suit by the manager against the lady, her father & the manager of the rival theatre, it was objected that the positive & negative terms formed but one agreement, & that, as it had been settled that the ct. could not by injunction enforce the positive term that the lady should sing, it could not enforce the negative stipulation:—**Held:** although it was a foreign contract, pltf. was entitled to the injunction without reference to where the contract was entered into, or what might be the remedies, or forms of procedure in other countries on it.—**LUMLEY v. WAGNER** (1852), 5 De G. & Sm. 485; 19 L. T. O. S. 127; 64 E. R. 1209; *affd.* on other grounds, 5 De G. M. & G. 604, L. C.

Annotations:—Mentd. Paris Chocolate Co. v. Crystal Palace Co. (1855), 3 Sm. & G. 119; Fechter v. Montgomery (1863), 33 Beav. 22; Ehrman v. Bartholomew, [1898] 1 Ch. 671; Chapman v. Westerby (1913), 58 Sol. Jo. 50.

717. — Deposit of insurance policy as security for advances—Lien.]—In 1833 A., domiciled in Jersey, deposited with B., domiciled in England, a policy of insurance effected in Jersey, upon A.'s life, for the sum of £499, as security for the sum of £210 advanced by B. to him. This transaction took place in England. No notice of the deposit was given to the insurance office, who afterwards, upon a false representation of the loss of the policy, delivered to A. a duplicate of the policy, which in 1853 he by deed assigned to his wife, from whom he had obtained a judicial sentence of separation *de biens*, in consideration of the sum of £400, alleged to have been paid by her to him. Notice of this assignment was given to the insurance office. A. or his wife paid the premiums till A.'s death. In 1838 A. became insolvent, & made a *cessio bonorum* of his property, but no proof of B.'s debt was registered by him under A.'s insolvency. In an action brought in Jersey by A.'s wife against the insurance office to recover the amount of the policy, B. intervened & claimed a lien under the deposit with him by A. of the original policy:—**Held:** (1) as B.'s domicile was English, & the contract made in England, B. had by the English law a lien upon the policy; (2) the *cessio bonorum* made by A. in Jersey did not affect such lien; (3) in the absence of evidence whether the assignment to A.'s wife was *bonâ fide* & for a valuable consideration without notice of the deposit of the original policy to B., the cause should be remitted back to the ct. in Jersey for further proof upon these points, with a declaration that, if the evidence established the title of A.'s wife, she had a preferential title to B., but, if otherwise, her title was to be considered as subsequent to B.'s charge on the policy for the principal & interest of his debt.—**LE FEUVRE v. SULLIVAN** (1855), 10 Moo. P. C. C. 1; 14 E. R. 389, P. C.

718. — Action by master of foreign ship—For wages & disbursements.]—THE MILFORD, No. 683, ante.

719. — — —.]—In an action by the

PART VII. SECT. 2, SUB-SECT. 5.

710 i. Remedy governed by lex fori.]—Questions relating to the remedy as distinct from those relating to the merits fall more properly under the *lex fori*, but it is often difficult to draw the line between the two classes of questions.—**STEWART v. RYALL** (1887), S. C. 146.—**S. AF.**

710 ii. —.]—The law of a country where it is sought to enforce a contract

must be applied in determining the remedies upon it & the procedure to enforce such remedies.—**SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNEELAND** (1913), 24 W. L. R. 587; *on appeal*, 27 W. L. R. 346.—**CAN.**

710 iii. —.]—ROBERTSON'S TRUSTEE v. BAIRDS (1852), 14 Dunl. (Ct. of Sess.) 1010; 24 Sc. Jur. 623.—**SCOT.**

n. *What amounts to breach*

*of contract within jurisdiction.]—*Pltf. remitted bills of exchange to R. in England. Before the bills became due R. was declared bkpt. in E., & deft., as his official assignee, received the proceeds of the bills:—**Held:** non-payment of the money was not a breach of "a contract made wholly or in part" within New Brunswick, & proceedings could not be taken against deft. under 18 Vict. c. 25.—**CRANE v. CAZENOVE** (1860), 4 All. 578.—**CAN.**

master of a ship for wages & disbursements the *lex fori* applies & not the *lex loci contractus*, & a foreign master has a maritime lien for his wages up to the date of the arrest of the ship.—*THE TAGUS*, [1903] P. 44; 72 L. J. P. 4; 87 L. T. 598; 19 T. L. R. 82; 9 Asp. M. L. C. 371.

Annotation:—*Mentd.* The Petone, [1917] P. 198.

See, further, ADMIRALTY, Vol. I., p. 137, No. 450, *et seq.*

720. — **Damages not awarded contrary to—Though recoverable by foreign law.**—*THE HALLEY*, No. 686, *ante*.

721. — **Right of unnamed principals to sue in England—Suit against foreigners carrying on business abroad—Subject to right of set-off.**—Pltfs., merchants at Havana, employed D. & Co., commission agents at Havana, to ship & consign goods for sale to defts., the bankers & agents in London of D. & Co. Defts. knew nothing of pltfs., & only dealt with D. & Co., & the goods were consigned in the name of D. & Co., & all the shipping documents were in their names. The general course of business between D. & Co. & defts. was for defts. to make advances to D. & Co. on general account, on the understanding that D. & Co. should remit them cash, bills or goods to cover such advances. On July 28, 1881, defts. received a telegram from D. & Co. requesting them to insure the goods in question. The next day defts. wrote in reply, acknowledging the telegram, & stating that they had taken out a provisional policy for the amount named. On Aug. 9 defts. received a letter from D. & Co. written on July 24, which informed them that there was an unnamed principal, who were in fact pltfs. This letter defts. answered on Aug. 10. The policy was perfected in the usual way on Sept. 18 on behalf of all parties interested. D. & Co. failed a few days before Sept. 18. The goods were lost at sea, but before the underwriters paid defts. the insurance moneys, pltfs. claimed to be entitled to the proceeds of the policies. Defts. knew of this claim, but claimed to retain & set off the policy moneys against the balance due to them on the general account between them & D. & Co. To an action by pltfs. for the insurance moneys the defence was that there was no privity of contract between pltfs. & defts.; that the contract between D. & Co. & defts. was governed by the Spanish law which prevailed at Havana, & by which defts. were entitled to treat D. & Co. as principals; & that there was a well-known course of business between foreign consignors & London merchants for the latter to make advances to the former against goods & shipping documents, on the terms that the London merchants were entitled to hold the proceeds of all goods so consigned, or, if they were lost at sea, the insurance moneys against any balance that might be due to them on their general account current with the consignors:—*Held*: (1) the contract between D. & Co. & defts. was governed by English law, & the persons who could sue & be sued on that contract in England must also be determined by English law; (2) by English law it was settled that pltfs., as unnamed principals, could under the circumstances sue defts., & the fact that pltfs. were foreigners carrying on business abroad made no difference; (3) the alleged usage

of trade was not proved & pltfs. were entitled to the insurance moneys, freed from the claims of defts., but subject to any set-off which D. & Co. might have against pltfs. for the balance due from them to D. & Co. on the account current between them.—*MASPONS Y HERMANO v. MILDRED* (1882), 9 Q. B. D. 530; 51 L. J. Q. B. 604; 47 L. T. 318; 30 W. R. 862, O. A.; *affd.* on other grounds, *sub nom.* *MILDRED v. MASPONS* (1883), 8 App. Cas. 874, H. L.

Annotation:—*Mentd.* *Kaltenbach v. Lewis* (1885), 10 App. Cas. 617.

722. — **Right to sue on English contract made abroad—Not affected by liquidation of defendants abroad.**—*CAPE COPPER CO., LTD. v. COMPTOIR D'ESCOMPTE & SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES METAUX & LAVASSEUR & LENGARRE, MASON & BARRY v. COMPTOIR D'ESCOMPTE* (1890), 6 T. L. R. 454.

723. — **Action maintainable in England on valid contract made abroad—Though no remedy provided by foreign law.**—*HANSEN v. DIXON*, No. 661, *ante*.

— **Necessity for compliance with Statute of Frauds.**—*See* Nos. 671, 672, *ante*.

Whether action barred by Statutes of Limitation.—*See* Part XVI., Sect. 6, *post*.

SUB-SECT. 6.—LEGALITY OF CONTRACTS.

A. Contracts illegal by their Proper Law.

724. Enforceable in England—Contravention of trade laws.—In an action against the owner of a ship for non-delivery to consignee of gold shipped from Portugal:—*Held*: (1) the fact that the export of gold was forbidden by the law of Portugal could not alter the right of an English subject, unless there had been a particular determination in his case; (2) a usage in such trade for the master, & not the owner, to be entitled to the freight, would not prevent the owner being liable on the bill of lading; (3) where there was a trading ship concerned in a voyage, it must be considered in the nature of a common carrier.—*BOUCHER v. LAWSON* (1736), Cunn. 144; *Lee temp. Hard.* 85, 194; 94 E. R. 1116.

Annotations:—*As to* (2) *Reid. Yates v. Hall* (1785), 1 Term Rep. 73; *Ashmall v. Wood* (1857), 3 Jur. N. S. 232; *Jackson v. S.S. Blanche*, [1908] A. C. 126.

725. — **Violation of fiscal law.**—The cts. of this country will not refuse to administer justice between joint importers of any article of commerce merely upon proof that in the production or exportation of such article some fiscal law of the country of produce has been violated.

A. & B., British subjects, purchased & repaired an American-built ship, on a joint speculation, with a view to employing her in the trade between the two countries, until an opportunity should occur for reselling her to advantage; for which purpose they procured her to be registered in the United States in the name of C., a citizen of that country, upon a false declaration that she was *bond fide* the sole property of C. After the ship had made several voyages, B., who had had the management of her, attempted to exclude A. from his share in the speculation, & in spite of the dissent

PART VII. SECT. 2, SUB-SECT. 6.—A.

o. General rule.—When a party is sued on a contract made in a foreign country, the ct. will presume it is a legal contract according to the law of that country, unless the contrary be proved; the onus of such proof lies on the party objecting to its legality.—

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v. KITCHEN (1854), 3 I. C. L. R. 613; 6 Ir. Jur. 218.—IR.

p. Contract made abroad—Competence of Scottish court to decide issues.—In an action by one American against another against whom arrestments had been used "*jurisdictionis fundandae causa*," for implement of a contract

entered into in America, defender averred that the contract was by the *lex loci contractus* illegal & pleaded "*forum non competens*":—*Held*: the plea was bad, for defender had failed to show the existence of any more convenient *forum*.—*CLEMENTS v. MACAULAY* (1860), 4 Macph. (Ct. of Sess.) 583.—SCOT.

1) D

Sect. 2.—Law governing contracts: Sub-sect. 6, A., B., C. & D.]

of A., sent her on another voyage to America:—**Held:** even supposing the declaration above-mentioned & the registration thereby effected to have been a fraud upon the American law, & the subsequent employment of the ship so registered to have been a fraud upon the English Navigation Laws, such fraud would not prevent A. from maintaining a suit against B. for an account & payment of his share of the realised profits of the speculation, & an inquiry should be directed as to what had become of the ship since she was sent on her last voyage, & what was her value when so sent, with a view to making B. personally liable for such value in case either the ship or the proceeds of her sale should not be ultimately forthcoming.—**SHARP v. TAYLOR** (1849), 2 Ph. 801; 14 L. T. O. S. 1; 41 E. R. 1153, L. C.

Annotations:—**Consd.** Sykes v. Beadon (1879), 11 Ch. D. 170. **Refd.** Coyle v. Alleyne (1854), 2 W. R. 382; Williams v. Trye (1854), 2 Eq. Rep. 766; Sheppard v. Oxenford (1855), 1 K. & J. 491; Ralli v. Universal Marine Insce. (1861), 2 John. & H. 159; Sichel v. Raphael (1864), 3 New Rep. 662; Beeston v. Beeston (1875), 1 Ex. D. 13. **Mentd.** Liverpool Corpn. v. Wright (1859), John. 359; Pare v. Clegg (1861), 4 L. T. 669; Re South Wales Atlantic S.S. Co. (1876), 2 Ch. D. 763; Bridgor v. Savage (1885), 15 Q. B. D. 363; Rawlings v. General Trading Co., [1921] 1 K. B. 635.

726. Unenforceable in England.]—When the subjects of a foreign country enter into an agreement conformable to the laws of their own country, they cannot by a subsequent agreement contravene such laws, & an agreement to such effect cannot be enforced.—**HULLE v. HEIGHTMAN** (1802), 4 Esp. 75; 2 East, 145; 102 E. R. 324.

Annotations:—**Mentd.** Collins v. Price (1828), 2 Moo. & P. 233; Thomas v. Williams (1834), 3 Nev. & M. K. B. 545; Priokett v. Badger (1856), 1 C. B. N. S. 296; Button v. Thompson (1869), L. R. 4 C. P. 330.

Whether enforceable in England—Breach of stamp laws.]—See Sect. 2, sub-sect. 3, *ante*.

B. Contracts illegal by Lex loci contractus.

727. General rule.]—Defts. were incorporated in 1836 by special Act for the purposes of making & working the S. Ry., & were empowered to fix the sum to be charged by them in respect of small parcels not exceeding 100 lbs. weight each, as to them should seem proper, provided always that these provisions should not extend to articles, matters or things sent in large aggregate quantities, although made up of separate & distinct parcels, such as bags of sugar, rice & the like, but only to single parcels unconnected with parcels of a like nature which might be sent upon the railway at the same time. By a later Act it was enacted that the charges by the above Act, among others, authorised to be made for the carriage of any goods etc., to be conveyed by the co. or for the use of any steam power or carriage to be supplied by the co., should be at all times charged equally to all persons, & after the same rate per mile, etc. Pltf. collected parcels in France, & made them up into packed parcels, & the railway co. charged him double for such parcels. Pltf. commenced an action for overcharge:—**Held:** (1) he could not treat the contract made by him abroad as a nullity & claim to alter it, after receiving the consideration for which the price was paid, by fixing a lower price; (2) the *lex loci contractus* was the means of

deciding whether there was illegality in the contract, & according to the law of France there was nothing illegal in it.—**BRANLEY v. SOUTH EASTERN RY. CO.** (1862), 12 C. B. N. S. 63; 31 L. J. O. P. 286; 9 Jur. N. S. 329; 142 E. R. 1066; *sub nom.* **BRAMLEY v. SOUTH EASTERN RY. CO.**, 6 L. T. 458. **Annotations:**—*As to* (1) **Refd.** G. W. Ry. v. Sutton (1869), L. R. 4 H. L. 226. **Generally, Mentd.** Baxendale v. G. W. Ry. (1863), 14 C. B. N. S. 1; Sutton v. S. E. Ry. (1865), L. R. 1 Exch. 32.

728. Contract made abroad—Liability to criminal prosecution—Not enforced in England.]—To a bill to carry into effect a contract made in a foreign country, & to take an account on the footing of such contract, deft. pleaded that by the law of such foreign country the contract between the parties thereto was illegal & void, & would subject such parties to criminal prosecution:—**Held:** this was a good plea in bar to the relief sought by the bill.—**HERIZ v. RIERA (OR DE CASA RIERA)** (1840), 11 Sim. 318; 10 L. J. Ch. 47; 5 Jur. 20; 59 E. R. 896.

C. Contracts illegal by Lex loci solutionis.

Legality of contracts generally, see **CONTRACT**.

729. Smuggling—Seller assisting in smuggling goods into England—Goods packed in particular manner—Not enforceable in England.]—An action cannot be maintained by several partners for goods sold by one of them living in Guernsey, & packed by him in a particular manner for the purpose of smuggling, though the other partners, who resided in England, knew nothing of the sale, for it is a contract by subjects of this country made in contravention of the laws, & this case must be considered in the same light as if all the partners lived in England.—**BIGGS v. LAWRENCE** (1789), 3 Term Rep. 454; 100 E. R. 673.

Annotations:—**Apld.** Clugas v. Penaluna (1791), 4 Term Rep. 466. **Refd.** Kaufman v. Gerson, [1903] 2 K. B. 114. **Mentd.** Lightfoot v. Tenant (1796), 1 Bos. & P. 551; Bauerman v. Radenius (1798), 7 Term Rep. 663; Fairlie v. Hastings (1804), 10 Ves. 123; Hodgson v. Temple (1813), 5 Taunt. 181; Langton v. Hughes (1813), 1 M. & S. 593; Betham v. Benson (1818), Gow, 45; Goss v. Watlington (1821), 3 Brod. & Bing. 132; Clifford v. Burton (1823), 8 Moore, C. P. 16; Pellocat v. Angell (1835), 2 Cr. M. & R. 311; Wharton v. Wright (1845), 1 New Pract. Cas. 296; Abbot v. Rogers (1855), 16 C. B. 277; Jeffrey v. Bamford, [1921] 2 K. B. 351.

730. — — — — —.]—An inhabitant of Guernsey cannot recover in the cts. of this country the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into England, & gave him assistance for that purpose.—**CLUGAS v. PENALUNA** (1791), 4 Term Rep. 466; 100 E. R. 1122.

Annotations:—**Mentd.** Lightfoot v. Tenant (1796), 1 Bos. & P. 551; Langton v. Hughes (1813), 1 M. & S. 593.

731. — — — — —.]—A vendor of goods abroad having packed them up by order of the buyer in a particular manner, for smuggling them into this country, & knowing at the time that they were to be smuggled, cannot recover the value of them against the buyer, although he was not concerned in the risk of importing the goods in this country.—**WAYMELL v. REED** (1794), 5 Term Rep. 599; 101 E. R. 335.

Annotations:—**Mentd.** Lightfoot v. Tenant (1796), 1 Bos. & P. 551; Langton v. Hughes (1813), 1 M. & S. 593; Pellocat v. Angell (1835), 2 Cr. M. & R. 311.

732. — — — — —.]—Mere knowledge of seller that goods to be smuggled into England—Smuggling not essential part of contract—Enforceable in England.]

PART VII. SECT. 2, SUB-SECT. 6.—C.

a. Contract founded on foreign law creating lien on Canadian land—Void ab initio.]—**Held:** a foreign legislature could make no law creating a lien on real estate in Canada, & any contract founded on such a considera-

tion was void *ab initio*.—**GENESEE MUTUAL INSURANCE CO. v. WESTMAN** (1852), 8 U. C. R. 487.—**CAN.**

r. Contract for services to be performed abroad—Illegal abroad—Not enforceable in Canada.]—A contract by a physician duly qualified by the

laws of Quebec, where he is domiciled, to render professional services in U.S.A., where he is prohibited from practising, is illegal, & charges for such services are not recoverable in the cts. of Q.—**RUGG v. LEWIS** (1900), Q. R. 17 S. C. 206.—**CAN.**

—A foreigner selling & delivering goods abroad to a British subject may recover the price, although he knows, at the time of the sale & delivery, that the buyer intends to smuggle them into this country.—*PELLECAT v. ANGELL* (1835), 2 Cr. M. & R. 311; 1 Gale, 187; 5 Tyr. 945; 4 L. J. Ex. 326; 150 E. R. 135.

Annotations:—*Consd.* *Seymour v. London & Provincial Marine Insee.* (1872), 41 L. J. C. P. 193. *Refd.* *Sharp v. Taylor* (1849), 14 L. T. O. S. 1.

733. Contract for delivery in England—For purpose illegal by English law—7 Geo. 1, c. 21—Not enforceable in England.—To debt on bond debt. pleaded that the bond was given to secure payment of the price of goods agreed to be sold & delivered in London by pltf. to debt., to be by the latter shipped to Ostend, & thence reshipped for the East Indies, & there trafficked with clandestinely:—*Held*: the plea was a sufficient bar to the action, the case being within 7 Geo. 1, c. 21, which avoided all contracts for supplying cargoes to foreign ships in such a trade.—*LIGHTFOOT v. TENANT* (1796), 1 Bos. & P. 551; 126 E. R. 1059.

Annotations:—*Consd.* *Langton v. Hughes* (1813), 1 M. & S. 593; *Gas Light & Coke Co. v. Turner* (1839), 5 Bing. N. C. 666; *Hobbs v. Henning* (1864), 17 C. B. N. S. 791; *Seymour v. London & Provincial Marine Insee.* (1872), 41 L. J. C. P. 193. *Refd.* *Fisher v. Bridges* (1854), 3 E. & B. 612.

734. Contract for delivery abroad—For purpose illegal by foreign law—Enforceable in England.—The value of paper made for forging assignats upon to be exported to France may be recovered in our cts., although pltf. knew for what purposes the paper was to be applied.—*SMITH v. MARCONNAY* (1796), Peake, Add. Cas. 81, N. P.

735. Champertous agreement made abroad—To be carried into effect in England—Not enforceable in England—Though legal by *lex loci contractus*.—An agreement entered into in France, but intended to be carried out in England, of such a nature that, if entered into in England, it would have been void for champerty, cannot be enforced in England.

Pltfs., who were merchants residing in Paris, agreed in Paris with debt., a solicitor residing & practising in London, that the latter should take proceedings in their names to recover a debt due to them from one W. The proceedings were all to be taken at the risk & expense of debt., who was to have no claim for them against pltfs. Debt. was to keep, for expenses & honorarium, one-half of the sum which he might recover from W. Debt. sued W. in an English ct. & W. paid to him £500 for the debt & £170 for costs. Debt. paid £300 to pltfs. & retained the remainder, whereupon pltfs. brought an action against him for the balance of the £500:—*Held*: the agreement was void, & debt. was remitted to his ordinary rights of an attorney upon a valid retainer, & was entitled to retain the £170 paid to him for costs by W., & a further sum of £40, found upon taxation to be due to him from pltfs. for additional costs as between attorney & client, & pltfs. were consequently entitled to a verdict for £160.—*GRELL v. LEVY* (1864), 16 C. B. N. S. 73; 9 L. T. 721; 10 Jur. N. S. 210; 12 W. R. 378; 143 E. R. 1052.

Annotations:—*Distd.* *Kaufman v. Gerson*, [1903] 2 K. B. 114. *Consd.* *Dynamit Act. v. Rio Tinto Co.*, [1918] A. C. 292. *Refd.* *Re Thomas, Jaquess v. Thomas* (1894), 10 T. L. R. 367. *Mentd.* *Wild v. Simpson*, [1919] 2 K. B. 544.

736. Contract on foreign ship—Part performance in England illegal—Unqualified medical

practitioner—Medical Act, 1858 (c. 90).—Deft., a foreigner, was the medical officer of a foreign ship lying in the Thames, & he entered into a contract with pltf., an English medical man, but not a registered practitioner, under Medical Act, 1858, for the latter to attend the crew of the ship, & to supply them with medicines. In an action by pltf. to recover for work & services, & medicines supplied under this contract:—*Held*: (1) pltf., not being registered under the Act, could not recover, & the fact that the contract was made on board a foreign ship made no difference; (2) the Act was part of the *lex loci* of this country.—*DE LA ROSA v. PRIETO* (1864), 16 C. B. N. S. 578; 4 New Rep. 463; 33 L. J. C. P. 262; 10 L. T. 757; 10 Jur. N. S. 851; 12 W. R. 1029; 2 Mar. L. C. 67; 143 E. R. 1253.

Annotation:—*Mentd.* *Howarth v. Brearley* (1887), 19 Q. B. D. 303.

737. Shipment of arms to foreign country—Prohibition on importation.—Pltf. insured with defts. arms & ammunition for delivery at certain ports in the Persian Gulf, under a policy which covered capture at sea. The goods were seized & confiscated by an English man-of-war, acting, it was alleged, on behalf of the Persian Govt., under an edict passed in 1881, but which had never been enforced so long as the duty demanded for import of such goods was paid, prohibiting the importation of arms & ammunition into Persia:—*Held*: (1) pltfs. could recover on the policy, because there had been in fact no wilful concealment on their part from the underwriters of the risk of seizure, for, if they knew of the edict, they had no reason to suppose that it would be enforced so long as the duty payable was forthcoming; (2) the policy was not void, as being on goods shipped for an illegal venture; for the importation of such goods into Persia was neither contrary to the law of Persia as that law was in practice administered, nor illegal by the law of the country of the assured, England being at the time in amity with Persia.—*FRACIS, TIMES & CO. v. SEA INSURANCE CO., LTD.* (1898), 79 L. T. 28; 47 W. R. 119; 42 Sol. Jo. 634; 8 Asp. M. L. C. 418; 3 Com. Cas. 229.

Annotation:—*Generally*, *Mentd.* *Sea Insee. v. Carr* (1900), 6 Com. Cas. 11.

738. Carriage of goods to foreign country—Agreement made in British territory for rebates on freight—Penalties imposed by foreign law—No excuse for non-performance.—An agreement made in British territory to allow rebates upon freights paid for the carriage of goods by sea to a foreign country cannot be repudiated, after the goods have been carried & the freights paid, on the ground that payment of the rebates would subject the ship-owners to penalties under legislation of the foreign country.—*TRINIDAD SHIPPING CO. v. ALSTON*, [1920] A. C. 888; 89 L. J. P. C. 185; 123 L. T. 476; 36 T. L. R. 654; 15 Asp. M. L. C. 31, P. C.

Contract violating revenue laws of country where contract to be performed.—*See* Nos. 668, 669, 670, 725, *ante*.

D. Contracts illegal by *Lex fori*.

739. General rule—Not enforceable in England—Though valid by *lex loci contractus*.—When a ct. of one country is called upon to enforce a contract entered into in another, it is not enough that the contract should be valid according to the law of

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739 i. General rule—Not enforceable—Though valid by *lex loci contractus*.—A contract made abroad in contempla-

tion of an object unlawful in New Zealand, though valid by the *lex loci contractus*, is not enforceable in N.Z.—*KLATZER v. CASELBERG & CO.* (1909),

28 N. Z. L. R. 994.—N.Z.

a. Contrary to public policy—Agreement to oust jurisdiction of

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the latter, for if any part of the contract be inconsistent with the law & policy of the former, the contract will not be enforced, even as to another part of it which may not be open to this objection, & may be the only part remaining to be performed.

Where an Englishman married a Frenchwoman, & they resided in France, where their children were born, & suits were instituted between them in both countries, & were compromised by an agreement, of which part was that the wife would facilitate proceedings for a divorce, & another part was that one of the children should remain with his mother, & a third part related to the payment of an allowance to the wife:—*Held*: even supposing the parties to be domiciled in France, & the agreement to be governed by French law, & to be valid according to that law, & to have been performed as to the parts which were invalid according to English law, it could not be enforced here as to any part of it.—*HOPE v. HOPE* (1857), 8 De G. M. & G. 731; 26 L. J. Ch. 417; 29 L. T. O. S. 4; 3 Jur. N. S. 454; 5 W. R. 387; 44 E. R. 572, L. J.

Annotations:—*Consd.* Saxby v. Fulton, [1909] 2 K. B. 208. *Refd.* Childers v. Childers (1857), 30 L. T. O. S. 3; Kaufman v. Gerson, [1904] 1 K. B. 591; Dynamit Act. v. Rio Tinto Co., [1918] A. C. 292; Aksionairnoye Obschestvo A. M. Luther v. Sagor, [1921] 3 K. B. 532. *Mentd.* Re Matthew's Settlement, Trusts & Trustees Act, 1850 (1858), 5 Jur. N. S. 184; Vansittart v. Vansittart (1858), 4 K. & J. 62; Re Matthews (1859), 7 W. R. 224; Tharsis Sulphur & Copper Co. v. Société Industrielle et Commerciale des Métaux (1889), 60 L. T. 924.

740. (1) If an agreement contrary to the policy of the English law is entered into in a country, by the law of which it is valid, an English ct. will not enforce it.

(2) The principles on which the ct. acts in enforcing judgments of a foreign ct. discussed (see No. 1040, *post*).

Deft., a Swiss subject, entered into an agreement with the plffs., French subjects residing in France, when he was in France on a temporary visit he being then domiciled in Switzerland but residing in England. Plffs. afterwards obtained judgment against him in a French ct. for breach of the agreement. He was not in France at the commencement of, or at any time during, the action, & he had no notice of the proceedings though plffs. knew his address in England, where he was then still residing:—*Held*: the judgment could not be enforced by an English ct.—*ROUSILLON v. ROUSILLON* (1880), 14 Ch. D. 351; 49 L. J. Ch. 338; 42 L. T. 679; 44 J. P. 663; 28 W. R. 623.

Annotations:—*As to* (1) *Folld.* Feyerick v. Hubbard (1902), 71 L. J. K. B. 509. *Consd.* Emanuel v. Symon, [1908] 1 K. B. 302; Dynamit Act. v. Rio Tinto Co., [1918] A. C. 292. *Appld.* Re Macartney, Macfarlane v. Macartney, [1921] 1 Ch. 522. *Refd.* Pemberton v. Hughes, [1899] 1 Ch. 781; Kaufman v. Gerson, [1904] 1 K. B. 591; Saxby v. Fulton, [1909] 2 K. B. 208. *As to* (2) *Consd.* Gurdial Singh v. Faridkote, [1894] A. C. 670; Gavin Gibson v. Gibson, [1913] 3 K. B. 379. *Refd.* Guillard v. De Clermont & Donner, [1914] 3 K. B. 145. *Generally, Mentd.* Davies v. Davies (1887), 36 Ch. D. 359; Mills v. Dunham, [1891] 1 Ch. 576; Badische Anilin und Soda Fabrik v. Schott, Segner, [1892] 3 Ch. 447; Moenich v. Fenestre (1892), 67 L. T. 602; Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] A. C. 535; Haynes v. Doman, [1899] 2 Ch. 13; Moulis v. Owen, [1907] 1 K. B. 746; North-Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; Eastes v. Russ, [1914] 1 Ch. 468; Goldsoll v. Goldman, [1914] 2 Ch. 603; Morris v. Saxelby, [1915] 2 Ch. 57; Millers v. Steedman (1915), 84 L. J. K. B. 2057.

741. ————.]—An English ct. will not enforce a foreign contract, though valid by

the law of the country in which it was made, in cases where the ct. deems the contract to be in contravention of some essential principle of justice or morality.

Pltf., who was domiciled in a foreign country, sued on a contract made in that country between himself & deft., a woman likewise domiciled there, whom he had coerced into signing the contract by threats of a criminal prosecution against her husband for an offence which he had committed, the consideration for the contract being that pltf. would not prosecute the husband. Evidence was given to the effect that the contract was not invalid by the law of the country in which it was made:—*Held*: even assuming that to be so, the ct. would not enforce a contract so procured.—*KAUFMAN v. GERSON*, [1904] 1 K. B. 591; 73 L. J. K. B. 320; 90 L. T. 608; 52 W. R. 420; 20 T. L. R. 277; 48 Sol. Jo. 296, C. A.

Annotations:—*Appld.* Société Des Hôtels Réunis (Soc. Anon.) v. Hawker (1913), 29 T. L. R. 578. *Consd.* Dynamit Act. v. Rio Tinto Co., [1918] A. C. 292; Aksionairnoye Obschestvo A. M. Luther v. Sagor, [1921] 3 K. B. 532. *Refd.* Moulis v. Owen, [1907] 1 K. B. 746; Saxby v. Fulton, [1909] 2 K. B. 208.

742. If contrary to essential or moral interests—Not mere invalidity.]—*Re FITZGERALD, SURMAN v. FITZGERALD*, No. 297, *ante*.

743. Contrary to public policy—Slave trade—Not recognised nor approved by English courts.]—S. purchased a negro slave in Virginia; he came to England & brought the slave with him; the slave escaped & persons employed by S. seized him & he was placed on board a ship bound for Jamaica. On an application for his release under a writ of *habeas corpus*:—*Held*: he must be discharged, for although slavery may be recognised & lawful in the colonies it is not allowed or approved of by the law of England.—*SOMMERSETT'S CASE* (1772), 20 State Tr. 1.

Annotations:—*Distd.* R. v. Thames Ditton (1785), 4 K. B. 300; Forbes v. Cochrane (1824), 2 B. & C. 448. *Consd.* The Slave Grace, R. v. Allen (1827), 2 Hag. Adm. 94; Canadian Prisoners' Case, Watson's Case, *Re* Parker, R. v. Batchelder (1839), 3 State Tr. N. S. 963. *Refd.* Worms v. De Valdor (1880), 49 L. J. Ch. 261. *Mentd.* Jefferys v. Boosey (1854), 4 H. L. Cas. 815.

744. ———— Contract legal by *lex loci contractus*—Slave Trade Act, 1843 (c. 98).]—Defts., a co. of British subjects domiciled in England, but working mines in Brazil, agreed to sell certain slaves to pltf., a Brazilian resident, & domiciled in Brazil, where slavery was allowed. The slaves were acquired by defts. in Brazil after the passing of Slave Trade Act, 1824 (c. 113), & before the passing of Slave Trade Act, 1843. A large number of the slaves were purchased & the others were the children & offspring of those acquired by purchase:—*Held*: the contract was legal, & might be enforced in this country, on the ground that s. 5 of the latter Act permitted the sale of slaves, the holding of whom was not prohibited by any Act of Parliament, & no statute prohibited the holding of the slaves in Brazil, even though the purchasing of them there might be a felony in a British subject.—*SANTOS v. ILLIDGE* (1860), 8 C. B. N. S. 861; 29 L. J. C. P. 348; 3 L. T. 155; 6 Jur. N. S. 1348; 8 W. R. 705; 141 E. R. 1404, Ex. Ch.

Annotations:—*Consd.* Kaufman v. Gerson, [1903] 2 K. B. 114; Dynamit Act. v. Rio Tinto Co., [1918] A. C. 292. *Refd.* Branley v. S. E. Ry. (1862), 12 C. B. N. S. 63; Ellis v. M'Henry (1871), L. R. 6 C. P. 228. *Mentd.* Aksionairnoye Obschestvo A. M. Luther v. Sagor, [1921] 3 K. B. 532.

745. ———— Agreement for collusive divorce—

Canadian courts—Made abroad.]—Where an action is cognisable by Canadian cts. an agreement to oust

their jurisdiction, even if made in a foreign place, is contrary to public policy & void.—*CARVETH v. RAILWAY*

ASBESTOS PACKING CO. (1913), 24 O. W. R. 151; 4 O. W. N. 872; 9 D. L. R. 631.—*CAN.*

Governed by & valid by foreign law—Not enforceable in England.]—HOPE v. HOPE, No. 739, *ante*.

746. — Champertous agreement made abroad — Valid by lex loci contractus—Not enforceable in England.]—GRELL v. LEVY, No. 735, *ante*.

747. — Contract obtained by duress abroad—Threat of prosecution—Not enforceable in England.]—KAUFMAN v. GERSON, No. 741, *ante*.

— **Cheque obtained by duress abroad.]—See** BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 430, No. 2785.

748. — Trading with the enemy—Validity determined by English law.]—An English co., owning cupreous ore mines in Spain, on various dates prior to the outbreak of the war between Great Britain & Germany, contracted to sell to three German cos. large quantities of this ore, to be shipped from Spain to Rotterdam, or certain other Continental ports, & to be delivered to the several buyers by instalments extending over a number of years. Each of the contracts contained a suspensory clause providing that, if owing to strikes, war or any other cause, over which the sellers had no control, they should be prevented from shipping or delivering the ore, the obligation to ship & deliver should be suspended during the continuance of the impediment & for a reasonable time afterwards, & the clause contained a corresponding provision in favour of the buyers, suspending the obligation to receive in the like event. At the date of the outbreak of war some of the contracts had been partially executed, the others were wholly executory. The contracts with one of the German cos. were in English form; those with the two other cos. were made in Germany & were in the German language. The English co. by actions commenced under Legal Proceedings against Enemies Act, 1915 (c. 36), claimed declarations that all the contracts were abrogated on Aug. 4, 1914, by the existence of a state of war between Great Britain & Germany:—*Held*: (1) apart from the suspensory clause, the contracts were abrogated on the outbreak of war inasmuch as they involved trading with the enemy; (2) the suspensory clause, assuming that it applied to a war between the countries of the contracting parties, was void as against public policy as tending to the detriment of this country & the advantage of the enemy country; (3) in the absence of evidence to the contrary, the presumption was that the law of Germany was the same as the law of England; (4) assuming that these contracts were valid by the law of Germany, the question whether they were void as against public policy was to be determined by the law of this country.—**ERTEL BIEBER & Co. v. RIO TINTO Co.**, [1918] A. C. 260; 87 L. J. K. B. 531; 118 L. T. 181; 34 T. L. R. 208, H. L.

Annotations:—As to (1) *Distd.* *Dynamit Act. v. Rio Tinto Co.*, [1918] A. C. 269. *Consd.* *Fried Krupp Akt. v. Orconera Iron Ore Co.* (1919), 88 L. J. Ch. 304. *Refd.* *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *Central India Mining Co. v. Société Colonial Anversoise*, [1920] 1 K. B. 753. As to (2) *Refd.* *Re Badische Co., Re Bayer Co., Etc.*, [1921] 2 Ch. 331. As to (3) *Apld.* *Naylor, Benzon v. Krainische Industrie Gesellschaft*, [1918] 2 K. B. 486. *Refd.* *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623. *Generally, Mentd.* *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

748 i. — Champertous agreement made abroad.]—Pltf., an attorney in Chicago, in 1910 obtained the execution by deft. of an agreement in writing, purporting to retain pltf. to institute & prosecute an action for alimony, or to compromise the same, & undertaking to pay for his services a sum of money equal to one-half of any sum recovered. Judgment had previously

been given & a settlement effected, by deft.'s husband assigning to her an interest in property in Alabama & executing a quit-claim deed to certain lots in Edmonton:—*Held*: so far as the agreement could affect the property in E., it was void or unenforceable, being either champertous or ineffective against the client's right of taxation.—**WATERS v. CAMPBELL** (1913), 25

749. —.]—Until the contrary be proved, the general law of a foreign State is presumed to be the same as the law of this country. Assuming, however, that the ct. had heard evidence as to German law & had decided as a matter of fact that according to German law the *force majeure* clause in the contract covered the case of war between the United Kingdom & Germany, & that there was nothing contrary to German public policy in the clause so interpreted, this would not, in my opinion, conclude the matter in applts.' favour. Whenever the cts. of this country are called upon to decide as to the rights & liabilities of the parties to a contract, the effect on such contract of the public policy of this country must necessarily be a relevant consideration. Every legal decision of our cts. consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights & liabilities or otherwise. If the policy of our law renders it unlawful for a subject of the Crown to contract with a foreigner that if war break out between this country & the State of which the foreigner is a subject the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise incur, no subject of the Crown can be allowed to evade the rule by entering into such a contract out of the jurisdiction & stipulating expressly or impliedly that the contract shall be governed by a foreign law. It is clear that in deciding under Legal Proceedings against Enemies Act, 1915 (c. 36), as to the effect of the war on the rights & liabilities of the parties to a contract it is the effect of the war according to English law which is to be determined or declared, & it follows, in my opinion, that the rights & liabilities in question are also the rights & liabilities of the parties according to English law. The *force majeure* clause in the contract in question, even if valid according to German law, must be held void in the cts. of this country as contravening a general rule of public policy. If this be so, the suggested ground for distinguishing this case from the case of *Ertel Bieber & Co. v. Rio Tinto Co.* (No. 748, *ante*) entirely breaks down (*LORD PARKER OF WADDINGTON*).—**DYNAMIT ACT. v. RIO TINTO Co.**, [1918] A. C. 292; 87 L. J. K. B. 549; 118 L. T. 191, H. L.

Annotation:—*Refd.* *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623.

— **Performance of contract becoming illegal by declaration of war.]—See** CONTRACT.

— **]—See, generally, ALIENS, Vol. II., pp. 162-188.**

750. Gaming—Money lent abroad for gaming purpose—Not illegal by foreign law—Recoverable in England.]—Gambling debts contracted in this country, as well as the securities given for them, are void & cannot be recovered. But money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the cts. of this country. Where an unascertained portion of a balance of

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750 i. Gaming—Money lent abroad for gaming purposes—Burden of proof.]—Defts., Toronto merchants, engaged pltf., Chicago brokers, to buy & sell grain in Chicago on margin, which the latter did, advancing them money for which they sued. Defts. having refused to settle for losses sustained:—

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account, for which an I.O.U. had been given, was admitted to consist of money lent for the purpose of playing at public tables in Germany, but it did not appear that the games played at such tables were forbidden by the laws of that country:—*Held*: an injunction, which had been granted to restrain an action brought to recover the whole balance should be dissolved.—**QUARRIER v. COLSTON** (1842), 1 Ph. 147; 12 L. J. Ch. 57; 6 Jur. 959; 41 E. R. 587, L. C.

Annotations:—**Consd.** Kaufman v. Gerson, [1903] 2 K. B. 114; Moulis v. Owen, [1907] 1 K. B. 746. **Foll.** Saxby v. Fulton, [1909] 2 K. B. 208. **Mentd.** Roussillon v. Roussillon (1880), 42 L. T. 679; *Re Campbell, Ex p. Seal* (1911), 81 L. J. K. B. 154; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 3 K. B. 532.

751. ————]—It is no defence to an action for money lost in France that it was lent for the purpose of gaming there.—**KING v. KEMP** (1863), 8 L. T. 255.

Annotation:—**N.F.** Moulis v. Owen, [1907] 1 K. B. 746.

752. ————]—Money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English cts.—**SAXBY v. FULTON**, [1909] 2 K. B. 208; 78 L. J. K. B. 781; 101 L. T. 179; 25 T. L. R. 446; 53 Sol. Jo. 397, C. A.

Annotations:—**Reid.** Société des Hôtels Réunis (Soc. Anon.) v. Hawker (1913), 29 T. L. R. 578; *Sutters v. Briggs* (1921), 125 L. T. 737.

— **Whether valid consideration for bill payable in England.**]—*See* **BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS**, Vol. VI., p. 429, No. 2779 *et seq.*

See, generally, **GAMING & WAGERING**.

SUB-SECT. 7.—ASSIGNABILITY OF CONTRACTS.

753. Policy of life insurance—Assignment abroad—Assignment void by foreign law.]—**LEE v. ABDY**, No. 423, *ante*.

Documents of title & choses in action.]—*See* Part V., Sect. 3, sub-sect. 2, B., C., *ante*.

Bills of exchange, promissory notes & other negotiable instruments.]—*See* **BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS**, Vol. VI., pp. 33, 428, Nos. 214, 2776 *et seq.*

Bonds.]—*See* **BONDS**, Vol. VII., p. 227, No. 691.

SUB-SECT. 8.—DISCHARGE OF CONTRACTS.

See, generally, **CONTRACT**.

754. By act of parties—Discharge in accordance with proper law—Binding in England.]—A contract was made in Carolina; a bond was given, & was afterwards satisfied by a payment in paper money at the value which it then legally bore in that state. The State of Carolina afterwards

Held: assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise & fall of the market and no grain be either delivered or accepted, the contract would be a gambling contract, & illegal, it lay upon defts. to establish clearly that such was the character of the dealing, & this defence not having been clearly proved, judgment must be given for pltf's.—**RICE v. GUNN** (1884), 4 O. R. 579.—**CAN.**

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753 i. Policy of life insurance—Assignment governed by law of place of

assignment.]—The assignment of a policy of life insurance is governed by the law of the place where the assignment is made, & not of the place where the policy was issued or where it is payable.—*Re PRENTICE & STEELE* (1888), M. L. R. 4 S. C. 319; M. L. R. 5 S. C. 294.—**CAN.**

753 ii. ————]—**TORONTO GENERAL TRUSTS CO. v. SEWELL** (1889), 17 O. R. 442.—**CAN.**

753 iii. ————]—An assignment of, or dealing with the benefits, of a policy made by the assured in Manitoba will be governed by the law of Manitoba.—**NATIONAL TRUST CO. v.**

passed an Ordinance, which made paper of that kind not a legal tender in transactions not complete. The parties being now here, pltf. applied for a writ of *ne exeat regno*, contending that he had an equity here from the nature of the payment there:—*Held*: the writ should be refused, as no equity could arise here from a transaction legally satisfied in the country where it arose.—**ANON.** (1784), 1 Bro. C. C. 376; 28 E. R. 1187, L. C.

755. ———— **Surety discharged by pro tempore payment.**]—By the old law of France where the dealing between a principal & his debtor is of such a nature as to operate simply as a prolongation of time for the payment of the debt, if the surety is not precluded by such dealing from suing the debtor for his indemnity, he will not be discharged; but if such dealing between the principal & his debtor amounts to a present, though but *pro tempore* payment, as the surety cannot then sue the principal debtor, he is discharged from his guarantee.

Where a party became surety upon an agreement for securing certain advances by future consignments of West India produce, & after such advances, but before any consignments, the party having contracted to make same accepted bills to the amount of the advances:—*Held*: inasmuch as such acceptances operated as a *pro tempore* payment of the sums advanced under the agreement, the surety was discharged.—**BELLINGHAM v. FREER** (1837), 1 Moo. P. C. C. 333; 12 E. R. 841, P. C.

756. ———— **Payment—In what currency.**]—In 1801 R., a partner in a banking concern in Ireland, applied to N. & Co., a banking-house in London, for a loan of £10,000 to bring into the Irish firm as his share of the capital, which sum they advanced upon the security of four bonds for £2,500 each, with warrants of attorney to confess judgments; which were accordingly entered up in the Ct. of K. B. in Ireland in 1803. The bonds were expressed to be for the sum of £5,000 sterling, & the condition was for the payment of the sum of £2,500 sterling of good & lawful money of Great Britain with legal interest. The warrants of attorney recited the bonds in the same words. The judgments had only the expression £5,000 sterling. Upon the execution of the bonds credit was given to R. in the books of N. & Co. for the sum of £10,000, of which R. being advised, he by letter dated in Aug., 1801, authorised N. & Co. to answer bills to the amount of £10,000, which were afterwards drawn by the Irish firm, & accepted & paid by N. & Co. Payments on account of the debt were made at various times to B., a legal agent of N. & Co., at Dublin, & he accepted & accounted for those payments as made in Irish currency. Upon a bill filed by the assignee of the debt:—*Held*: it was payable in English currency & with English interest.—**NOEL v. ROCHFORD** (1836), 10 Bli. N. S. 483; 4 Cl. & Fin. 158; 6 E. R. 179, II. L.

At what rate interest payable.]—*See* Sect. 3, *post*.

(1902), 14 Man. L. R. 41.—**CAN.**

753 iv. ————]—A domiciled Scotsman obtained a loan in England from a domiciled Englishman, & in security therefor delivered to the latter a policy of insurance on his life with a Scottish Co.:—*Held*: the rights of the holder were to be determined by English law.—**SCOTTISH PROVIDENT INSTITUTION v. COHEN & CO.** (1888), 16 R. (Ct. of Sess.) 112; 26 Sc. L. R. 73.—**SCOT.**

753 v. ————]—**SCOTTISH PROVIDENT INSTITUTION v. ROBINSON & NEWETT** (1892), 29 Sc. L. R. 733.—**SCOT.**

In what currency charges on immovables payable.]—See Part IV., Sect. 6, *ante*.

757. By operation of proper law.]—In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, & that such a discharge, if it extinguishes the debt or liability, & does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the cts. of that country, but in every other country. This is the law of England, & is a principle of private international law adopted in other countries. Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country (BOVILL, C.J.).—ELLIS v. M'HENRY (1871), L. R. 6 C. P. 228; 40 L. J. C. P. 109; 23 L. T. 861; 19 W. R. 503.

Annotations:—As to (1) *Reid*. New Zealand Loan & Mercantile Agency Co. v. Morrison, [1898] A. C. 349; *Re Nelson, Ex p. Dare & Dolphin*, [1918] 1 K. B. 459. As to (2) *Consd.* *Re Debtor* (No. 333 of 1917), *Ex p. Debtor* (1918), 34 T. L. R. 277.

758. —.—GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX, No. 642, *ante*.

759. By release in foreign country—Contract to be performed in England.]—In 1884 pltf. recovered judgment against deft. in England for £15,067 9s. 11d. In 1886 he brought an action upon the judgment in the cts. of the South African Republic, where deft. was domiciled. The foreign ct. refused to enforce the judgment in full, but gave judgment for pltf. for the sum, including interest, of £9,635 4s. 6d. Sequestration proceedings were then taken against deft. in South Africa, & eventually the £9,635 4s. 6d. was paid to pltf. by the curators under deft.'s sequestration & insolvency, & deft. was released from all debts claimable against his estate. In 1900 pltf. brought an action in England against deft. to recover the balance remaining due under the original judgment & interest thereon:—*Held*: (1) the action not having been brought within the period of twelve years prescribed by Real Property Limitation Act, 1874 (c. 57), s. 8, pltf.'s right to recover was barred by that sect., & the part payment of the £9,635 4s. 6d. did not operate to take the case out of the statute, it not having been made under circumstances from which an acknowledgment of liability & a promise to pay the balance could be inferred; (2) pltf. had elected to take the foreign judgment in discharge of his whole cause of action, & could not afterwards sue for the residue of the original judgment debt in England; (3) the release in the foreign country could not *per se* get rid of a cause of action arising out of a contract to be performed in this country.—TAYLOR v. HOLLARD, [1902] 1 K. B. 676; 71 L. J. K. B. 278; 86 L. T. 228; 50 W. R. 558; 18 T. L. R. 287.

Limitation of action.]—See Part XVI., Sub-sect. 6, *post*.

In bankruptcy.]—See BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 593–598, Nos. 5425–5459, Vol. V., p. 1006, No. 8208.

Bills of exchange, promissory notes & other negotiable instruments.]—See BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 435, Nos. 2802 *et seq.*

PART VII. SECT. 3.

t. Whether recoverable — Governed by lex loci contractus—Contract made & executed abroad.]—BROOKS v. A. A. TELEGRAPH CO. (1879), 6 Nfld. L. R. 197.—NFLD.

English contract.]—

GILLOW & Co. v. BURGESS (1824), 3 Sh. (Ct. of Sess.) 45.—SCOT.

w. Rate of — Bond payable at particular place.]—In assessing damages in the nature of interest on a bond payable at a particular place, reference should, in general, be had to the rules

SECT. 3.—INTEREST.

760. Whether recoverable—Question of fact.]—

(1) As a general rule, the *lex loci contractus* governs the construction of contracts. Therefore if a bill of exchange, on the face of which no interest is reserved, is drawn in one country payable in another, the drawer is liable on its dishonour to pay as damages interest at the current rate in the country where the bill was drawn.

(2) The rate of interest at each place, & whether pltf. has sustained any damage requiring the payment of interest, are questions of fact for the jury, but which rate of interest ought to be adopted is purely a question of law for the direction of the judge.—GIBBS v. FREMONT (1853), 9 Exch. 25; 22 L. J. Ex. 302; 21 L. T. O. S. 230; 17 Jur. 820; 1 W. R. 482; 1 C. L. R. 675; 156 E. R. 11.

Annotations:—As to (1) *Expld.* Branley v. S. E. Ry. (1862), 12 C. B. N. S. 63. *Consd.* Rouquette v. Overmann (1875), L. R. 10 Q. B. 525. *Distd.* Horne v. Rouquette (1878), 3 Q. B. D. 514. *Reid.* Keene v. Keene (1857), 3 C. B. N. S. 144; Sharples v. Rickard (1857), 2 H. & N. 57; Reynolds v. Goodwin (1859), 6 C. B. N. S. 370; Scott v. Seymour (1862), 1 H. & C. 219; *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522. As to (2) *Reid.* *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522.

761. — Contract in England to be executed abroad—Foreign judgment giving interest.]—(1) A foreign judgment is *prima facie* evidence of a debt; & unless it be impeached, or the contrary be shown, it must be presumed that everything has been done which was necessary to support it.

(2) In an action on a judgment obtained in the Ct. of Admty. in Scotland, interest was decreed to be paid to pltf., for a debt due to him on a contract for work & labour up to the time when the principal debt should be discharged; but defts. withheld the payment, although pltf. endeavoured to obtain it:—*Held*: the jury might give interest in the shape of damages for the unjust detention of the money, although the debt arising out of the original contract did not carry interest.—ARNOTT v. REDFERN (1826), 3 Bing. 353; 4 L. J. O. S. C. P. 89; 11 Moore, C. P. 209; 130 E. R. 549.

Annotations:—As to (2) *Consd.* Page v. Newman (1829), 9 B. & C. 378; Hare v. Rickards (1831), 7 Bing. 254; L. C. & D. Ry. v. S. E. Ry., [1893] A. C. 429. *Reid.* Fruhling v. Schroeder (1835), 2 Bing. N. C. 77; Juggomohun Ghose v. Manickohund (1859), 7 Moo. Ind. App. 263.

762. — Agreement for regulation of rights according to German law—Enemy ordinance postponing fulfilment of contracts & claims for interest.]

—Where an enemy ordinance passed after the outbreak of war postponed the fulfilment of certain contracts & stated that no interest could be claimed in respect of the period during which postponement continued:—*Held*: such a provision was inoperative as not being part of the German general law, or as essentially one-sided & not in the contemplation of the parties to the contract at the time when they entered into it, & undertook that their rights were to be regulated by German Law, or was not conformable to the usage of nations; interest was therefore properly allowable.—*Re FRIED KRUPP ACT.*, [1917] 2 Ch. 188; 86 L. J. Ch. 689; 117 L. T. 21; *sub nom.* *Re FIELD KRUPP ACT.*, 61 Sol. Jo. 593.

Annotations:—*Reid.* *Re Franche & Rasch*, [1918] 1 Ch. 470; *Re Deutsche Bank*, [1921] 2 Ch. 30.

763. Rate of—Question of law.]—GIBBS v. FREMONT, No. 760, *ante*.

in force at the place where it is payable.—R. v. GRAND TRUNK RY. CO. (1890), 2 Exch. C. R. 132.—CAN.

y. — Debt contracted in India.]—Eight per cent. on a loan of money being stipulated in the East Indies, may be recovered in Scotland.—

Sect. 3.—Interest. Part VIII. Sects. 1 & 2: Sub-t. 1.]

764. — Bond made in England—To be paid in Ireland.]—A bond was made in England, & sent over to the obligee in Ireland, & the money was to be paid there:—*Held*: it should carry Irish interest.—*CHAMPANT v. RANELAGH* (LORD) (1700), Prec. Ch. 128; 24 E. R. 62; *sub nom.* *RANELAUGH* (LORD) *v.* *CHAMPANTE*, 2 Vern. 395; 1 Eq. Cas. Abr. 289, pl. 2.

Annotations:—*Distd.* *Connor v. Bellamont* (1742), 2 Atk. 382. *Consd.* *Robinson v. Bland* (1760), 2 Burr. 1077.

765. — Debt contracted in England—Bond taken in Ireland.]—A debt was contracted in England but the bond for it was taken in Ireland to be paid at a certain time & at 7 per cent.:—*Held*: it should carry Irish interest.—*CONNOR v. BELLAMONT* (EARL) (1742), 2 Atk. 382; 26 E. R. 631, L. C.

Annotation:—*Consd.* *Noel v. Rochfort* (1836), 10 Bli. 483.

766. — Debt contracted abroad—To be paid abroad—Subsequently converted into English debt.]—K., having left East India bonds in the hands of a mercantile firm at Calcutta with directions to apply the interest & principal when received to a specific purpose, by his will appointed G., a partner in the firm, one of his exors. After the death of K., the will was proved by G., & the firm, acting under his authority as exor., assigned the bonds, & used in their trade the money received upon the assignments. G. ceased to be a partner in the firm before all the bonds had been assigned. Upon suit by the residuary legatee of K. against G.:—*Held*: (1) he was accountable to the residuary legatee of K. for the money received upon the bonds with 8 per cent. from the time of the deposit to the dates of the respective assignments by the firm, & with interest at 12 per cent., being the current rate in Calcutta, from the time of the assignments & receipt of the money to the date of the judgment upon appeal in the original suit, & with interest at 5 per cent. upon the accumulated sum, composed of principal & interest, from the judgment till payment, but the cost of remittance from India & the property tax were to be charges on the fund payable; (2) As between K. & the Calcutta firm, G., as partner & exor., was liable for the balances of account & interest at 12 per cent. upon all such balances as should appear to be stated & signed by the parties, such interest to be calculated from the date of the statement & signature of the account to the time of the final judgment on appeal.—*GRAHAM v. KEBLE* (1820), 2 Bli. 126; 4 E. R. 274, H. L.

Annotation:—*Generally*, *Mentd.* *Rowe v. Young* (1820), 2 Bli. 391.

767. — revolted colony of Spain, not recognised as an independent state by Great Britain, executed bonds at 6 per cent. interest as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced pltf. to become a purchaser:—

CAMPBELL v. RAMSAY (1809), 15 Fac. Coll. 187.—*SCOT.*

z. — *Interest on an account with an Indian house of agency is due at the Indian rate of interest, till final decree in an action brought in Scotland against debtor's representa-*

—*PALMER & Co.'s ASSIGNEES v. GLAS'S TRUSTEE* (1835), 13 Sh. (Ct. of Sess.) 308; 31 Fac. Coll. 175.—*SCOT.*

a. — *Acknowledgment of debt made in England.]—*Where an acknow-

Held: (1) the bonds were not usurious, as it did not appear by the bill that the contract for the loan was made, or the amount of it to be paid, in this country; (2) P. & B. would have been answerable to pltf. for losses sustained upon his purchase, but, as the original contract was made with a govt. not acknowledged by Great Britain, the ct. could not relieve him.—*THOMPSON v. POWLES* (1828), 2 Sim. 194; 2 State Tr. N. S. App. 999; 57 E. R. 761.

Annotations:—*As to* (2) *Appld.* *Foster v. Globe Venture Syndicate*, [1900] 1 Ch. 811. *Refd.* *Taylor v. Barclay* (1828), 2 Sim. 213.

768. — To be paid in England.]—Pltfs., A. & Co. in England, consigned goods to defts., B. & Co. at Gibraltar, to be sold on commission. B. & Co., as soon as the bills of lading & invoices were delivered to their agents in London, advanced through them to A. & Co. two-thirds of the invoice price of the goods by bills at ninety days; & for these advances received interest at the rate of 6 per cent. calculated from the date of the bills, which was the usual rate of interest at Gibraltar. In an action for the proceeds of the goods:—*Held*: this could not be considered as a loan of money in England, & was not usurious, & defts. were entitled to set off the monies so advanced.—*HARVEY v. ARCHBOLD* (1825), 3 B. & C. 626; 5 Dow. & Ry. K. B. 500; Ry. & M. 184; 107 E. R. 865.

Annotations:—*Refd.* *Re Trye, Ex p. Gullebert* (1838), 7 L. J. Bcy. 25. *Mentd.* *Poole v. Cowan* (1847), 8 L. T. O. S. 385.

769. — — *Under a contract made abroad, to be performed in England:—Held*: English mercantile interest at 5 per cent. should be allowed.—*CHILI REPUBLIC v. ROYAL MAIL STEAM PACKET CO.* (1895), 11 T. L. R. 203.

770. — Indian interest made principal in England.]—Indian interest when made principal here bears English interest.—*BODLEY v. BELLAMY* (1760), 2 Burr. 1094; 97 E. R. 727; *sub nom.* *BODLEY v. BELLAMY*, 1 Wm. Bl. 267.

Annotations:—*Refd.* *Auriol v. Thomas* (1787), 2 Term Rep. 52. *Mentd.* *Frith v. Leroux* (1787), 2 Term Rep. 57; *Clarke v. Seton* (1801), 6 Ves. 411; *Gaunt v. Taylor* (1834), 3 L. J. Ch. 135.

771. — Advances within dominions of Indian sovereigns—By British subjects domiciled in such dominions—Not limited to 12 per cent.]—The rate of interest for loans advanced within the dominions of native & independent Indian sovereigns, by British subjects domiciled, & residing, within such dominions, is not limited to 12 per cent.—*ANON.* (1825), 3 Bing. 193; 130 E. R. 488, H. L.

— *Foreign judgments.]—See Part XIV., Sect. 9, post.*

772. — Debt contracted in India.]—*FINCH v. FINCH*, No. 1394, *post.*

— *On charges on immovables.]—See Part IV., Sect. 6, ante.*

— *On bills of exchange, cheques, promissory notes, etc.]—See BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., pp. 334, 335, Nos. 2220–2224.*

— *ledgment of debt, executed in E., provided for payment of interest without any statement as to the rate:—Held*: interest should be granted at the legal rate pertaining in E.—*Re SAVAGE'S ESTATE* (1908), 29 N. L. R. 397.—*S. AF.*

Part VIII.—Torts.

SECT. 1.—JURISDICTION WITH REGARD TO TORTS.

Torts generally, *see* TORT.

773. Tort affecting person or movables—Act must be wrongful in country where action brought.]—THE HALLEY, No. 686, *ante*.

774. ———.]—By the law of England actions for personal wrongs arising in foreign countries may be brought in an English ct.; & it is not contrary to the spirit of the Treaty of Tientsin that the same principles of law should be applied to the decision of such an action in the Supreme Ct. for China & Japan, which would have governed it if brought in the cts. of England.—HART v. GUMPACH (1873), L. R. 4 P. C. 439; 9 Moo. P. C. C. N. S. 241; 42 L. J. P. C. 25; 21 W. R. 365; 17 E. R. 505, P. C.

775. ——— & not justifiable in country where committed.]—An act committed abroad, if valid & unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct exceptional legislation superadding a liability other than & besides that incident to the act itself. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. (a) The wrong must be of such a character that it would have been actionable if committed in England; (b) the act must not have been justifiable by the law of the place where it was done (WILLES, J.).—PHILLIPS v. EYRE, No. 783, *post*.

776. ———.]—For any tort committed in a foreign country within its own exclusive jurisdiction an action of tort cannot be maintained in this country unless the cause of action would be a cause of action in that country & also would

be a cause of action in this country (BRETT, L.J.).—CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO., No. 697, *ante*.

777. ———.]—An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful, both in this country & in the country where it was committed, but it is not necessary that the act should be the subject of civil proceedings in the foreign country.—MACHADO v. FONTES, [1897] 2 Q. B. 231; 66 L. J. Q. B. 542; 76 L. T. 588; 45 W. R. 565; 13 T. L. R. 407; 41 Sol. Jo. 507, C. A.

*Annotations:—*Reid. Rayment v. Rayment & Stuart. Chapman v. Chapman & Buist, [1910] P. 271; Canadian Pacific Ry. v. Parent, [1917] A. C. 195.

778. ———.]—CARR v. FRACIS, TIMES & Co., No. 789, *post*.

779. ———.]—THOENE v. LOCKWOOD & Co., LTD., No. 786, *post*.

Tort affecting immovables.]—*See* Part IV., Sects. 1, 2, *ante*.

Agreement to submit to jurisdiction of English courts.]—*See* No. 333, *ante*.

Acts of State.]—*See* Sect. 5, *post*; PUBLIC AUTHORITIES & PUBLIC OFFICERS.

Action begun in foreign court—Jurisdiction of English court to restrain.]—*See* Part XVI., Sect. 5, sub-sect. 2, *post*.

SECT. 2.—TORTS AFFECTING PERSON OR MOVABLES.

SUB-SECT. 1.—TORTS AFFECTING PERSON.

See, generally, TORT.

780. Trespass to person—Damages.]—SKINNER v. EAST INDIA CO., No. 316, *ante*.

PART VIII. SECT. 1.

775 i. Torts affecting person or movables—Act must be wrongful in country where action brought—& not justifiable in country where committed.]—Pltf. sued as admor. of the estate of his deceased wife appointed by the proper ct. of M., of which they were residents, for damages for the death of his wife in N.W. Territories alleged to have been caused by negligence of defts., whose domicile was also in M.: the negligence was not actionable where it took place:—*Held*: the action was not maintainable in M., though defts. were domiciled there.—COUTURE v. DOMINION FISH CO. (1909), 19 Man. L. R. 65.—CAN.

775 ii. ———.]—Pltf. bringing his action in B. C. for an alleged wrong committed in another country must show that the act complained of was wrongful in both countries.—GILLIS SUPPLY CO. v. CHICAGO, MILWAUKEE & PUGET SOUND RY. CO. (1911), 18 W. L. R. 355; 16 B. C. R. 254.—CAN.

775 iii. ———.]—Redress may be obtained in O. for a tort committed abroad, if actionable under either the common or statute law of O., & not justifiable in the foreign law district.—STORY v. STRATFORD MILL BUILDING CO. (1913), 24 O. W. R. 552; 4 O. W. N. 1212; 11 D. L. R. 49; 30 O. L. R. 271; 18 D. L. R. 309; 5 O. W. N. 611.—CAN.

iv. ———.]—A within the jurisdiction may be sued in respect of a tort committed out of

the jurisdiction, if the act complained of is not justifiable according to the law of the foreign country where it was done, & is also an act which, if done within the jurisdiction, would be a tort, but not if the act, although wrongful by the law of the foreign country, would not be actionable as a tort if done within the jurisdiction.—SIMONSON v. CANADIAN NORTHERN RY. CO. (1914), 28 W. L. R. 310.—CAN.

775 v. ———.]—LEWIS v. GRAND TRUNK PACIFIC RY. CO. (1915), 52 S. C. R. 227.—CAN.

775 vi. ———.]—JONES v. CANADIAN PACIFIC RY. CO. (1919), 3 W. W. R. 994; 49 D. L. R. 335.—CAN.

775 vii. ———.]—When the cause of action alleged is a personal tort committed outside the local limits of the jurisdiction of the cts. of B.I., unless the act is wrongful according to the law both of B.I. & of the place where the act is committed, the suit will not be sustainable.—GOVINDAN NAIR v. ACHUTHA MENON (1916), 1 L. R. 39 Mad. 433.—IND.

775 viii. ———.]—A person suing for damages "*ex delicto*" in respect of an act committed abroad has no action, unless that act is by the law of the place where it is committed a wrong inferring a legal remedy.—ROSS v. BHAGVAT SINHJEE (1891), 19 R. (Ct. of Sess.) 31; 29 Sc. L. R. 63.—SCOT.

775 ix. ———.]—In order to maintain an action *ex delicto* in S.,

when the wrong is committed in another country, the wrong must be one for which an action can be maintained both by the law of S. & by the law of the country in which it is said to have been done.—EVANS & SONS v. STEEN & Co. (1904), 7 F. (Ct. of Sess.) 65.—SCOT.

x. ———.]—An Irishman residing in I., whose son had been killed in a tramway accident in S., raised an action in S. against the tramway co. in which he claimed damages, by way of *solatium*, for the death of his son. Defender, on the ground that the law of I. recognises no claim to *solatium*, pleaded that pursuer had no title to sue:—*Held*: pursuer had a right to reparation depending solely on the law of S., which was both the *lex fori* & the *lex loci delicti*.—CONVERY v. LANARKSHIRE TRAMWAYS CO. (1905), 8 F. (Ct. of Sess.) 117; 43 Sc. L. R. 92.—SCOT.

775 xi. ———.]—ZEEDERBERG v. MANSON (1898), 8 H. C. 158.—S. AF.

PART VIII. SECT. 2, SUB-SECT. 1.

b. Trespass—Negligence—Common employment—Lex loci actus.]—The widow & children of D., a British subject, & an employee of defts., claimed damages for his death, caused by the fall of a derrick on board the s.s. "M." a British ship, registered in E., belonging to & navigated by defts., while being loaded off Port of S., in T. Deft. was incorporated by a C. statute, with its head office in Q., where the contract of hiring D. was entered into:—*Held*: (1) the rules of

Sect. 2.—Torts affecting person or movables: Subsects. 1 & 2. Sect. 3.]

781. — False imprisonment.]—Trespass & false imprisonment lies in England by a native Minorquin, against a governor of Minorca, for such injury committed by him in Minorca.—*MOSTYN v. FABRIGAS* (1775), 1 Cowp. 161; 98 E. R. 1021, Ex. Ch.; *affg. S. C. sub nom. FABRIGAS v. MOSTYN* (1773), 2 Wm. Bl. 929.

Annotations:—Distd. Hill v. Bigge (1841), 3 Moo. P. C. C. 465. *Consd. Scott v. Seymour* (1862), 32 L. J. Ex. 61; *The Halley* (1868), L. R. 2 P. C. 193; *Phillips v. Eyre* (1870), 10 B. & S. 1004. *Distd. Whitaker v. Forbes* (1875), 45 L. J. Q. B. 140; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743. *Consd. British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. *Reid. R. v. Johnson* (1805), 2 Smith, K. B. 591; *Mure v. Kaye* (1811), 4 Taunt. 34; *Shackell v. Macaulay* (1824), 3 L. J. O. S. 30; *Bedreechund v. Elphinstone* (1830), 2 State Tr. N. S. 379; *A.-G. v. Kent* (1862), 1 H. & C. 12; *Hart v. Gumpach* (1873), L. R. 4 P. C. 439; *Musgrave v. Pulido* (1879), 5 App. Cas. 102; *Adam v. British & Foreign S.S. Co.*, [1898] 2 Q. B. 430. *Mentd. Sutton v. Johnstone* (1786), 1 Term Rep. 493; *Warden v. Bailey* (1811), 4 Taunt. 67; *Morris v. Robinson* (1824), 5 Dow. & Ry. K. B. 34; *A.-G. v. Bovel* (1846), 15 M. & W. 60; *Munden v. Brunswick* (1847), 16 L. J. Q. B. 300; *R. v. Upton St. Leonard's* (1847), 10 Q. B. 827; *Houlden v. Smith* (1850), 19 L. J. Q. B. 170; *Magnay v. Edwards* (1853), 21 L. T. O. S. 103; *Ruckmaboye v. Lulloobhoy Mottichund* (1853), 5 Moo. Ind. App. 234; *Ex p. Baker* (1857), 26 L. J. M. C. 155; *Di Sora v. Philipps* (1863), 10 H. L. Cas. 625; *Feather v. R.* (1865), 6 B. & S. 257; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *De Grenchy v. Wills* (1879), 43 J. P. 818; *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453; *Gilbey v. Cossey* (1912), 106 L. T. 607; *Board v. Board*, [1919] A. C. 956.

782. Proceedings in foreign court pending—Preliminary penal proceedings necessary by foreign law.]—It is no bar to an action in this country for an assault & false imprisonment committed by one Englishman upon another at Naples that, by the law of Naples, no proceeding to recover damages for the trespasses could be maintained by pltf., until after deft. had been found guilty & condemned by the criminal tribunal at Naples, before which he had been arraigned, in respect thereof; nor is it any bar to such action for the assault that, by the law of Naples, damages in respect of it could only be recovered in one particular form of proceeding, which had been commenced & was still pending.—*SCOTT v. SEYMOUR* (LORD) (1862), 1 H. & C. 219; 32 L. J. Ex. 61;

international law are based on reason & justice, on a sort of moral necessity to do justice in order that justice may be done in return; its rules are flexible, & the circumstances of each particular case must be carefully considered & taken into account; (2) only the most positive, clear & undisputed rule of international law would warrant the ct. in applying the law of T. to enable defts. to defeat the claim of deceased's widow & children, pronounced by Q. law to be a just one. No such rule existed, & even if Q. law could not justly be applied, there was more authority for choosing the law of England than that of T.; (3) the Q. law was to be applied: it could not be presumed to have been the intention of either D. or defts. that the terms of his engagement with them or their mutual rights & liabilities connected with such engagement, or the services to be performed under them, should be interpreted or affected by any law other than that of Q., & it would be unreasonable & unjust to apply any foreign law so as to read into the contract of hiring an implied consent by the party hired to take the risk of accident caused by the acts & defaults of his fellow employees, a consent which plainly defts. never intended to exact nor D. to give.—*DUPONT v. QUEBEC S.S. Co.* (1896), Q. R. 11 S. C. 188.—CAN.

c. the law of the place recognises the liability, the ct. should not be bound by an exception which it makes, drawn from a presumption that circumstances take it out of the rule. Thus the law of N.B. renders the master responsible for the acts of his servant, except in the case of damages caused by a fellow workman (common employment), but such exception does not apply to a servant domiciled & engaged at M. to work in N.B. That engagement, interpreted according to the law of the place where it was made, excludes the presumption that the employee has accepted the risk of the common employment.—*LOGAN v. LEE* (1907), 27 C. L. T. 781; 39 S. C. R. 311.—CAN.

d. ————.]—*MARLEAU v. GRAND TRUNK RY. Co.* (1910), Q. R. 38 S. C. 394.—CAN.

e. ————.]—A domiciled in Q., while travelling on applts. ry. in charge of cattle, was killed in O. by the negligence of applts. servants. The widow of deceased sued applts. in Q. for damages under Civil Code of Lower C., art. 1056. Under Fatal Accidents Act (Ont.) she could not have maintained an action in O. if her husband would have been precluded by his contract from doing so; the cause of action under above art. is not so limited:—*Held*: on the

11 W. R. 169; 158 E. R. 865; *sub nom. SEYMOUR* (LORD) *v. SCOTT*, 1 New Rep. 129; 8 L. T. 511; 9 Jur. N. S. 522, Ex. Ch.

Annotations:—Consd. Phillips v. Eyre (1869), L. R. 4 Q. B. 225; *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358. *Reid. Hart v. Gumpach* (1873), L. R. 4 P. C. 439. *Mentd. Ellis v. M'Henry* (1871), L. R. 6 C. P. 228.

783. — Committed in colony—Act of indemnity passed by colonial legislature.]—(1) The Crown has, by its prerogative, power to create a legislative assembly in a conquered or ceded colony, & still more in a settled colony.

(2) An Act of the local legislature lawfully constituted, whether in a settled or in a conquered colony, assented to by the Crown, has, as to matters within its competence & the limits of its jurisdiction, the operation & force of Sovereign legislation, though subject to be controlled by the Imperial Parliament.

(3) Trespass for false imprisonment in Jamaica. Plea, that deft. was governor of the island; that a rebellion broke out there which the governor & others acting under his authority arrested by force of arms; & that an Act was afterwards duly passed by the legislature of the island & received the royal assent, by which, after reciting the rebellion; a proclamation of martial law within certain local limits by the governor, with the advice of a council of war; that the rebellion had been suppressed & imminent general sacrifice of life thereby averted; that the military, naval or civil authorities might, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace & quelling the rebellion, etc., it was enacted by the governor, legislative council & assembly of the island, among other things, that deft., & all officers & other persons who had acted under his authority or had acted *bonâ fide* for the purposes & during the existence of martial law, whether the acts were done in any district in which martial law was proclaimed or not, were thereby indemnified in respect of all acts, matters & things done in order to put an end to the rebellion, & all such acts were thereby made & declared lawful, & were confirmed; that the grievances complained of were measures used

principles of private international law applts. were under no common law liability in Q., since they were neither civilly nor criminally liable in O.—*CANADIAN PACIFIC RY. Co. v. PARMENT*, [1917] A. C. 195.—CAN.

f. ————.]—A domiciled Scotsman was killed by an accident on the line of an R. ry. co. The line was entirely in E., but the co. had a place of business in S. Three years after the accident, the widow of deceased brought an action of damages in S.:—*Held*: the grounds of action having arisen entirely in E., the rights & liabilities of parties must be regulated by the law of E., & as by that law the action was not maintainable it must be dismissed.—*GOODMAN v. LONDON & NORTH WESTERN RY. Co.* (1877), 14 Sc. L. R. 449.—SCOT.

g. *Slander.*]—An action will lie for words spoken in O. imputing the commission in a colony subject to British criminal law of a crime punishable by that law.—*MALLOCH v. GRAHAM* (1846), 2 O. S. 375.—CAN.

h. ————. *Uttered in another country.*]—In an action of damages for oral slander the slander was alleged to have been uttered in P.:—*Held*: the case fell to be tried as if the slander had been uttered in S.—*M'LARTY v. STEELE* (1881), 8 R. (Ct. of Sess.) 435; 18 Sc. L. R. 266.—SCOT.

in the suppression of the rebellion, & were reasonably & in good faith considered by deft. to be proper for the purpose of putting an end to & were *bonâ fide* done in order to put an end to the rebellion, & so were included in the indemnity. Demurrer, & replication; that deft. as governor was, by the law of Jamaica, a necessary party to the making of the Act:—*Held*: so far as it related to civil proceedings, the Act of Indemnity was not repugnant to the Colonial Governors Act, 1699 (c. 12), & was not made void by Colonial Laws Validity Act, 1865 (c. 63); (4) though retrospective in its character & taking away a right of action once vested, it was not naturally or necessarily unjust, & had force without the limits of Jamaica; (5) it could have the extra-territorial effect of taking away a right of action in an English Ct.; (6) the governor might give his official consent to the Act, though he was individually interested.

(7) As to power to question acts valid abroad (see No. 775, *ante*).—*PHILLIPS v. EYRE* (1870), L. R. 6 Q. B. 1; 10 B. & S. 1004; 40 L. J. Q. B. 28; 22 L. T. 869, Ex. Ch.; *affg.* (1869), L. R. 4 Q. B. 225.

Annotations:—As to (2) *Refd.* Fielding v. Thomas, [1896] A. C. 600. As to (3) *Consd.* Musgrave v. Pulido (1879), 5 App. Cas. 102; R. v. Crewe, *Ex p.* Sekgome, [1910] 2 K. B. 576. *Refd.* A.-G. for Colony of Hong Kong v. Kwok-A-Sing (1873), L. R. 5 P. C. 179. As to (5) *Distd.* Harris v. Quine (1869), L. R. 4 Q. B. 653. As to (7) *Consd.* The M. Moxham (1875), 1 P. D. 43. *Appld.* Machado v. Fontes, [1897] 2 Q. B. 231; Carr v. Francis Times, [1902] A. C. 176. *Refd.* British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602; Rayment v. Rayment & Stuart, Chapman v. Chapman & Bulst, [1910] 1 P. 271. *Generally, Refd.* Batthyany v. Walford (1886), 33 Ch. D. 624. *Mentd.* Ellis v. M'Henry (1871), L. R. 6 C. P. 228; Rouquette v. Overmann (1875), 33 L. T. 420; Bath Grdns. v. Berwick-upon-Tweed Grdns., [1892] 1 Q. B. 731; Batt v. Metropolitan Water Board, [1911] 1 K. B. 845.

784. Libel—Treaty of Tientsin.]—*HART v. GUMPACH*, No. 774, *ante*.

785. — Civil proceedings unnecessary in foreign country.]—*MACHADO v. FONTES*, No. 777, *ante*.

786. — Act wrongful by local law.]—This was an action for libel brought by pltf., an assistant judge at Munster, Westphalia, to recover damages for a libel contained in a letter sent by defts. who were outside stockbrokers in London to the Royal Public Prosecutor, Munster, Westphalia. The defence was a denial that the letter contained a libel & pleaded privilege, & that the act complained of was an innocent one in Westphalia & was not actionable in this country:—*Held*: it was a matter of qualified privilege, & when the act was actionable in this country & wrongful in the foreign country where it was committed an action would lie.—*THOENE v. LOCKWOOD & Co., LTD.* (1911), *Times*, April 11.

SUB-SECT. 2.—TORTS AFFECTING MOVABLES.

Acts of State.]—See Sect. 5, *post*, & PUBLIC AUTHORITIES & PUBLIC OFFICERS.

787. Trespass to goods—Damages recoverable in England.]—*SKINNER v. EAST INDIA CO.*, No. 316, *ante*.

788. — Seizure sanctioned by local law—Action not maintainable in England—Proceedings restrained.]—Perpetual injunction to restrain proceedings against a Dane, for the seizure of property of English subjects in Iceland, the seizure being sanctioned by the Danish autho-

rities.—*BLAD v. BAMFIELD* (1674), 3 Swan. 604; 36 E. R. 992.

Annotations:—*Consd.* Phillips v. Eyre (1870), L. R. 6 Q. B. 1. *Refd.* Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co., [1892] 2 Q. B. 358. *Mentd.* Denow v. Stook (1677), 3 Swan. 662; R. v. Carew (1682), 3 Swan. 669.

789. — — — — —.]—To found an action in this country for a wrong committed abroad the wrong must be such that it would have been actionable if committed in this country, & the act must not have been justifiable by the law of the place where it was committed.

British goods on board a British ship within the territorial waters of Muscat were seized by an officer of the British navy under the authority of a proclamation issued by the Sultan, the sovereign ruler of Muscat:—*Held*: the seizure having been shown to be lawful by the law of Muscat no action could be maintained in this country by the owner of the goods against the naval officer.—*CARR v. FRANCIS TIMES & Co.*, [1902] A. C. 176; 71 L. J. K. B. 361; 85 L. T. 144; 50 W. R. 257; 17 T. L. R. 657, H. L.; *revsq.* S. C. *sub nom.* FRANCIS, TIMES & Co. v. CARR (1900), 82 L. T. 698, C. A.

Annotation:—*Mentd.* A.-G. for British Columbia v. A.-G. for Canada, [1914] A. C. 153.

790. — Seizure of cargo of slaves by British subject—Slave trade authorised by local law—Damages recoverable in England by owner.]—A foreigner, who is not prohibited from carrying on the slave trade by the laws of his own country may, in a British ct., recover damages sustained by him in respect of the wrongful seizure, by a British subject, of a cargo of slaves on board of a ship then employed by him in carrying on the African slave trade.—*MADRAZO v. WILLES* (1820), 3 B. & Ald. 353; 1 State Tr. N. S. App. A. 1345 106 E. R. 692.

Annotations:—*Distd.* Forbes v. Cochrane (1824), 2 B. & C. 448. *Consd.* Santos v. Illidge (1859), 28 L. J. C. P. 317. *Refd.* Seymour v. Scott (1862), 8 L. T. 511; Tobin v. R. (1864), 16 C. B. N. S. 310.

791. Collision in foreign territorial waters—Compulsory pilotage—Owner relieved from liability by English law—Notwithstanding liability by foreign law.]—*THE HALLEY*, No. 686, *ante*.

— Damage to foreign pier.]—See No. 333, *ante*.

See, further, SHIPPING & NAVIGATION.

Infringement of copyright.]—See COPYRIGHT & LITERARY PROPERTY.

Infringement of patent.]—See PATENTS & INVENTIONS.

Infringement of trade marks.]—See TRADE MARKS, TRADE NAMES & DESIGNS.

792. Measure of damages—Governed by *lex loci actus*—Interest allowed.]—Interest allowed for a ship & cargo wrongfully taken by deft., & this being done in the Indies, Indian interest allowed, deducting the charge of the return.—*EAST INDIA CO. v. EKINES* (1718), 2 Bro. Parl. Cas. 382; 1 E. R. 1011, H. L.; *affg.* S. C. *sub nom.* EKINS v. EAST-INDIA CO. (1717), 1 P. Wms. 395, L. C.

Annotation:—*Distd.* Law v. East-India Co. (1799), 4 Vee 824.

See, further, DAMAGES.

SECT. 3.—TORTS IN RESPECT OF LAND SITUATE ABROAD.

See Part IV., Sect. 1, *ante*.

SECT. 4.—TORTS COMMITTED ON HIGH SEAS.

793. Collision—Liability governed by general maritime law.]—A suit between two foreign ships for loss by collision at sea must be governed by the general maritime law of nations, & not by the provisions of any British Act of Parliament.—**THE CARLYLE** (1858), as reported in 5 L. T. 62.

Annotation:—Mentd. **Chapman v. Royal Netherlands Steam Navigation Co.** (1879), 4 P. D. 157.

794. ———.]—The liability of foreign owners sued in a British ct. in respect of a collision on the high seas is governed by general maritime law which is administered in such ct., & not by the *lex loci* of the country under the flag of which the ship is sailing. Therefore the allegation that by Spanish law the owners of a ship were not personally liable for the default, if any, of the master & crew of such ship:—*Held*: not to be a valid ground of defence.—**THE LEON** (1881), 6 P. D. 148; 50 L. J. P. 59; 44 L. T. 613; 29 W. R. 916; 4 Asp. M. L. C. 404.

Annotations:—Refd. **Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.** (1883), 10 Q. B. D. 521; **Davidsson v. Hill**, [1901] 2 K. B. 606.

——— **In foreign territorial waters.]—**See No. 686, *ante*.

See, further, SHIPPING & NAVIGATION.

795. Injury to submarine cable—By foreign ship—Actionable in England.]—(1) In an action brought against the owners of a ship for injury to a telegraphic cable on the high seas, the first count of the declaration stated that plffs. were possessed of the cable, which was lawfully & with the consent of Her Majesty lying at the bottom of the sea within three marine miles of the shore & coast of Kent, & defts. so negligently navigated their ship that an anchor belonging to it struck against & injured plffs.' cable. The second count was to same effect, but stated that the cable, at the time of the injury to it, was lying within eight marine miles of, & more than three marine miles from, the seashore:—*Held*: these counts, though omitting to allege notice on the part of defts. of the existence & situation of the cable, were good.

(2) Defts., in answer pleaded that the cable, at the time of the alleged injury to it, was lying at a place beyond the jurisdiction of Her Majesty, & defts. were aliens, subject to the laws of the kingdom of Sweden, & not to those of England, & the injury to the cable was caused by a lawful use of their anchor by defts. in the ordinary course of navigation:—*Held*: the introductory part of the plea, setting up that defts. were foreigners, & not subject to the laws of this country, alleged facts which, by themselves, afforded no legal answer to the action, & were only matters to be taken into account by the jury in deciding whether defts. had or had not been guilty of negligence, but that the whole plea was good.—**SUBMARINE TELEGRAPH Co. v. DICKSON** (1864), 15 C. B. N. S. 759; 3

New Rep. 572; 33 L. J. C. P. 139; 10 L. T. 32; 10 Jur. N. S. 211; 12 W. R. 384; 2 Mar. L. C. 9; 143 E. R. 983.

Annotations:—As to (1) **Distd.** **Wilson v. Newberry** (1871), 36 J. P. 215. *Refd.* **The Clara Killam** (1870), L. R. 3 A. & E. 161.

Jurisdiction of the Court of Admiralty.]—See **ADMIRALTY**, Vol. I., pp. 106, 108, Nos. 82–84, Nos. 115–117.

Death of alien caused by negligence—Recovery of damages under Fatal Accidents Acts, 1846 (c. 93) & 1864 (c. 95).]—See **ALIENS**, Vol. II., p. 131, Nos. 72, 73.

Criminal offences committed on the high seas.]—See **CRIMINAL LAW & PROCEDURE**.

SECT. 5.—ACTS OF STATE.

See, generally, **PUBLIC AUTHORITIES & PUBLIC OFFICERS**.

796. Of Imperial Government—Liberation of slaves by British subject—Ratification of act by ministers of state—Equivalent to prior command.]—Deft., a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the Governor of Sierra Leone to obtain the liberation of two British subjects detained as slaves at the Gallinas by the son of the king of that country, & in effecting that object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, & having landed at Dombocorro, took military possession of a barracoon belonging to plff., who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the king of the country, & the two British subjects having been released, deft. concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty, deft. fired the barracoons of plff., & carried away his slaves to Sierra Leone, where they were liberated. Some of plff.'s goods, used in the slave traffic, were claimed by the king as forfeited, & delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admlty., & the Secretaries of State for the foreign & colonial departments, they respectively, by letter, adopted & ratified the act of deft.:—*Held*: (1) plff. had a property in his slaves, & might maintain trespass for their seizure, the slave trade not being piratical by the law of nations, & it not appearing that Spain had passed any law abolishing the slave trade pursuant to the treaty embodied in 6 & 7 Will. 4, c. 6; (2) the ratification of deft.'s act by the ministers of state was equivalent to a prior command, & rendered it an act of state, for which the Crown was alone responsible, & such defence was open under the general issue.—**BURON v.**

PART VIII. SECT. 4.

i. Collision—Liability governed by lex domicilii of ship-owner.]—Where a person is injured in a collision on the high seas, caused by the fault of a vessel, the liability of the owner for damages will not be other than that which attaches to him by the law of the country of his domicile, & that liability only arises where the person injured is domiciled in a country where the law imposes a corresponding liability on its subjects.—**KENDRICK v. BURNETT** (1897), 25 R. (Ct. of Sess.) 82.—**SCOT.**

j. Death of alien caused by negligence—Recovery of damages under Fatal Accidents Act, 1846.]—Above Act does not apply where the act out of which the liability arises occurs on a foreign ship on the high seas; but it would

apply to non-resident relatives of deceased, being foreigners, if the act was committed within the jurisdiction though by a foreigner against foreigners.—**CHUKICHI HASHIMOTO v. THE "BRAND"** (1907), 2 Hong Kong L. R. 1.—**HONG KONG.**

PART VIII. SECT. 5.

k. Of Imperial Government Alien no right to question—Trawling within prohibited area.]—A German subject, master of a German trawler, brought a note of suspension & interdict against the Lord Advocate, an officer of the Royal Navy & an officer of the Scottish Fishery Board, praying for interdict against respts. preventing him from landing fish at A. The fish had been caught by trawling out-

side the three-mile limit, but within the area within which trawling is prohibited by Herring Fishery (Scot.) Act, 1889, s. 7, & a bye-law made by the Fishery Board in pursuance of above act., and the officers had prevented the landing of the fish:—*Held*: (1) where an action is raised on account of the actings of a Crown official, & H.M. by Lord Advocate appears in process & states that the actings complained of were duly authorised by H.M., proof that the actings were unauthorised is incompetent; (2) an alien is not entitled to question in the cts. of this country the administrative acts of the Crown.—**POLL v. LORD ADVOCATE** (1899), 1 F. (Ct. of Sess.) 823.—**SCOT.**

l. Of foreign government—Grant of letters patent—Infringement—Whether

DENMAN (1848), 2 Exch. 167; 6 State Tr. N. S. 525; 10 L. T. O. S. 523; 154 E. R. 450.

Annotations:—As to (1) *Refd.* Doss v. Secretary of State for India in Council (1875), L. R. 19 Eq. 509. As to (2) *Expld.* Santos v. Illidge (1859), 28 L. J. C. P. 317; Scott v. Seymour (1862), 8 Jur. N. S. 568; Feather v. R. (1865), 6 B. & S. 257. *Consd.* Phillips v. Eyre (1870), L. R. 6 Q. B. 1; Mill v. Hawker (1874), L. R. 9 Exch. 309. *Expld.* Doss v. Secretary of State for India in Council (1875), L. R. 19 Eq. 509; Dixon v. Farrer (1886), 18 Q. B. D. 43. *Consd.* Johnstone v. Pedlar, [1921] 2 A. C. 262. *Refd.* Houlden v. Smith (1850), 19 L. J. Q. B. 170; Secretary of State in Council of India v. Kamachee Boye Sahaba (1859), 7 Moo. Ind. App. 476; London Corpn. v. Cox (1867), L. R. 2 H. L. 239; Rustomagee v. R. (1876), 24 W. R. 428; Fraais, Times v. Carr (1900), 82 L. T. 698.

797. Of foreign government—Confiscation of estate of English subjects abroad—In derogation of letters patent granted by foreign Power—Proceedings in respect of restrained in England.]—BLAD v. BAMFIELD, No. 788, ante.

798. — Seizure of British ships by British subject for blockade running—Captor acting under authority of foreign Government—Foreign Enlistment Act, 1819 (c. 69).]—(1) In an action against deft., a British subject, for taking & seizing the steam vessel of plffs. also British subjects:—*Held*: pleas alleging that deft., acting as the officer & servant of a foreign power then at peace with our lord the king, took & captured the vessel in question in the act of breaking a blockade duly established by such foreign power, & supplying the enemies of such power with stores, ammunition, etc., amounted to a good justification, notwithstanding the above Act.

(2) The sentence of a foreign court of competent jurisdiction, condemning a neutral vessel taken in war as prize, is good & binding against the world.—DOBREE v. NAPIER (1836), 2 Bing. N. C. 781; 3 State Tr. N. S. 621; 2 Hodg. 84; 3 Scott, 201; 5 L. J. C. P. 273; 132 E. R. 301.

Annotations:—As to (1) *Consd.* R. v. Lesley (1860), Bell,

C. C. 220; Phillips v. Eyre (1870), L. R. 6 Q. B. 1; The M. Moxham (1875), 1 P. D. 43; Carr v. Fraais, Times, [1902] A. C. 176. *Refd.* Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co., [1892] 2 Q. B. 358. *Generally, Mentd.* Ryan v. Clark (1849), 14 Q. B. 65.

799. Imprisonment of foreign convicts by master of English vessel—In virtue of contract with foreign Government—No liability for wrongs in foreign territory.]—Deft. was convicted on an indictment charging him with assaulting the prosecutors on the high seas, & falsely imprisoning & detaining them. The prosecutors were Chilean subjects & had been ordered by the Govt. of Chili to be banished from that country to England. Deft., being master of an English merchant vessel lying in the territorial waters of Chili, contracted with the Chilean Govt. to take the prosecutors from Valparaiso to Liverpool; & they were accordingly brought on board deft.'s vessel by the officers of the Govt. & were carried by deft. to Liverpool under his contract:—*Held*: although the conviction could not be supported for the assault & imprisonment in the Chilean waters, it must be sustained for that which was done out of the Chilean territory, & although deft. was justified in receiving the prosecutors on board his vessel in Chili, yet that justification ceased when he passed the line of Chilean jurisdiction, & the detention of the prisoners & conveying them to Liverpool was a wrong intentionally planned & executed in pursuance of the contract, amounting to a false imprisonment & triable by English law.—R. v. LESLEY (1860), Bell, C. C. 220; 29 L. J. M. C. 97; 1 L. T. 452; 24 J. P. 115; 6 Jur. N. S. 202; 8 W. R. 220; 8 Cox, C. C. 269, C. C. R.

Annotations:—*Consd.* Phillips v. Eyre (1870), L. R. 6 Q. B. 1; R. v. Keyn (1876), 2 Ex. D. 63. *Refd.* Fraais, Times v. Carr (1899), 81 L. T. 50. *Mentd.* Seymour v. Scott (1863), 8 L. T. 511.

Part IX.—Marriage.

SECT. 1. — GENERAL PRINCIPLES OF VALIDITY.

SUB-SECT. 1.—WHAT MARRIAGES RECOGNISED.

See, generally, HUSBAND & WIFE.

800. Marriage as understood in Christendom—Voluntary union for life of one man & one woman to exclusion of all others.]—Marriage as understood in Christendom is the voluntary union for life of one man & one woman, to the exclusion of all others. A marriage contracted in a country where polygamy is lawful, between a man & a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom & although it is a valid marriage by the *lex loci*, & at the time when it was contracted both the man & the woman were single & competent to contract

*validity examinable in another State.]—*The grant of letters patent is an exercise of the sovereign power of a State; & as in the case of title to land, the validity of the grant is not examinable in the cts. of another State, except in cases where the question of that validity arises merely incidentally in an action otherwise cognisable by the cts. of that other state.—POTTER v. BROKENHILL PROPRIETARY CO. LTD. (1906), 3 C. L. R. 479.—AUS.

*m. — Violation of customs law—Arrest without warrant.]—*The law of a foreign state authorising an officer of the state to arrest without warrant persons suspected of violating the customs law of the state, for the purpose of bringing them to justice, is a defence to an action in N.B. for

an arrest in such state.—MAY v. SMITH (1894), 32 N. B. R. 474.—CAN.

*n. No right of action in British Court.]—*Pltf., an alien, being unlawfully within U.S.A. in violation of an Act of Congress, & liable to be deported, has no right of action in N.B. against a U.S. officer for arrest in, & deportation from, that country.—PAPAGEORGIOU v. TURNER (1906), 37 N. B. R. 449; 1 E. L. R. 387.—CAN.

PART IX. SECT. 1, SUB-SECT. 1.

800 i. Marriage as understood in Christendom—Voluntary union for life of one man & one woman to exclusion of all others—Marriage between Hindus—Act IV. of 1869, s. 7.]—Petitioner & his wife married according to the rites of the Hindu religion. The wife subsequently left her husband, &

marriage, the English Matrimonial Ct. will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations.—HYDE v. HYDE & WOODMANSEE (1866), L. R. 1 P. & D. 130; 35 L. J. P. & M. 57; 14 L. T. 188; 12 Jur. N. S. 414; 14 W. R. 517.

Annotations:—*Consd.* Re Ullee, Nawab Nazim of Bengal's Infants (1885), 53 L. T. 711; Re Bozzelli's Settlement, Husey-Hunt v. Bozzelli, [1902] 1 Ch. 751. *Refd.* Re Bethell, Bethell v. Hildyard (1888), 38 Ch. D. 220; R. v. Dibdin, Ex p. Thompson (1909), 101 L. T. 106; R. v. Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwaruddin, [1917] 1 K. B. 634.

801. — — —.]—A union formed between a man & a woman in a foreign country, although

lived in adultery with another man. Both husband & wife subsequently became Christians but the wife continued to live in adultery. The husband sued under above Act for dissolution of the marriage:—*Held*: (1) the marriages contemplated by above sect. are those founded on the Christian principle of a union of one man & one woman to the exclusion of others; (2) the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, a Hindu marriage not being a monogamous one.—THAPITA PETER v. THAPITA LAKASHMI (1893), 1 L. R. 17 Mad. 235.—IND.

801 i. — By words of mutual consent.]—A woman, native of F., was married to a half-caste native in one

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it may there bear the name of a marriage, & the parties to it may there be designated husband & wife, is not a valid marriage according to the law of England unless it is formed on the same basis as marriages throughout Christendom, & is in its essence the voluntary union for life of one man & one woman, to the exclusion of all others.

C., an Englishman, in 1878 went to South Africa, & while there married T., a woman of a semi-barbarous tribe, according to the native customs. No religious form or ceremony was gone through, & beyond the taking of the woman, the native ceremony consisted simply in the bridegroom slaughtering an ox & sending the head to the bride's parents. By the custom of the tribe polygamy was practised, but C. never had more than the one wife, whom he took to his house, & he continued to live with her alone until 1884, when he was killed while fighting with the Boers. Ten days after his death T. gave birth to a female child. C. kept up communication with various members of his family in England, but never mentioned his marriage, & by a testamentary document he made some provision out of his property in South Africa for T., & any child which she might have by him. Under the will of his father he was entitled to real estate in England for life, with remainder to his children, with remainder over in default of issue:—*Held*: the union between C. & T. was not a valid marriage according to the law of England.—*Re BETHELL, BETHELL v. HILDYARD* (1888), 38 Ch. D. 220; 57 L. J. Ch. 487; 58 L. T. 674; 36 W. R. 503; 4 T. L. R. 319.

Annotation:—*Consd.* R. v. Hammersmith Superintendent Registrar of Marriages, *Ex p.* Mir-Anwaruddin, [1917] 1 K. B. 634.

802. ———.]—It is an open question whether the union of a man & woman, in a state where polygamy is recognised, solemnised according to the laws of such state will be recognised in England as a marriage.—R. v. NAGUIB, [1917] 1 K. B. 359; 86 L. J. K. B. 709; 116 L. T. 640; 81 J. P. 116; 25 Cox, C. C. 712; 12 Cr. App. Rep. 187, C. C. A.

803. ——— Monogamous marriage in non-Christian country—Valid by *lex loci*.]—Marriage, as understood in Christian countries, means the voluntary union for life of one man & one woman, to the exclusion of all others. Therefore, a marriage contracted on this basis will be valid though celebrated in a heathen country, provided always it be legally contracted & celebrated according to the laws & customs of that country.—BRINKLEY v. A.-G. (1890), 15 P. D. 76; 59 L. J. P. 51; 62 L. T. 911; 6 T. L. R. 191.

Annotation:—*Refd.* R. v. Hammersmith Superintendent Registrar of Marriages, *Ex p.* Mir-Anwaruddin, [1917] 1 K. B. 634.

804. Not incestuous marriages—Deceased wife's sister.]—T. domiciled in England, in 1808 married there his deceased wife's sister, & had by her a son, A. She died in 1832. No proceedings were taken in the ecclesiastical ct. to declare the marriage void:—*Held*: (1) the marriage by the law of

England was unlawful, & not a valid marriage; (2) though the son was legitimate in England by the rule of law that the marriage could not be declared void after the death of either of his parents, yet that rule is not binding out of England, & cannot operate to make the son legitimate in Scotland, where such a marriage is assumed to be incestuous, & to contract it a capital offence.

(3) The rule, that the *lex loci contractus* of a marriage establishes its validity, requires this qualification, *viz.*, where the law of a country forbids marriage under any particular circumstances, the prohibition follows the subjects of that country wherever they may go.

(4) The comity of nations does not demand that a nation should recognise as valid every marriage which is valid *lege loci contractus*, & not prohibited by the common consent of Christianity. Each nation has a right to define & prohibit incest.—FENTON v. LIVINGSTONE (1859), 33 L. T. O. S. 335; 23 J. P. 579; 5 Jur. N. S. 1183; 7 W. R. 671; 3 Macq. 497, H. L.

Annotations:—*As to* (1) *Consd.* *Re Goodman's Trusts* (1881), 44 L. T. 527; R. v. Dildin, [1910] P. 57. *Generally*, *Mentd.* *Chichester v. Mure* (1863), 32 L. J. P. M. & A. 146.

805. ———.]—A., a native of Marburg, came to England in 1822, aged 13, & remained here till his death in 1858, having made occasional visits to Germany. In 1835 he was married in this country to B., a native of Frankfort-on-the-Maine; in 1836 he obtained letters of naturalisation; in 1841 he made a will; in 1844 his wife died, leaving children, & in 1846 he married at Frankfort C., who was B.'s sister of the half-blood, & had children by her. On his death his brother took out letters of administration as the uncle & guardian of all the children, none of whom were of age, on the supposition that the will was revoked by the second marriage. The eldest son of the first marriage on coming of age called in the letters of administration, & set up the will:—*Held*: (1) the principle laid down by Stuart, V.C., in *Brook v. Brook* (No. 806, *post*) as to the disability of a native-born English subject to contract such a marriage applied equally to a naturalised subject, (2) though by the law of Frankfort, C.'s domicile, such a marriage would have been valid, yet the disability of either party to the contract would invalidate the marriage.—METTE v. METTE (1859), 1 Sw. & Tr. 416; 28 L. J. P. & M. 117; 33 L. T. O. S. 139; 164 E. R. 792; *sub nom.* *In the Goods of METTE*, 7 W. R. 543.

Annotations:—*Expld.* *Chetti v. Chetti*, [1909] P. 67. *Refd.* *Sottomayer v. De Barros* (1879), 5 P. D. 94; *Ogden v. Ogden*, [1908] P. 46. *Mentd.* *Re Martin*, *Loustalan v. Loustalan*, [1900] P. 211.

806. ———.]—(1) A marriage of a widower with his deceased wife's sister, both being English-born subjects & domiciled at the time in England, is void, though the marriage was celebrated in a foreign country, by the law of which such marriages were legal.

(2) Where the parties to such a marriage, though English born, had been domiciled in such foreign country at the time of the marriage:—*Semble*: the marriage would be valid here also.

(3) A foreign marriage, valid according to the law of the country where it is celebrated, is good

of the F. islands by the British consul there by words of mutual consent to live together as man and wife:—*Held*: there had not been a valid marriage cognisable by English law.—R. v. BYRNE (1867), 6 N. S. W. S. C. R. 302.—AUS.

808 i. ——— Monogamous marriage in non-Christian country—Valid by *lex loci*.]—A. was baptised in infancy

into R.C. Church, but subsequently relapsed into Hinduism, & was married to a Hindu. Her Hindu husband afterwards discarded her; A. was subsequently re-admitted into R.C. Church & married by a priest to a R.C. during the lifetime of her Hindu husband:—*Held*: A.'s marriage with the Hindu was subsisting & valid at the time of her Christian marriage.—*Re MILLARD* (1887), 1 L. L. R. 10 Mad.

218.—IND.

o. ——— Marriage between Christian & Mahomedan—Mahomedan rites.]—A marriage ceremony performed according to Mahomedan rites between a Christian man & a Mahomedan woman can create no valid marriage between the parties.—SKINNER v. DURGA PRASAD (1904), 1 L. R. 31 All. 239.—IND.

everywhere; but that applies only to the form, & not to the essentials of the contract, which depend on the *lex domicilii*, that is, the law of the country where the parties are then domiciled, & in which they contemplate to reside. Hence, if a marriage abroad of English subjects domiciled here is contrary to our notions of public policy, for example, polygamous or incestuous, this country will not recognise it, & will follow in that respect its own rules as to incest & policy.

(4) Marriage Act, 1835 (c. 54), does not bind all English subjects in all parts of the world, & it would not, for example, affect the law of marriage in any conquered colony in which a different law of marriage prevailed, whatever effect it might have in any other colony.—*BROOK v. BROOK* (1861), 9 H. L. Cas. 193; 4 L. T. 93; 25 J. P. 259; 7 Jur. N. S. 422; 9 W. R. 461; 11 E. R. 703, H. L.; *affg.* (1858), 3 Sm. & G. 481.

Annotations:—As to (1) & (2) *Consd.* *Mette v. Mette* (1859), 1 Sw. & Tr. 416; *Simonin v. Mallac* (1860), 29 L. J. P. M. & A. 97; *Howarth v. Mills* (1866), L. R. 2 Eq. 389; *Expld.* *Re Allison's Trusts* (1874), 31 L. T. 638; *Pawson v. Brown* (1879), 13 Ch. D. 202. *Consd.* *Sottomayor v. De Barros* (1879), 41 L. T. 281; *Re Bozzelli's Settlement*, *Husey-Hunt v. Bozzelli*, [1902] 1 Ch. 751; *Ogden v. Ogden*, [1908] P. 46. *Expld.* *Chetti v. Chetti*, [1909] P. 67. *Refd.* *R. v. Dibdin*, [1910] P. 57. As to (3) *Consd.* *Ogden v. Ogden*, [1908] P. 46; *R. v. Dibdin*, [1910] P. 57. *Refd.* *Fenton v. Livingstone* (1859), 33 L. T. O. S. 335; *Wing v. Taylor* (1861), 30 L. J. P. M. & A. 258; *Sottomayor v. De Barros* (1877), 2 P. D. 81; *Re De Wilton*, *De Wilton v. Montefiore*, [1900] 2 Ch. 481; *Re Bozzelli's Settlement*, *Husey-Hunt v. Bozzelli*, [1902] 1 Ch. 751.

807. — *Deceased husband's brother.*—A naturalised Italian domiciled in Italy married her deceased husband's brother, an Italian domiciled in Italy. The marriage, which was solemnised in Italy, after the necessary dispensations had been obtained, was admittedly valid in Italy:—*Held*: notwithstanding Marriage Act, 1835 (c. 54), the marriage was valid in England.

Semble: the law of the common domicile is sufficient to determine marriage capacity except in the case of marriages stamped as incestuous by the general consent of Christendom.—*Re Bozzelli's Settlement*, *Husey-Hunt v. Bozzelli*, [1902] 1 Ch. 751; 71 L. J. Ch. 505; 86 L. T. 445; 50 W. R. 447; 18 T. L. R. 365; 46 Sol. Jo. 318. *Annotation*:—*Refd.* *R. v. Dibdin*, *Ex p. Thompson* (1909), 101 L. T. 106.

Sec, now, Marriage (Prohibited Degrees of Relationship) Acts, 1907 (c. 47) & 1921 (c. 24).

808. *Whether marriage in polygamous country—Governed by lex domicilii.*—*BROOK v. BROOK*, No. 806, *ante*.

809. — *By persons who profess faith which allows polygamy—Valid by lex loci.*—*HYDE v. HYDE & WOODMANSEE*, No. 800, *ante*.

810. — *According to native custom—Without religious form or ceremony—Polygamy not practised by husband.*—*Re BETHELL*, *BETHELL v. HILDYARD*, No. 801, *ante*.

811. — *Marriage solemnised according to law of state.*—*R. v. NAGUIB*, No. 802, *ante*.

809 i. *Whether marriage in polygamous country—By persons who profess faith which allows polygamy.*—There is a cogent presumption in favour of Mahomedan marriages.—*KARIEM v. LATIEF* (1910), 1 C. P. D. 154.—S. AF.

809 ii. — *—*—The word "wife" in Act 30 of 1906, s. 4 (e), does not include a wife married by Mahomedan custom.—*ESOP v. UNION GOVERNMENT (MINISTER OF THE INTERIOR)* (1913), 4 C. P. D. 133.—S. AF.

p. — *According to native custom.*—C., the son of an Englishman who settled in Pondoland, married according to the native custom two wives before the annexation of P. & continued to reside in P. after the

annexation:—*Held*: as the marriages were valid according to P. law & were contracted prior to the annexation of P., they should be treated as lawful & valid in the Cape Colony.—*CANHAM'S ESTATE v. THE MASTER* (1909), 26 S. C. 166; 19 C. T. R. 383.—S. AF.

PART IX. SECT. 1, SUB-SECT. 2.—A.

q. *Whether consent of parties in questions involving matrimonial status gives court jurisdiction.*—The mere consent of the parties in questions involving their matrimonial status cannot give the ct. jurisdiction not otherwise existing; & the ct. can *mero motu* raise & decide the question of jurisdiction.—*BRUNSCHWIK v. BRUN-*

SUB-SECT. 2.—ESSENTIAL VALIDITY OF MARRIAGE.

A. Jurisdiction of Courts.

812. *Marriage in England—Between foreigners domiciled abroad.*—*SIMONIN v. MALLAC*, No. 924; *post*.

813. — *—*— *Declaratory judgment as to validity.*—*DE GASQUET JAMES (COUNTESS) v. MECKLENBURG-SCHWERIN (DUKE)*, No. 923, *post*.

B. When governed by Lex domicilii.

See, generally, HUSBAND & WIFE.

814. *General rule.*—A. bequeathed a sum of stock to B. for life, & then to his children living at his death. A. died, & then B. died. At B.'s death he left two legitimate daughters, & one other daughter, born under the following circumstances. B., being a widower, with two children by his first wife, & a domiciled Englishman, went to reside in France, where he cohabited with a Frenchwoman, by whom he had a daughter born in that country. After the birth of that child, B. married its mother, first at the English Embassy, then again according to the forms prescribed by the law of France, & the parents then acknowledged the child to be theirs, but B. alone signed the act of acknowledgment, which was contained in the marriage contract. Upon the question whether this child of B. could take a share of this stock jointly with the other two:—*Held*: she could not do so: because (1) the law of domicile was carried by the domiciled party into any foreign country in which he might be residing, & it signified nothing whether or not the marriage was in a country where the law was different from the law of his domicile; (2) the legitimacy of this child was to be ascertained by the law of that country which regulated the domicile of the father at the time of its conception & birth; (3) at that time the father was a domiciled Englishman, subject to the laws of this country; (4) by those laws, no illegitimate child of a domiciled English subject, could be legitimatised by any act of his; (5) this ct. could not refuse to recognise the marriage at the English Embassy, when no act of recognition was made by the parents, & the act of recognition, when made, being required by the French law to be by both parents, that which was executed in this case, by the father alone, appeared to be, under any circumstances, invalid.—*Re WRIGHT'S TRUST* (1856), 2 K. & J. 595; 25 L. J. Ch. 621; 27 L. T. O. S. 213; 20 J. P. 675; 2 Jur. N. S. 465; 4 W. R. 541; 69 E. R. 920.

Annotations:—As to (2) *Consd.* *Boyes v. Bedale* (1863), 1 Hem. & M. 798. As to (3) *Consd.* *Levy v. Solomon* (1877), 37 L. T. 263; *Re Goodman's Trusts* (1881), 17 Ch. D. 266. *Refd.* *Re Grave*, *Vaucher v. Treasury Solicitor* (1888), 40 Ch. D. 216.

815. — *—*—*BROOK v. BROOK*, No. 806, *ante*.

SCHWIK, [1902] T. H. 223.—S. AF.

PART IX. SECT. 1, SUB-SECT. 2.—B.

814 i. *General rule.*—The validity of a marriage is determined by the law of the domicile at the time of the marriage.—*GRAY v. NATIONAL TRUST CO.* (1915), 31 W. L. R. 684; 8 W. W. R. 1061.—CAN.

814 ii. — *—*—The essential validity of a marriage is governed by *lex domicilii*, & the marriage in W. of a man domiciled in B.C., invalid by B.C. law, is not rendered valid by the fact that it would be recognised as valid in W.—*MILLER v. ALLISON*, [1917] 2 W. W. R. 231; 33 D. L. R. 144; 24 B. C. R. 123.—CAN.

Sect. 1.—General principles of validity: Sub-sect. 2,

816. —.]—FENTON v. LIVINGSTONE, No. 804, *ante*.

817. — Capacity to contract.]—RUDING v. SMITH (1821), 2 Hag. Con. 371; 1 State Tr. N. S. 1054; 161 E. R. 774.

*Annotations:—*Consd. Kent v. Burgess (1840), 11 Sim. 361. *Refd.* R. v. Millis (1844), 10 Cl. & Fin. 534; Ward v. Day (1846), 5 Notes of Cases, 66; Connelly v. Connelly (1851), 2 Rob. Eccl. 201; Brook v. Brook (1858), 3 Sm. & G. 481; Armitage v. Armitage (1866), L. R. 3 Eq. 343; Bater v. Bater, [1906] P. 209.

818. —.]—The *lex loci contractus* as to marriage will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicile; & therefore a second marriage, had in Scotland on a Scottish divorce *a vinculo* from an English marriage between parties domiciled in England at the times of such marriages & divorce, is null.—CONWAY v. BEAZLEY (1831), 3 Hag. Ecc. 639; 162 E. R. 1292.

*Annotations:—*Consd. Dolphin v. Robins (1859), 7 H. L. Cas. 391; Harvey v. Farnie (1880), 6 P. D. 35. *Refd.* Brook v. Brook (1858), 3 Sm. & G. 481; Shaw v. Gould (1868), L. R. 3 H. L. 55; Niboyet v. Niboyet (1878), 4 P. D. 1. *Mentd.* Chesney v. Newsholme, Newsholme v. Chesney, [1908] P. 301.

819. Marriage abroad—With deceased wife's sister—By British subjects domiciled in England—Naturalised British subject.]—METTE v. METTE No. 805, *ante*.

820. —.]—BROOK v. BROOK, No. 806, *ante*.

See, now, Marriage (Prohibited Degrees of Relationship) Acts, 1907 (c. 47) & 1921 (c. 24).

821. — With deceased wife's niece—By domiciled Englishman.]—A domiciled Englishman went through the ceremony of marriage abroad with his deceased wife's niece. The marriage was void according to the English law, but valid according to the foreign law. He, on that occasion executed a marriage settlement in favour of his intended wife, & also of the children of his former & of his intended marriage, as a class:—*Held*: the whole was void.—CHAPMAN v. BRADLEY (1863), 4 De G. J. & Sm. 71; 3 New Rep. 182; 33 L. J. Ch. 139; 9 L. T. 495; 10 Jur. N. S. 5; 12 W. R. 140; 46 E. R. 842, L. J.J.

*Annotations:—*Refd. Pawson v. Brown (1879), 13 Ch. D. 202; A. v. M. (1884), 10 P. D. 178; Neale v. Neale (1899), 79 L. T. 629; Hay v. Northcote (1900), 82 L. T. 656; Dorner v. Ward, [1901] P. 20; Re Garnett, Richardson v. Greenep (1905), 74 L. J. Ch. 570. *Mentd.* Neale v. Mitchell (1897), 14 T. L. R. 154.

822. — Between uncle & niece—Jews domiciled in England.]—The capacity of persons professing the Jewish religion who are also domiciled British subjects to contract marriage is regulated by the law of England.

Where a marriage was solemnised abroad according to Jewish rites between a niece & her maternal uncle, both the contracting parties being at the time of the solemnisation domiciled British subjects & adherents of the Jewish faith, & the marriage being valid by the Jewish law:—*Held*: the marriage was invalid.—*Re* DE WILTON, DE WILTON v. MONTEFIORE, [1900] 2 Ch. 481; 69 L. J. Ch. 717; 83 L. T. 70; 48 W. R. 645; 16 T. L. R. 507; 44 Sol. Jo. 626.

*Annotation:—*Refd. Ogden v. Ogden, [1908] P. 46.

823. — With deceased husband's brother—Both parties domiciled abroad.]—*Re* BOZZELLI'S SETTLEMENT, HUSEY-HUNT v. BOZZELLI, No. 807, *ante*.

See, now, Marriage (Prohibited Degrees of Relationship) Acts, 1907 (c. 47) & 1921 (c. 24).

824. — Hindu child marriage.]—GREWALS v. GREWALS (1907), *Times*, Aug. 1.

825. — By repute.]—A foreign marriage, recognised as valid by the law of the domicile of the parties, will be held good by the law of England, notwithstanding that there has been no formal ceremony of marriage. A marriage by repute which is valid by the law of the domicile will be recognised as valid by the English cts.—*Re* GREEN, NOYES v. PITKIN (1909), 25 T. L. R. 222.

As to what marriages recognised in English law.]—See Sub-sect. 1, ante.

As to law governing capacity in mercantile contracts.]—See Part VII., ante.

As to what constitutes marriage.]—See HUSBAND & WIFE.

C. When governed by Lex loci contractus.

826. General rule.]—FENTON v. LIVINGSTONE, No. 804, *ante*.

827. —.]—(1) Any incapacity of either a man or a woman, which, though recognised & enforced by the law of the domicile of either, is of a kind to which the cts. of this country refuse recognition, does not render a marriage celebrated here invalid on account of any such incapacity. A foreigner or a British subject domiciled abroad who enters into a contract of marriage with an Englishwoman domiciled in England, a marriage which would be recognised by the law of England as valid if contracted between persons domiciled in this country, does not carry with him any disability of a personal character imposed by the law of his domicile so as to preclude him from contracting a valid marriage with her in this country.

(2) A foreigner or a British subject domiciled abroad who, being in England, contracts in due form according to the laws of England a marriage with a person domiciled in England is not to be permitted to assert that he was under the burden of an incapacity, imposed by the law of the foreign domicile, to do that which he in fact did voluntarily & in due form according to the laws of England, & he cannot repudiate the marriage on the ground of such personal incapacity.

(3) Where both parties to a marriage are domiciled in a country the laws of which forbid them to marry, considerations may apply differing from those which would be applicable in cases where one party only is domiciled in a country the laws of which forbid such a marriage.—CHETTI v. CHETTI, [1909] P. 67; *sub nom.* VENUGOPAL CHETTI v. VENUGOPAL CHETTI, 78 L. J. P. 23; 99 L. T. 885; 25 T. L. R. 146; 53 Sol. Jo. 163.

*Annotation:—*As to (1) & (2) Consd. R. v. Hammersmith Superintendent Registrar of Marriages, *Ex p.* Mir-Anwaruddin, [1917] 1 K. B. 634.

828. Marriage in England—Both parties domiciled abroad—In conformity with laws of England—Evasion of *lex domicilii*.]—SIMONIN v. MALLAC, No. 924, *post*.

829. — One party domiciled in England—Incapacity of other party by *lex domicilii*—Not recognised by English law.]—Two Portuguese subjects, one of whom was domiciled in England, the other in Portugal, contracted a marriage in England in 1868. They were first cousins & were incapable, according to the law of Portugal, of intermarrying, on account of consanguinity,

PART IX. SECT. 1, SUB-SECT. 2.—C.

827 i General rule.]—H., a slave in V., married a slave; slaves not being able to marry in V. The marriage

was celebrated by a Baptist minister with the usual ceremony, & with all formalities practicable to make it binding:—*Held*: the validity of the marriage must, according to the general

rule, be determined by the law of the country where it was celebrated & the marriage was not valid in O.—HARRIS v. COOPER (1871), 31 U. C. R. 182.—CAN.

without a Papal dispensation. Petitioner, the wife, filed a petition, praying that her marriage with the resp. might be declared null & void:—*Held*: the *lex loci contractus* should prevail in the matter, & the marriage being valid according to the law of England, the petition must be dismissed.—*SOTTO-MAYER v. DE BARROS* (1879), 5 P. D. 94; 49 L. J. P. 1; 41 L. T. 281; 27 W. R. 917.

Annotations:—*Consd.* Ogden v. Ogden, [1908] P. 46. *Refd.* Linke (otherwise Van Aerde) v. Van Aerde (1894), 10 T. L. R. 426; Hay v. Northcote, [1900] 2 Ch. 262; Chetti v. Chetti, [1909] P. 67; R v. Hammersmith Superintendent Registrar of Marriages, *Ex p.* Mir-Anwaruddin, [1917] 1 K. B. 634. *Mentd.* Moss v. Moss, [1897] P. 263.

830. ————.]—OGDEN v. OGDEN, No. 228, *ante*.

831. ————.]—CHIETTI v. CHIETTI, No. 827, *ante*.

832. **Marriage abroad—By person attainted in England.**—An attainted man, although civilly dead for some purposes, is nevertheless capable of contracting in a foreign country a marriage which will be deemed valid in England, if it was valid by the law of that country.

C. was attainted of high treason in 1715, he escaped from England, married at Brussels in 1724, & left issue, amongst other children, J. a son & M. a daughter. J. left surviving him an only son A., who died in 1814:—*Held*: (1) the descendants of M. could inherit from A., as they need not mention C., the common ancestor in the pedigree, & were unaffected by the old doctrine as to corruption of blood which prevailed before 3 & 4 Will. 4, c. 106, s. 10; (2) the marriage of C., being contracted in a foreign country was valid in England, & the children legitimate. When a marriage is contracted by an innocent woman, who might know nothing whatever of the attainder of the man whom she is marrying, the law of the place where the marriage contract is performed governs the validity of the contract & must prevail (WILLES, J.).—*KYNNAIRD v. LESLIE* (1866), L. R. 1 C. P. 389; Har. & Ruth. 521; 35 L. J. C. P. 226; 14 L. T. 756; 12 Jur. N. S. 468; 14 W. R. 761.

Annotation:—*As to* (2) *Refd.* Phillips v. Eyre (1870), L. R. 6 Q. B. 1.

As to what marriages recognised in English law.—*See* Sub-sect. 1, *ante*.

As to law governing capacity in mercantile contracts.—*See* Part VII., Sect. 2, sub-sect. 2, *ante*.

D. Remarriage after Decree of Divorce.

833. **Restrictions on remarriage of guilty party—Imposed by lex domicilii—Whether regarded by English courts.**—*SCOTT v. A.-G.*, No. 133, *ante*.

834. ————.]—**Prohibition of marriage within specified period from decree of divorce.**—The prohibition contained in the Indian Divorce Act, 1869, No. 4, s. 57, against the remarriage of either party within six months of the date of the final decree is an integral part of the proceeding, & a condition which must be fulfilled before the parties can contract a fresh marriage, & they cannot evade it by obtaining a domicile in another country. A respondent & a co-respondent in a divorce suit in

India, in which a decree absolute was pronounced on Nov. 27, 1879, came to this country & were married on Feb. 3, 1880. On Feb. 6 the co-respondent duly executed a will by which he bequeathed all his property to his reputed wife. On Apr. 2, 1880, the parties went through a second form of marriage:—*Held*: the first marriage, having been celebrated within six months from the date of the final decree of divorce, was invalid, & the will was revoked by the subsequent marriage.—*WARTER v. WARTER* (1890), 15 P. D. 152; 59 L. J. P. 87; 63 L. T. 250; 54 J. P. 631; 6 T. L. R. 391.

Annotations:—*Mentd.* Ogden v. Ogden, [1908] P. 46; Keyes v. Keyes & Gray, [1921] P. 204.

Dissolution of marriage—Jurisdiction of English courts.—*See* Part X., Sect. 1, *post*.

— **Jurisdiction of foreign courts.**—*See* Part X., Sect. 2, *post*.

— **Recognition in England of foreign decrees of divorce.**—*See* Part X., Sects. 2, 3, *post*.

SUB-SECT. 3.—FORMS AND CEREMONIES OF MARRIAGE.

A. **General Rule—Governed by Lex loci contractus.**

835. **In general.**—*BROOK v. BROOK*, No. 806, *ante*.

836. **Marriage abroad.**—*SCRIMSHIRE v. SCRIMSHIRE* (1752), 2 Hag. Con. 395; 161 E. R. 782.

Annotations:—*Folld.* Middleton v. Janverin (1802), 2 Hag. Con. 437. *Consd.* R. v. Millis (1844), 10 Cl. & Fin. 534; Connelly v. Connelly (1850), 2 Rob. Eccl. 201; Ogden v. Ogden, [1908] P. 46. *Refd.* Harford v. Morris (1776), 2 Hag. Con. 423; Ruding v. Smith (1821), 2 Hag. Con. 371; Simonin v. Mallac (1860), 2 Sw. & Tr. 67; Brook v. Brook (1861), 9 H. L. Cas. 193; Sottomayer v. De Barros (1879), 5 P. D. 94. *Mentd.* Mastin v. Escott (1841), 2 Curt. 692; Titchmarsh v. Chapman (1844), 3 Curt. 840.

837. ————.]—**Whether this is a good marriage, non constat.** It is said by M., he saw them married according to the rites & ceremonies of the Church of England. But it will not be valid here, unless it is so by the laws of the country where it was had (LORD HARDWICKE, C.).—*BUTLER v. FREEMAN* (1756), Amb. 301; 27 E. R. 204, L. C.

Annotations:—*Refd.* Middleton v. Janverin (1802), 2 Hag. Con. 437; Brook v. Brook (1861), 9 H. L. Cas. 193. *Mentd.* De Manneville v. De Manneville (1804), 10 Ves. 52; Wellesley v. Beaufort (1827), 2 Russ. 1; Johnstone v. Beattie (1843), 10 Cl. & Fin. 42; R. v. Gyngall, [1893] 2 Q. B. 232.

838. ————.]—**A marriage of English subjects was celebrated abroad, not according to the lex loci:—Held: the marriage was invalid.**—*MIDDLETON v. JANVERIN* (1802), 2 Hag. Con. 437; 161 E. R. 797.

Annotations:—*Consd.* Ruding v. Smith (1821), 2 Hag. Con. 371. *Refd.* Fenton v. Livingstone, Livingstone v. Livingstone (1859), 5 Jur. N. S. 1183; Simonin v. Mallac (1860), 2 Sw. & Tr. 67; Ogden v. Ogden, [1908] P. 46. *Mentd.* De Bode's Case (1845), 8 Q. B. 208.

839. ————.]—**Clandestine marriage.**—A clandestine marriage between an Englishman & a Sicilian woman, celebrated in Sicily, & valid by the laws of that kingdom:—*Held*: marriage valid in England.—*HERBERT (LADY) v. HERBERT (LORD)*

PART IX. SECT. 1, SUB-SECT. 2.—D.

833 i. **Restriction on remarriage of guilty party—Imposed by lex domicilii—Whether regarded by domestic court.**—Where a marriage is dissolved by the cts. of a foreign country & by the law of that country a prohibition against remarriage is imposed for a time upon both spouses, such prohibition may be held to create in respect of both spouses an incapacity to remarry during that period, & this incapacity will extend to a remarriage in Victoria:

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but where such prohibition is imposed upon one only of the spouses, it will be deemed to impose only a personal disability on that spouse, confined to such foreign country, & it will not prevent that spouse from remarrying in V. during the prohibited period.—*LUNDGREN v. O'BRIEN*, [1921] V. L. R. 361.—AUS.

PART IX. SECT. 1, SUB-SECT. 3.—A.

a. **Marriage abroad—Parties of different religious denominations—5 &**

6 Vict. c. 113.]—**Marriages contracted in I. between members of the Church of E. & Presbyterians, celebrated by ministers not belonging to the Church of E., were legalised by above Act, & such marriages celebrated before that Act was passed are legal marriages in O.**—*DOE D. BREAKER v. BREAKER* (1846), 2 U. C. R. 349.—CAN.

19 Geo. 2, c. 13 (Ir.), s. 1.]—**A marriage which might be validly made in one country is good when made in accordance with lex**

E E

Sect. 1.—General principles of validity: Sub-sect. 3,

(1819), 2 Hag. Con. 263; 3 Phillim. 58; 161 E. R. 1257.

*Annotations:—*Consd. *Brook v. Brook* (1861), 9 H. L. Cas. 193; *Ogden v. Ogden*, [1908] P. 46. *Refd. R. v. Millis* (1844), 10 Cl. & Fin. 534; *Fenton v. Livingstone*, *Livingstone v. Livingstone* (1859), 5 Jur. N. S. 1183; *Beamish v. Beamish* (1861), 9 H. L. Cas. 274. *Mentd. Harrison v. Sparrow* (1842), 3 Curt. 1.

840. — Whether formalities directory only.]

—(1) The validity of a marriage, celebrated in a foreign country, must be determined in an English ct. by the *lex loci*, where the marriage is solemnised.

On a plea of coverture, where the parties, who were British subjects, were married in France:—*Held*: if the marriage would not be valid in that country, it would not be valid in this.

(2) A printed copy of the “Cinq Codes” of France, produced by the French vice-consul, resident in London, purchased by him at a bookseller’s shop at Paris, received as evidence of the law of France, upon which this ct. would act.—*LACON v. HIGGINS* (1822), Dow. & Ry. N. P. 38; 3 Stark. 178, N. P.

*Annotations:—*As to (2) *Refd. De Bode’s Case* (1845), 8 Q. B. 208; *Lloyd v. Gilbert* (1865), 13 L. T. 602. *Generally, Mentd. R. v. Koops* (1837), 6 Ad. & El. 198.

841. — Abjuration of faith—Sufficiency of abjuration.]—A marriage having been clandestinely celebrated between two English persons resident at Rome, both previously Protestants, & one a minor, who in conformity with the Roman law had abjured the Protestant faith & been admitted into the Roman Catholic Church, one of them making such abjuration two days previous to, & the other immediately before, the ceremony, was repudiated by the lady in a suit for restitution of conjugal rights, on the ground that the priest was not properly qualified to perform the ceremony, & that she had never become or intended to become a Roman Catholic, her abjuration being made without her knowledge or consent:—*Held*: it appearing by the evidence that the marriage ceremony & act of abjuration were duly performed according to the Roman law, the marriage was a valid & subsisting contract.—*SWIFT v. KELLY* (1835), 3 Knapp. 257; 12 E. R. 648, H. L.

*Annotations:—**Refd. Kent v. Burgess* (1840), 10 L. J. Ch. 100; *Connolly v. Connolly* (1851), 7 Moo. P. C. C. 438; *Moss v. Moss*, [1897] P. 263; *Cramp v. Cramp & Freeman*, [1920] P. 158. *Mentd. Re Herbage Rents, Greenwich Charity Comrs. v. Green*, [1896] 2 Ch. 811; *Portwel v. Townsend*, [1896] 2 Q. B. 129.

842. — In presence of British consul in English church—According to rites of Church of England.]—A marriage between a British subject domiciled in England, & a female ward of ct., was celebrated in the presence of the British consul & in the English church at Antwerp, by a clergyman of the Church of England who had been appointed chaplain to the church & was paid by the British Govt.:—*Held*: the marriage was invalid, as certain ceremonies prescribed by the law of Belgium had not been observed.—*KENT v. BURGESS* (1840), 11 Sim. 361; 10 L. J. Ch. 100; 5 Jur. 166; 59 E. R. 913.

*Annotation:—**Mentd. Roskell v. Whitworth* (1870), 5 Ch. App. 459.

843. — Formalities dispensed with by lex loci.]—M., an illegitimate was born at Demerara, her father was of that colony, & from the time of her birth, she remained in Demerara until she, little more than thirteen years of age, was prevailed upon by D., a native & domiciled inhabitant of

Demerara, to leave her mother, in whose house & under whose protection she was residing, & to embark with him on board a sloop at such time lying in the river at Demerara, & which immediately put to sea, & after a few days’ sail reached St. Lucia, when & where they were married, by the laws & ordinances in force, for the regulation of marriages at St. Lucia. At the time the marriage in question was had, no marriage in general could be contracted there, so as to be good & valid in law, if contracted without due publication of banns first made on three several occasions at competent intervals, unless dispensed with for some urgent & lawful cause, at the request of the principal & nearest relations of the contracting parties, & who, in that case, should have been married in the presence of four at least credible witnesses, & without the consent first had & obtained of the mother of the woman, if under the age of twenty-five & illegitimate. The marriage in question was had without any publication whatever of banns, such publication was not dispensed with at the request of the principal & nearest, or any relations of the contracting parties, they were not married in the presence of four witnesses, & the consent of the mother was not first obtained. By the laws & ordinances for the regulation of marriages at St. Lucia, at the time of the marriage in question, a marriage between Protestants by licence from the Governor for the time being, by a minister in Holy Orders of the Church of England, in the presence of two witnesses, was a valid marriage without publication of banns, or the consent, or any of the above formalities at the time of the marriage, Mr. & Mrs. D. were respectively Protestants:—*Held*: the marriage was valid.—*WARD v. DEY* (1849), 1 Rob. Eccl. 759; 7 Notes of Cases, 96; 163 E. R. 1204.

844. — Marriage by consent & repute.]

—*NEWMAN v. A.-G.* (1906), *Times*, Feb. 27.

845. — Personal incapacity of one party.]—O., an English Protestant, went through a form of marriage with V., an Armenian Protestant Christian at Teheran, she being pregnant at the time. By the Persian law Christian marriages are recognised, if valid according to the religious denomination of the parties. By the Armenian Church law a woman cannot marry while in a state of pregnancy. The Armenian priests having refused to marry the parties, a Roman Catholic priest performed the ceremony according to the rites of the Romish Church, he having obtained a special licence to do so, on the ground that V. was a Roman Catholic & O. a Protestant:—*Held*: as by the law of the country where the solemnisation took place the marriage was invalid, & as the forms, prescribed by 12 & 13 Vict. c. 68, had not been complied with, there was no marriage.—*Re ALISON’S TRUSTS* (1874), 31 L. T. 638; 23 W. R. 226.

846. — Parties of different religious denominations.]—A marriage between a member of the Church of England & an Episcopalian Methodist is good according to Argentine law, although only celebrated once & at a Methodist Episcopal church by a minister who was not an ordained minister of the Church of England.—*LIGHTBODY v. WEST* (1903), 88 L. T. 484; 19 T. L. R. 319, C. A.

*Annotation:—**Refd. R. v. Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwauddin* (1916), 86 L. J. K. B. 210.

847. Marriage per verba de praesenti—In

loci of its celebration; accordingly a marriage between a domiciled Irish Protestant & a R.C. celebrated in A. by an R.C. priest is valid, so as to prevent the Protestant husband intermarrying before the death of his wife or the annulment of the marriage, notwithstanding above sect.—*SWIFT v. A.-G. FOR IRELAND*, [1912] A. C. 276; 2 I. R. 289; 46 I. L. T. 234. IR.

Scotland.]—Marriage, good in Scotland, & not contrary to the law of England, will not be pronounced void under 26 Geo. 2, c. 33, though that Act does not extend to Scotland.

Applt. & resp., both English subjects, & applt. under age, ran away without consent of applt.'s guardian, & were married in Scotland:—Held: the marriage was nevertheless good.—**COMPTON v. BEARCROFT** (1769), Bull. N. P. 113; 2 Hag. Con. 444, n.; 161 E. R. 799.

Annotations:—Consd. Middleton v. Janverin (1802), 2 Hag. Con. 437; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895; Fenton v. Livingstone (1859), 33 L. T. O. S. 335; Simonin v. Mallac (1860), 2 Sw. & Tr. 67. **Refd.** Harford v. Morris (1776), 2 Hag. Con. 423; Warrender v. Warrender (1835), 9 Bl. N. S. 89; Sussex Peerage Case (1844), 11 Cl. & Fin. 85; Brook v. Brook (1861), 9 H. L. Cas. 193; Sottomayor v. De Barros (1877), 2 P. D. 81; Ogden v. Ogden, [1908] P. 46.

848. ———.]—A Scottish marriage was celebrated between an Englishman & a Scottish woman:—Held: the marriage was valid *per verba de praesenti*, in accord with opinions of Scottish advocates as to the validity of such marriages which were before the ct.—**BEAMISH v. BEAMISH** (1788), cited in 2 Hag. Con. 83; 161 E. R. 675.

Annotations:—Consd. Dalrymple v. Dalrymple (1811), 2 Hag. Con. 54. **Refd.** M'Adam v. Walker (1813), 1 Dow. 148.

849. ———.]—One party acting mala fide.]—A domiciled Englishman & Englishwoman residing in England, after an illicit connection of some years' standing, went to Gretna in Scotland & on their arrival there, before Marriage (Scotland) Act, 1856 (c. 96), contracted a marriage *per verba de praesenti*, by making a mutual declaration of marriage before witnesses. At the instance of the man, the certificate of marriage given by the person who officiated at the ceremony was antedated four years. In a suit for nullity of marriage by the man, he repudiated the marriage, on the ground, that he had never consented to a marriage, but went through the form of marriage with a simulated object in view, namely, for the purpose of obtaining a certificate to blind inquiries. There was no deception on the part of the woman, who believed it to be a marriage:—Held:** (1) the marriage was valid by the *lex loci contractus*, there being reasonable evidence of the intention of the parties to contract, *ipsum matrimonium*; (2) as there was a mutual declaration of present marriage, it was immaterial whether the man had some other motive beside marriage.—**BELL v. GRAHAM** (1859), 13 Moo. P. C. C. 242; 1 L. T. 221; 24 J. P. 20; 8 W. R. 98; 15 E. R. 91, P. C.**

850. ———.]—In Ireland.]—A. & B. entered into a present contract of marriage *per verba de praesenti* in Ireland, in the house & in the presence of a placed & regular minister of the congregation of the Protestant dissenters called Presbyterians. A. was a member of the Established Church of England & Ireland; B. was not a Roman Catholic, but either a member of the Established Church or a Protestant dissenter. A religious ceremony of marriage was performed on the occasion by the minister between the parties, according to the usual form of the Presbyterian Church in Ireland. A. & B., after the contract & ceremony, cohabited together for two years as man & wife. A. afterwards & while B. was living, married C. in England:—Held** (TINDAL, C.J., & COMMON LAW JUDGES): these circumstances did constitute a marriage; (LORD BROUGHAM, C., LORD CAMPBELL & LORD DENMAN) these circumstances did not constitute a marriage.—**R. v. MILLIS** (1844), 10 Cl. & Fin. 534; 8 Jur. 717; 8 E. R. 844, H. L.**

Annotations:—Consd. Catherwood v. Caslon (1844), 13 M. & W. 261; Beamish v. Beamish (1861) 9 H. L. Cas. 274; Culling v. Culling, [1896] P. 116. **Distd.** Lightbody v.

West (1902), 87 L. T. 138. **Refd.** Catterall v. Sweetman (1847), 1 Rob. Ecol. 580; R. v. Mainwaring (1856), 7 Cox, C. C. 192; A.-G. v. Windsor (1860), 8 H. L. Cas. 369; Phillips v. Eyre (1870), L. R. 6 Q. B. 1; Re De Wilton, De Wilton v. Montefiore, [1900] 2 Ch. 481. **Mentd.** O'Connell v. R. (1844), 11 Cl. & Fin. 155; R. v. Chadwick (1846), 11 J. P. 140; R. v. Canterbury (1848), 11 Q. B. 483; Prince of Wales Assoc. v. Harding (1858), E. B. & E. 183; Hope v. Hope (1858), 1 Sw. & Tr. 94; Beachey v. Brown (1860), E. B. & E. 796; Bevan v. M'Mahon (1861), 30 L. J. P. M. & A. 61; Stichel v. Lambert (1864), 15 C. B. N. S. 781; Exeter v. Marshall (1868), L. R. 3 H. L. 17; Thompson v. Ward, Ellis v. Burch (1871), 24 L. T. 679; R. v. Allen (1872), L. R. 1 C. C. R. 367; Anderson v. Morice (1876), 1 App. Cas. 713; Mackonochie v. Penzance (1881), 6 App. Cas. 424; Moss v. Moss, [1897] P. 263; London Street Tram. Co. v. L. C. C., [1898] A. C. 375; R. v. Canterbury (1902), 71 L. J. K. B. 894; Usher's Wiltshire Brewery v. Bruce, [1915] A. C. 433.

851. Marriage in England—One party domiciled in England—Consent required by lex domicilii of other party.]—OGDEN v. OGDEN, No. 228, ante.

B. Absence of Consents.

852. Marriage abroad—Without consent required by lex loci—Provisions merely directory.]—LACON v. HIGGINS, No. 840, ante.

Per verba de praesenti.]—See Nos. 847–850, ante.

853. Without consent required by Royal Marriage Act, 1772 (c. 11)—Invalid in England.]—In 1793, a marriage was solemnised at Rome by an English priest, between F., a son of his Majesty King George III., & M., a British subject, without the previous consent of his Majesty. After the decease of F., upon the petition of his eldest son, claiming to succeed to the titles, dignities & honours of F.:—Held:** the marriage was invalid.—**SUSSEX PEERAGE CASE** (1844), 11 Cl. & Fin. 85; 6 State Tr. N. S. 79; 3 L. T. O. S. 277; 8 Jur. 793; 8 E. R. 1034, H. L.**

Annotations:—Refd. Fenton v. Livingstone, Livingstone v. Livingstone (1859), 5 Jur. N. S. 1183; Brook v. Brook (1861), 9 H. L. Cas. 193. **Mentd.** Davis v. Lloyd (1844), 1 Car. & Kir. 275; Vander Donckt v. Thellusson (1849), 8 C. B. 812; Leroux v. Brown (1852), 12 C. B. 801; R. v. Povey (1852), Dears, C. C. 32; Stapylton v. Clough (1853), 2 E. & B. 933; Papendick v. Bridgwater (1855), 5 E. & B. 166; Grey v. Pearson (1857), 6 H. L. Cas. 61; Bright v. Legerton (1860), 29 Beav. 60; A.-G. v. Sillem (1863), 2 H. & C. 431; Di Sora v. Phillips (1863), 10 H. L. Cas. 624; Re Coppin (1866), 2 Ch. App. 47; Er p. Dubois (Alias Coppin) (1867), 36 L. J. M. C. 10; Smith v. Blakey (1867), L. R. 2 Q. B. 326; Whaley v. Carlisle (1867), 15 W. R. 1183; Rowley v. L. & N. W. Ry. (1873), 29 L. T. 180; The Argos, Gaudet v. Brown, The Hewsons, Gelpel v. Cornforth (1873), L. R. 5 P. C. 134; River Wear Comrs. v. Adamson (1877), 2 App. Cas. 743; Re Lambert (1886), 56 L. J. Ch. 122; Income Tax Special Purposes Comrs. v. Pemsel, [1891] A. C. 531; R. v. City of London Court, [1892] 1 Q. B. 273; R. v. Brixton Prison, Re Percival (1907), 76 L. J. K. B. 619; R. v. Dibden, [1910] P. 57; Tucker v. Oldbury U. C., [1912] 2 K. B. 317; Vacher v. London Soc. of Compositors, [1913] A. C. 107; Ward v. Pitt, [1913] 2 K. B. 130; Re Vexations Actions Act, 1896, Re Bosler, [1915] 1 K. B. 21; R. v. Naguib, [1917] 1 K. B. 359; G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 414; Bourne v. Keane, [1919] A. C. 815; Thomson v. St. Catharine's College, Cambridge, etc., [1919] A. C. 468.

854. Marriage in England—Without consent required by lex domicilii—Both parties domiciled abroad—Valid in England.]—SIMONIN v. MALLAC, No. 924, post.

855. ———.]—One party domiciled abroad—Valid in England.]—E. v. E. (1893), 37 Sol. Jo. 250.

856. ———.]—OGDEN v. OGDEN, No. 228, ante.

C. Doctrine of Exterritoriality.

857. British subjects resident in British settlement or colony—Governed by canon law as to marriage—Marriage of Protestants by Catholic priest—Without customary licence of governor.]—British subjects, resident in a British settlement

Sect. 1.—General principles of validity: Sub-sect. 3, C. & D.; sub-sect. 4. Sect. 2: Sub-sects. 1, 2 & 3. Part X. Sect. 1: Sub-sects. 1 & 2, A. (a).]

abroad, are governed by the laws of this country; & consequently, with respect to marriage, by the law which existed here before the Marriage Act, 1753 (c. 33), viz. the canon law.

Where two British subjects, being Protestants, were married at Madras, by a Portuguese Roman Catholic priest, according to the Catholic form, in the Portuguese language, in a private room, & the ceremony was followed by cohabitation:—*Held*: this was a valid marriage, though without a licence from the governor, which it is the custom at Madras to obtain.—*LAUTOUR v. TEESDALE* (1816), 8 Taunt. 830; 2 Marsh. 243; 129 E. R. 606. *Annotations*:—*Refd.* R. v. Millis (1844), 10 Cl. & Fin. 534; *Ballet v. Ballet*, *Ballet v. Ballet & Ballet* (1901), 17 T. L. R. 317.

858. ——— Marriage of Protestants by Presbyterian priest.—A marriage was celebrated in a colony between two persons, neither of whom was a member of the Presbyterian Church of Scotland, by an ordained minister of that Church:—*Held*: the marriage was valid.—*CATTERALL v. CATTERALL* (1847), 5 Notes of Cases, 466; 11 Jur. 914.

Annotation:—*Refd.* Anon. (1857), Dea. & Sw. 295.

859. Marriage at consulate in England—Between foreigners domiciled abroad—Governed by lex domicilii.—Domiciled French subjects contracted a marriage in this country:—*Held*: if they were married at the French Consulate in London according to the forms required by French law, the marriage was valid.—*BAILLET v. BAILLET* (1901), 84 L. T. 272; 17 T. L. R. 317.

Marriages of British subjects abroad—Valid by statute.—*See* Sect. 2, sub-sect. 1, *post*.

D. Compliance with Local Forms impossible.

Marriages of British subjects abroad—Valid by statute.—*See* Sect. 2, sub-sect. 1, *post*.

860. General rule—British subjects governed by English common law—Foreigners by lex domicilii.—*RUDING v. SMITH* (1821), 2 Hag. Con. 371; 1 State Tr. N. S. 1054; 161 E. R. 774.

Annotations:—*Consd.* Kent v. Burgess (1840), 11 Sim. 361. *Refd.* R. v. Millis (1844), 10 Cl. & Fin. 534; *Ward v. Day* (1846), 5 Notes of Cases, 66; *Connelly v. Connelly* (1851), 2 Rob. Eccl. 201; *Brook v. Brook* (1858), 3 Sm. & G. 481; *Armitage v. Armitage* (1866), L. R. 3 Eq. 343; *Bater v. Bater*, [1906] P. 209.

861. ——— Marriage in remote part of China.—*PHILLIPS v. PHILLIPS*, No. 868, *post*.

862. Marriage of Protestants in Rome—By English clergyman—Per verba de praesenti.—*CLONCURRY'S (LORD) CASE* (1811), cited in 6 State Tr. N. S. 87; *Cruise's Dignities*, 276.

Annotation:—*Refd.* Sussex Peerage Claim (1844), 6 State Tr. N. S. 79.

863. Marriage of British subjects in British settlement—Governed by canon law—Marriage of Protestants by Catholic priest—Without customary licence of governor.—*LAUTOUR v. TEESDALE*, No. 857, *ante*.

864. Marriage of British subjects in Cyprus—According to rites of Church of England—Not in presence of priest—Invalid at common law.—A marriage, between English subjects, was celebrated according to the rites of the Church of England, but not in the presence of a priest in holy orders:—*Held*: the marriage was invalid at the common law.—*CATHERWOOD v. CASLON* (1844), 13 M. & W. 261; 13 L. J. Ex. 334; 8 Jur. 1076; 153 E. R. 108.

Annotations:—*Folld.* Culling v. Culling, [1896] P. 116. *Refd.* R. v. Manwaring (1856), Dears. & B. 132; *Beamish v. Beamish* (1861), 9 H. L. Cas. 274.

SUB-SECT. 4.—PROOF OF MARRIAGE.
See HUSBAND & WIFE.

SECT. 2.—MARRIAGES VALID BY ENGLISH STATUTES.

SUB-SECT. 1.—MARRIAGES OF BRITISH SUBJECTS CELEBRATED ABROAD.

865. Marriage Act, 1823 (c. 76)—Marriage before British ambassador—One party British subject.—*O'CONNOR v. OMMANEY* (1837), cited in 2 Curt. 259; 163 E. R. 404.

Annotation:—*Consd.* Lloyd v. Petitjean (1839), 2 Curt. 251.

866. ——— ——— ———.—A marriage between an Englishman & a domiciled French lady, at the house of the British ambassador at Paris, by the chaplain to the Embassy, is a valid marriage, under 4 Geo. 4, c. 91.—*LLOYD v. PETITJEAN* (1839), 2 Curt. 251; 163 E. R. 402.

867. Foreign Marriage Act, 1892 (c. 23)—Marriage at British consulate—Invalid as to form by lex loci—Valid in England.—A marriage between a Frenchman & an Englishwoman duly solemnised in France under Consular Marriage Act, 1849, which was repealed & virtually re-enacted by the above Act, is valid as regards form in England, though declared invalid as regards form by a French ct.—*HAY v. NORTHCOTE*, [1900] 2 Ch. 262; 69 L. J. Ch. 586; 82 L. T. 656; 48 W. R. 615; 16 T. L. R. 418.

Annotation:—*Refd.* Ogden v. Ogden, [1908] P. 46.

868. ——— When compliance with forms of impossible—Parties entitled to resort to common law rights—Marriage in church hall after publication of banns.—A marriage was celebrated in a church hall, after publication of banns, by a priest of the Church of England between British subjects in a remote part of China where there was no Church of England:—*Held*: owing to the impossibility of complying with the British Acts as to marriage, the parties, who enjoyed the rights of extritoriality, were entitled to resort to their common law rights & the marriage was valid.—*PHILLIPS v. PHILLIPS* (1921), 38 T. L. R. 150.

SUB-SECT. 2.—MARRIAGES OF BRITISH SUBJECTS ON HIS MAJESTY'S SHIPS.

Sec, generally, HUSBAND & WIFE.

869. Marriage by ship's chaplain—Without licence—No banns—Marriage valid.—A marriage between British subjects, solemnised on board an English man-of-war at a foreign station by a clergyman of the Established Church without licence or banns, is valid.

Petitioner, an officer in Her Majesty's army, was married in 1884 to resp., also a British subject, on board one of Her Majesty's ships, then lying at Limasol, in Cyprus, where petitioner was stationed. The ceremony was performed by the chaplain of the vessel, a clergyman of the Established Church. There had been no publication of banns & no licence had been obtained:—

Held: there had been a valid marriage according to the common law of this country, & upon proof of resp.'s adultery, petitioner was entitled to a decree nisi for dissolution of the marriage.—*CULLING v. CULLING*, [1896] P. 116; 65 L. J. P. 59; 74 L. T. 252; 12 T. L. R. 210.

See, now, Foreign Marriage Act, 1892 (c. 23).

SUB-SECT. 3.—MARRIAGES WITHIN LINES OF
BRITISH ARMY SERVING ABROAD.

870. Before Foreign Marriage Act, 1892 (c. 23)—**Marriage performed by priest—Presumption of validity.**—Evidence that British subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, & interpreted into English by the officiating clerk; which service the parties understood to be the marriage service of the Church of England, & they received a certificate of the marriage which was afterwards lost, is sufficient whereon to found a presumption that the marriage was duly celebrated according to the law of that country, particularly after eleven years cohabitation as man & wife, till the period of the husband's death.

Such British subjects being attached at the time to the British army on service in such foreign country, & having military possession of the place, it seems that such marriage solemnised by a priest in holy orders, of which this would be reasonable evidence, would be a good marriage by the law of

England, as a marriage contract *per verba de praesenti* before Marriage Act, 1753 (c. 33); marriages beyond sea being excepted out of that Act. It would make no difference if solemnised by a Roman Catholic priest.—*R. v. BRAMPTON* (1808), 10 East, 282; 103 E. R. 782.

Annotations:—*Refd.* *R. v. Mills* (1844), 10 Cl. & Fin. 534; *Sichel v. Lambert* (1864), 15 C. B. N. S. 781; *Baillet v. Baillet*, *Baillet v. Baillet & Baillet* (1901), 17 T. L. R. 317. *Mentd.* *R. v. Povey* (1852), 22 L. J. M. C. 19.

871. — Marriage performed by chaplain to forces—Army of occupation.—*BURN v. FARRAR*, (1819), 2 Hag. Con. 369; 161 E. R. 773.

Annotation:—*Consd.* *Ruding v. Smith* (1821), 2 Hag. Con. 371.

872. — — — — No authority by commanding officer.—The marriage of an officer celebrated by a chaplain of the British army within the lines of the army when serving abroad is valid, under 4 Geo. 4, c. 91, though such army is not serving in a country in a state of actual hostility; & though no authority for the marriage was previously obtained from the officer's superior in command.—*WALDEGRAVE PEERAGE CASE* (1837), 4 Cl. & Fin. 649; 7 E. R. 247, H. L.

Part X.—Divorce and other Matrimonial Causes.

SECT. 1.—JURISDICTION OF COURT.

SUB-SECT. 1.—IN GENERAL.

873. Position of Scotland, Ireland & British Colonies.—*FIREBRACE v. FIREBRACE*, No. 104, *ante*.

Recognition of jurisdiction of foreign courts as to marriages.—*See* Sect. 2, sub-sect. 1, *post*.

SUB-SECT. 2.—DISSOLUTION OF MARRIAGE—
DIVORCE À VINCULO MATRIMONII.

A. As regards Petitioner and Respondent.

(a) Necessity for Domicil of Parties.

874. Whether depending on domicil at time of suit—Whether place of marriage material—Parties married in country where divorce sought.—A, an Englishwoman by origin, petitioned for dissolution of an English marriage, on the ground of adultery & cruelty. Resp. was served with a citation in Ireland, but did not appear. At the hearing facts were elicited, from which it might be inferred that resp.'s domicil of origin was Ireland, but the evidence not being conclusive, & it appearing that resp. had lived with his wife in England:—*Held*: without expressing an opinion as to jurisdiction, if it had clearly appeared that resp.'s domicil had been Ireland, the marriage must be dissolved.

Qu.: whether the ct. has jurisdiction in a suit for dissolution of an English marriage against a foreigner, who is served abroad with a citation to which he does not appear.

Semble: if a foreigner appears to a citation otherwise than under protest, he submits himself to the jurisdiction of the ct.—*BOND v. BOND* (1860), 2 Sw. & Tr. 93; 29 L. J. P. M. & A. 143; 2 L. T. 543; 8 W. R. 630; 164 E. R. 927.

Annotations:—*Consd.* *Le Sueur v. Le Sueur* (1876), 1 P. D. 139. *Refd.* *Wilson v. Wilson* (1871), L. R. 2 P. & D. 341.

875. — — — — Marriage invalid by foreign law.—Petitioner, an Englishwoman, married in England a domiciled Mexican. By Mexican law a marriage is not valid in Mexico unless it is registered by one or other of the parties to it. The marriage of petitioner & resp. had not been registered in Mexico. Petitioner, by registering the marriage in Mexico, could have obtained a judicial separation, a decree of divorce not being granted in that country. Petitioner having brought a suit for divorce in this country on the ground of resp.'s adultery, cruelty & desertion:—*Held*: as resp.'s domicil was Mexican, the ct. had no jurisdiction to entertain the suit.—*RAMOS v. RAMOS* (1911), 27 T. L. R. 515.

876. — — — — Petitioner registered alien enemy.—An alien enemy, registered as such & who is domiciled in England, has a right to bring a petition for the dissolution of his marriage solemnised in England.—*KRAUSS (OTHERWISE DES SALLES D'EPINOIX) v. KRAUSS (OTHERWISE DES SALLES D'EPINOIX & ORBACH)* (1919), 35 T. L. R. 637; 63 Sol. Jo. 760.

877. — — — — Petitioner wife of repatriated alien enemy.—*THIELE v. THIELE* (1920), 150 L. T. Jo. 387.

PART X. SECT. 1. SUB-SECT. 2.—
A. (a).

u. Whether depending on domicil at time of suit.—The validity of a divorce depends upon the domicil of the parties at the time proceedings were commenced.—*GUEST v. GUEST* (1883), 3 O. R. 344, 570.—CAN.

w. —.—Jurisdiction will not be exercised in divorce unless the parties are domiciled within the jurisdiction at the commencement of the proceedings, & such domicil must be clearly established.—*MCCORMACK*

v. MCCORMACK (1920), 2 W. W. R. 714; 15 Alta. L. R. 490.—CAN.

y. —.—*BROWNE v. BROWNE* (1917), 36 N. Z. L. R. 425.—N.Z.

z. —.—*LEVETT v. LEVETT* (1816), 19 Fac. Coll. 139, 245.—SCOT.

a. —.—*DOMBROWITZKI v. DOMBROWITZKI* (1895), 22 R. (Ct. of Sess.) 906; 32 Sc. L. R. 681; 3 S. L. T. 84.—SCOT.

b. —.—*MURPHY v. MURPHY*, [1902] T. S. 179.—S. AF.

874 l. — Whether place of marriage

material—Parties married in country where divorce sought.—The parties, whose domicil was in T., were married in T.; the husband changed his domicil, & the wife sought a divorce in T.:—*Held*: the T. ct. had no jurisdiction.—*PACKER v. PACKER* (1907), 3 Tas. L. R. 5.—AUS.

874 ii. — — — —.—*KALENCZUK v. KALENCZUK & JURKEWICH* (1920), 2 W. W. R. 415; 52 D. L. R. 406; 13 Sask. L. R. 262.—CAN.

874 iii. — — — —.—*HOLDEN v. HOLDEN* (1914), 33 N. Z. L. R. 1032.—N.Z.

Sect. 1.—Jurisdiction of court: Sub-sect. 2, A. (a) & (b).]

878. — Indian marriage.]

Divorce cts. in India have no jurisdiction to decree dissolution of a marriage between parties not domiciled in India, though the marriage was celebrated & the parties were resident in India, & the acts of adultery relied on were committed within the jurisdiction of the Indian cts.—*KEYES v. KEYES & GRAY*, [1921] P. 204; 90 L. J. P. 242; 124 L. T. 797; 37 T. L. R. 499; 65 Sol. Jo. 435.

See, now, Indian Divorces (Validity) Act, 1921 (c. 18).

879. — Parties not married in country where divorce sought.]—A Scotsman, in the army, was married at Gibraltar to an English woman. While retired on half-pay he resided with his family at Durham, for the education of his children, & was subsequently again employed in the military service, but still kept his family at Durham, where it remained for about ten years. Misunderstandings having arisen, an English deed of separation between the husband & wife was executed, by which he permitted her to choose her own residence, & she resided in England. The husband brought two actions of divorce against her in the Scottish cts., on the ground of adultery; one laying the acts of adultery in England, the other laying them in Scotland:—*Qu.*: whether the Scottish ct., in these circumstances, had jurisdiction to dissolve the marriage.—*TOVEY v. LINDSAY* (1) (1813), 1 Dow. 117; 3 E. R. 643, H. L.

Annotations:—*Consd.* *Warrender v. Warrender* (1834), 9 Bl. N. S. 89. *Expld.* *Shaw v. Gould* (1868), L. R. 3 H. L. 55. *Consd.* *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Harvey v. Farnie* (1882), 8 App. Cas. 43. *Refd.* *McCarthy v. Decaix* (1831), 2 Russ. & M. 614; *Dolphin v. Robins* (1859), 7 H. L. Cas. 390. *Mentd.* *Re Daly's Settlement* (1858), 25 Beav. 456.

880. — WARRENDER v. WARRENDER, No. 218, ante.

881. — (1) A Scotsman domiciled in Scotland, married in England an English lady, & after the marriage they went to Scotland to reside there. During the marriage he committed in Scotland acts of adultery, after which the wife separated from him, & came to live in England. Thereupon the husband instituted a suit in the Arches Ct. of Canterbury for restitution of conjugal rights. To this suit the wife pleaded his acts of adultery in Scotland in the form of a responsive allegation, & prayed a sentence of separation *a mensâ et thoro*, which was pronounced. The wife thereafter commenced an action in Scotland to obtain a divorce *a vinculo*, the cts. there having the power to dissolve a Scottish marriage on the ground of adultery. To this action, which was founded on the same acts of adultery, as the responsive allegation, the husband pleaded in bar the sentence of separation obtained in England:—*Held*: this was a bad plea, because the wife's proceeding in England, & her action for divorce *a vinculo* in Scotland, were collateral remedies, having distinct objects and totally different effects.

(2) *Semle*: where a domiciled Scotsman marries in England an English lady with a view to return to Scotland to reside there immediately

879 i. Parties not married in country where divorce sought.]—*PROTOPSALTES v. PROTOPSALTES*, [1918] Q. S. R. 270.—AUS.

879 ii. — CUTLER v. CUTLER (1914), 20 B. C. R. 34.—CAN.

879 iii. — A. was born & educated in S. & was afterwards appointed a surgeon's mate in the Navy. He married in E. & never afterwards returned to S. In an action

of divorce by A's wife:—*Held*: the S. cts. had no jurisdiction.—*MORCOMBE v. M'LELLAND* (1801), 12 Fac. Coll. 545.—SCOT.

c. — Adultery committed in country where divorce sought.]—An Englishwoman, who had been married to an Englishman in E., eloped with a student prosecuting his studies in Edinburgh, & resided with him there, in lodgings, for several months. The

after, the marriage may be treated either as an English or a Scottish marriage.

(3) *Qu.*: whether a sentence of separation *a mensâ et thoro* in England has the effect of severing the domicile of the wife from that of the husband, & giving her a domicile of her own.—*GEILS v. GEILS* (OR *DICKENSON*) (1852), 20 L. T. O. S. 145; 17 Jur. 423; 1 W. R. 537; 1 Macq. 255, H. L.

Annotations:—*As to* (2) *Consd.* *Harvey v. Farnie* (1880), 5 P. D. 153. *Refd.* *Harvey v. Farnie* (1882), 8 App. Cas. 43.

882. — Where the domicile of the parties is English the jurisdiction of the ct. is founded, though the marriage & adultery may have taken place abroad.—*RATCLIFF v. RATCLIFF* (1859), 1 Sw. & Tr. 467; 29 L. J. P. M. & A. 171; 33 L. T. O. S. 262; 5 Jur. N. S. 714; 7 W. R. 726; 164 E. R. 816.

Annotations:—*Refd.* *Niboyet v. Niboyet* (1878), 4 P. D. 1. *Mentd.* *Medley v. Medley* (1882), 51 L. J. P. 74; *Regan v. Regan* (1892), 67 L. T. 720.

883. — PITT v. PITT, No. 142, ante.

884. — A Scotsman married a Scotswoman in Scotland, & cohabited with her in Scotland until he discovered her adultery. He thereupon, in 1866, broke up his home & removed to England. In 1871 he instituted a suit in England for the dissolution of his marriage on the ground of the adultery committed in Scotland previous to the separation. He left Scotland with the intention of taking up his permanent abode in England:—*Held*: he had abandoned his domicile of origin & acquired an English domicile, & the ct. had jurisdiction to dissolve the marriage.—*WILSON v. WILSON* (1872), L. R. 2 P. & D. 435; 41 L. J. P. & M. 74; 27 L. T. 351; 20 W. R. 891.

Annotations:—*Consd.* *Le Sueur v. Le Sueur* (1876), 1 P. D. 139; *Niboyet v. Niboyet* (1878), 3 P. D. 52; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Bater v. Bater*, [1906] P. 209; *Ogden v. Ogden*, [1908] P. 46. *Refd.* *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Armstrong v. Armstrong*, [1898] P. 178; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Bulst*, [1910] P. 271; *De Montalgu v. De Montalgu*, [1913] P. 154; *Keyes v. Keyes & Gray*, [1921] P. 204.

885. — There is no recognised rule of general law to the effect that a matrimonial domicile gives jurisdiction to dissolve a marriage. According to international law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage.

Neither the Roman-Dutch law nor the *jus gentium* gives the cts. of Ceylon jurisdiction to dissolve a marriage contracted in England by British subjects who though resident within the *forum* retain their English domicile.—*LE MESURIER v. LE MESURIER*, [1895] A. C. 517; 64 L. J. P. C. 97; 72 L. T. 873; 11 T. L. R. 481; 11 R. 527, P. C.

Annotations:—*Consd.* *Bater v. Bater*, [1906] P. 209; *R. v. Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwaruddin*, [1917] 1 K. B. 634; *Keyes v. Keyes & Gray*, [1921] P. 204; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146. *Refd.* *Christian v. Christian* (1897), 78 L. T. 86; *Sinclair's Divorce Bill*, [1897] A. C. 469; *Armstrong v. Armstrong*, [1898] P. 178; *Lowenfeld v. Lowenfeld, Corbett Intervening* (1903), 72 L. J. P. 57; *Re Stirling, Stirling v. Stirling*, [1908] 2 Ch. 344; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Bulst*, [1910] P. 271; *Anghinelli v. Anghinelli*, [1918] P. 247; *Casdagli v. Casdagli*, [1918] P. 89. *Mentd.* *Dicks v. Dicks*,

husband came to Edinburgh, & after a residence there, in furnished lodgings, for six weeks, raised a summons of divorce, which was served upon the wife personally. Both parties left Scotland *pendente processu*:—*Held*: the ct. had jurisdiction to pronounce decree of divorce; the *forum delicti* is generally a just & often a necessary foundation of jurisdiction.—*CHRISTIAN v. CHRISTIAN* (1851), 13 Dunl. (Ot. of Sess.) 1149; 23 Sc. Jur. 541.—SCOT.

[1899] P. 275; *Davidsson v. Hill* (1901), 70 L. J. K. B. 788; *Roberts v. Brennan* (1902), 71 L. J. P. 74; *Von Eckhardstein v. Von Eckhardstein* (1907), 23 T. L. R. 539.

886. ———.]—*CASDAGLI v. CASDAGLI*, No. 115, *ante*.

887. ——— Whether place of matrimonial offence material—Adultery not committed in country where divorce sought.]—*RATCLIFF v. RATCLIFF*, No. 882, *ante*.

888. ———.]—*WILSON v. WILSON*, No. 884, *ante*.

889. ——— Or on allegiance of parties.]—A natural-born English subject does not by the acquisition of a foreign domicile, shake off his allegiance to the Crown of England, but continues liable to be affected by the laws of England. Two natural-born English subjects were married in England. The husband afterwards went to America, became domiciled there, & there committed bigamy & adultery. The wife petitioned for a dissolution of the marriage. The citation & a copy of the petition were personally served on the husband in America, but he did not appear:—*Held*: notwithstanding the husband's change of domicile, the ct. had jurisdiction to dissolve the marriage.—*DECK v. DECK* (1860), 2 Sw. & Tr. 90; 29 L. J. P. M. & A. 129; 2 L. T. 542; 8 W. R. 666; 164 E. R. 926.

Annotations:—*Folld. Bond v. Bond* (1860), 2 Sw. & Tr. 93. *Expld. Wilson v. Wilson* (1871), L. R. 2 P. & D. 341. *Consd. Le Sueur v. Le Sueur* (1876), 1 P. D. 139. *Dbtd. Niboyet v. Niboyet* (1878), 4 P. D. 1. I respectfully differ from the decision in *Deck v. Deck* (BRETT, L.J.). *Consd. Rayment v. Rayment & Stuart, Chapman v. Chapman & Bulst.* [1910] P. 271. *Refd. Cohen v. Cohen* (1876), 24 W. R. 283.

890. ——— Or on submission of parties to jurisdiction.]—*BOND v. BOND*, No. 874, *ante*.

891. ———.]—Where a husband was domiciled in Ireland, & had only a temporary abode in England at the date of filing the petition, & the wife appeared & submitted to the jurisdiction of the ct., the ct. dissolved their marriage, which had been celebrated in Ireland, on the ground of adultery committed by the wife in England & on the Continent.—*CALLWELL v. CALLWELL* (1860), 3 Sw. & Tr. 259; 164 E. R. 1274.

Annotations:—*Consd. Le Sueur v. Le Sueur* (1876), 1 P. D. 139. *Expld. Niboyet v. Niboyet* (1878), 4 P. D. 1. *Mentd. Blandford v. Blandford* (1892), 67 L. T. 392.

892. ———.]—A wife filed a petition for dissolution of marriage, which was served on the husband, who appeared absolutely, & obtained further time to answer. He filed an answer, objecting to the jurisdiction of the ct., by reason of his want of an English domicile, & the incapacity of petitioner to institute a suit in her own name by reason of her infancy. On motion to take this answer off the file:—*Held*: it was too late for resp. to raise such objection.—*ZYCKLINSKI v. ZYCKLINSKI* (1862), 2 Sw. & Tr. 420; 31 L. J. P. M. & A. 37; 5 L. T. 690; 164 E. R. 1059.

Annotation:—*Expld. Wilson v. Wilson* (1871), L. R. 2 P. & D. 341.

887 i. ——— Adultery not committed in country where divorce sought.]—Pursuer in an action of divorce in S. married defender in A. The parties settled in S. & became permanently domiciled there. In S. they entered into a voluntary contract of separation, after which defender went to reside in I., where she committed adultery:—*Held*: the S. ct. had jurisdiction notwithstanding that the adultery was committed in I.—*TULLOH v. TULLOH* (1861), 23 Dunl. (Ct. of Sess.) 639; 33 So. Jur. 314.—SCOT.

890 i. ——— Or on submission of parties to jurisdiction.]—An entry of appearance or submission to the jurisdiction by a respondent cannot

confer on the ots. jurisdiction, not otherwise possessed by it, to dissolve a marriage.—*FORSTER v. FORSTER*, [1907] V. L. R. 159.—AUS.

890 ii. ———.]—Where a husband is not & never has been domiciled in N.Z. the ct. has no jurisdiction to grant a divorce against him at the suit of his wife, even if he appears & consents to the exercise of the jurisdiction.—*WALKER v. WALKER* (1909), 28 N. Z. L. R. 917.—N.Z.

890 iii. ———.]—Two parties, English by domicile, contracted marriage in England; the husband, some years afterwards, came alone to S., & after a residence of 40 days, raised an action of divorce against his wife for

893. Or on residence.]—The parties were married in Ireland, in 1847. In 1872 resp. came over to England with the alleged intention of purchasing a medical practice, but almost immediately returned to Ireland. The petition & citation were served upon him while lodging in London:—*Held*: he had not acquired a residence in the country, & the jurisdiction of the ct. did not attach.—*BURTON v. BURTON* (1873), 21 W. R. 648.

894. ———.]—An Englishwoman married a Frenchman at Gibraltar. The parties afterwards resided in England for some years & then the wife filed a petition for dissolution of marriage for offences committed by her husband in England. Both parties were resident in England at the commencement of the suit, but the husband had never abandoned his domicile of origin which was French:—*Held*: as the parties were resident in England at the commencement of the suit & the offences had been committed in England there was jurisdiction to entertain the petition.—*NIBOYET v. NIBOYET* (1878), 4 P. D. 1; 48 L. J. P. 1; 39 L. T. 486; 43 J. P. 140; 27 W. R. 203, C. A.

Annotations:—*Expld. & Distd. Harvey v. Farnie* (1882), 8 App. Cas. 43. *Consd. Forsyth v. Forsyth, Eccles & Foster* (1890), 63 L. T. 263; *Hurley v. Hurley & Menzies* (1892), 67 L. T. 384. *Dbtd. Le Mesurier v. Le Mesurier*, [1895] A. C. 517. There appears to be an obvious fallacy in the reasoning of the learned judges of the majority in *Niboyet v. Niboyet*. It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe [Matrimonial Causes Act, 1857 (c. 85)], s. 27 as giving the English ct. divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Ct. (LORD WATSON); *Armstrong v. Armstrong*, [1898] P. 178. *Niboyet v. Niboyet* is opposed to the general current of the cases in this ct. & has been practically overruled by the decision of the P. O. in *Le Mesurier v. Le Mesurier* (No 885, *ante*) (GORELL BARNES, J.); *Roberts v. Brennan*, [1902] P. 143. *Consd. Anghinelli v. Anghinelli*, [1918] P. 247. *Dbtd. Keyes v. Keyes & Gray*, [1921] P. 204. *Refd. Ingham (falsely called Sachs) v. Sachs* (1886), 56 L. T. 920; *T. v. T.* (1888), 57 L. J. P. 40; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Ogden v. Ogden*, [1908] P. 46; *Lord Advocate v. Jaffroy*, [1921] 1 A. C. 146. *Mentd. Turner v. Thompson* (1888), 13 P. D. 37; *Linke (otherwise Van Aerde) v. Van Aerde* (1894), 10 T. L. R. 426; *Loyenfeld v. Lowenfeld, Corbett Intervening* (1903), 19 T. L. R. 443; *R. v. Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwaruddin*, [1917] 1 K. B. 634.

Compare Nos. 895, 896, post.

Nature of domicile required.]—See Sub-sect. 2, A., (b), *post*.

Acquisition of domicile.]—See Part II., *ante*.

Recognition of jurisdiction of foreign courts.]—See Sect. 2, sub-sect. 1, *post*.

(b) Nature of Domicil required.

895. General rules—Whether matrimonial domicile different from ordinary domicile.]—The domicile of the husband is that of the wife, & she cannot acquire a separate domicile, even when he has been guilty of such misconduct as would

adultery committed in France & Belgium; the action was duly intimated to the wife, who lodged defences on the merits, without objecting to the jurisdiction, & closed a record, & had appearance made for her at all the diets of proof:—*Held*: defender was not amenable to the jurisdiction of S. cts.—*RINGER v. CHURCHILL* (1840), 2 Dunl. (Ct. of Sess.) 307.—SCOT.

PART X. SECT. 1, SUB-SECT. 2.—A. (b).

d. General rule — Whether residence sufficient.]—A deserted wife who resorts to Victoria where her husband has resided, with the object of obtaining a divorce, is debarred by Marriage Act,

Sect. 1.—*Jurisdiction of court: Sub-sect. 2, A. (b),*

furnish her with an answer to a suit for restitution of conjugal rights.

A. was born in Ireland of Irish parents, & while a minor received a military education in England, obtained a commission, & was afterwards stationed at Edinburgh. When there he married, in Scotland, petitioner, who was born in England. The parties then went to Ireland, were remarried there according to the rites of the Roman Catholic Church, returned to Scotland, cohabited there, at Hull, & afterwards at Bordeaux. In 1858 A. deserted petitioner at Bordeaux & returned to Edinburgh, where he remained with his company, & refused again to live or to cohabit with her:—*Held*: (1) A. was not domiciled in England for the purpose of founding jurisdiction; (2) petitioner could not, as a married woman, acquire a domicile recognised by the law other than that of her husband.—*YELVERTON v. YELVERTON* (1859), 1 Sw. & Tr. 574; Sea. & Sm. 49; 29 L. J. P. & M. 34; 1 L. T. 194; 6 Jur. N. S. 24; 8 W. R. 134; 164 E. R. 866.

Annotations:—As to (1) *Consd. Re Mitchell, Ex p. Cunningham* (1884), 13 Q. B. D. 418. *Refd. Burton v. Burton* (1873), 21 W. R. 648; *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517. As to (2) *Refd. Le Sueur v. Le Sueur* (1876), 1 P. D. 139; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146. *Generally, Mentd. Zychlinski v. Zychlinski* (1861), 31 L. J. P. M. & A. 37; *Firebrace v. Firebrace* (1878), 4 P. D. 63; *Dicks v. Dicks*, [1899] P. 275; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist*, [1910] P. 271; *De Gasquet James v. Mecklenburg-Schwerin*, [1914] P. 53; *Perrin v. Perrin, Powell v. Powell* (1914), 83 L. J. P. 69.

896. ———.]—The ct. has jurisdiction to dissolve a marriage solemnised between foreigners in a foreign country, on the ground of adultery of the wife committed abroad, if the husband at the time the adultery is committed, & at the time the petition is presented, is *bonâ fide* & permanently resident in England; although, for the purpose of succession, he may not have acquired an English domicile.—*BRODIE v. BRODIE* (1861), 2 Sw. & Tr. 259; 30 L. J. P. M. & A. 185; 4 L. T. 307; 9 W. R. 815; 164 E. R. 995.

1890, s. 74 (No. 1166), from obtaining relief.—*LONG v. LONG* (1892), 18 V. L. R. 792.—AUS.

e. ———.]—*If resorted to for divorce purposes.*—*BROOK v. BROOK* (1892), 13 N. S. W. L. R. 9; 9 N. S. W. W. N. 55.—AUS.

f. ———.]—*LEDWELL v. LEDWELL* (1900), 26 V. L. R. 595.—AUS.

899 i. *Exceptions—Whether separate matrimonial domicile acquired by wife—On judicial separation.*—In 1883, petitioner, a domiciled Victorian, was married in V. to resp. a domiciled Tasmanian, & thereafter cohabited with him in T. In 1892 petitioner was granted a decree of judicial separation by the T. Ct. A term of the decree was that she should “be at liberty to reside elsewhere than in T. until further order of the ct.” In 1893 she returned to V. & resided there continuously until 1902, when she petitioned the V. ct. for a dissolution of her marriage:—*Held*: (1) ct. had no jurisdiction to entertain the petition; (2) the terms of the decree of judicial separation themselves precluded petitioner from acquiring a domicile in V.—*LORD v. LORD* (1902), 28 V. L. R. 566.—AUS.

899 ii. ———.]—To an action for divorce instituted by H., who was domiciled in C., W. pleaded in abatement that she had been judicially separated from H., that since the decree she had resided in T., & had acquired a domicile separate from her husband:—*Held*: the C. ct. had juris-

diction & that an exception to the plea in abatement should be allowed.—*STEYTLER v. STEYTLER* (1913), 4 C. P. D. 725.—S. AF.

902 i. ———.]—*On separation.*—Petitioner's domicile of origin was in N.Z. She lived there until her marriage with A. there, & continued to live there until a deed of separation was executed. Shortly afterwards A. went abroad taking with him the only issue of the marriage & never returned to N.Z. Fifteen years after the deed of separation petitioner instituted proceedings:—*Held*: whether or no A. had renounced his N.Z. domicile, petitioner's domicile was in N.Z.—*RYLEY v. RYLEY*, 4 J. R. N. S. 50.—N.Z.

903 i. ———.]—*On desertion by husband.*—Petitioner & resp. had been domiciled in V. Resp., the husband, subsequently went to N.S.W. for the purpose of obtaining employment, & became domiciled there. Some months afterwards, while resp. was in N.S.W., he deserted the petitioner:—*Held*: a V. ct. had no jurisdiction to entertain the petition.—*ROSS v. ROSS* (1896), 22 V. L. R. 376.—AUS.

903 ii. ———.]—*MARTIN v. MARTIN* (1898), 17 N. Z. L. R. 126.—N.Z.

903 iii. ———.]—P., who married & lived with his wife in N. Zealand, acquired a domicile there. He left N.Z. with the consent of his wife & went to settle in U.S.A. He never returned to N.Z. He communicated

Annotations:—*Consd. Manning v. Manning* (1871), L. R. 2 P. & D. 223. *Expld. Wilson v. Wilson* (1871), L. R. 2 P. & D. 341. *Consd. Niboyet v. Niboyet* (1878), 4 P. D. 1; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517. *Refd. Le Sueur v. Le Sueur* (1876), 1 P. D. 139; *Armstrong v. Armstrong* (1898), 78 L. T. 689.

897. ———.]—*LE MESURIER v. LE MESURIER*, No. 885, *ante*.

Compare No. 894, ante.

898. ———.]—*LORD ADVOCATE v. JAFFREY*, No. 221, *ante*.

———]—*Must be domicile of husband.*—*See Nos. 218, 874, 875, 893, ante.*

899. *Exceptions—Whether separate matrimonial domicile acquired by wife—On judicial separation.*—*DOLPHIN v. ROBINS*, No. 220, *ante*.

900. ———.]—*On such misconduct by husband as would enable wife to resist suit for restitution of conjugal rights.*—*YELVERTON v. YELVERTON*, No. 895, *ante*.

901. ———.]—*PITT v. PITT*, No. 142, *ante*.

902. ———.]—*On separation on account of husband's adultery & cruelty.*—An English lady consented to marry the son of a Neapolitan nobleman, on condition of their having, after marriage, a residence in England, & residing there six months, at least, in each year. The marriage was celebrated in 1854, in England. The marriage settlements contained a proviso that they should be construed according to the laws of England. After the marriage a London residence was taken by the parties, which they occupied for six months in each year, with two or three exceptions, living for the remainder of the year in the palace of the husband's father, at Naples, or at other places on the Continent. In 1872, the lady separated from her husband in consequence of his cruelty & adultery, & she continued up to the hearing to reside in their London residence. In 1873 the husband's father died, when he succeeded to his title & estates, & since then had resided sometimes in Naples, but principally at other places on the Continent. The petition & citation were served on the husband at Paris, & he had entered no appearance:—*Held*: the ct. had jurisdiction to dissolve the marriage.—*SANTO TEODORO v. SANTO*

with his wife for 2 years & then ceased so to do, & she never heard of him again. She remained in N.Z., & filed a petition claiming a dissolution of her marriage upon the ground of desertion:—*Held*: (1) P. retained his N.Z. domicile up to the time he ceased to communicate with his wife; (2) petitioner, notwithstanding that by his desertion P. had abandoned his N.Z. domicile, retained a domicile in N.Z. for the purpose of bringing a suit for a divorce.—*POINGDESTRE v. POINGDESTRE* (1909), 28 N. Z. L. R. 604.—N.Z.

903 iv. ———.]—A deserted wife whose husband's domicile is not in N.Z. cannot, except where she retains her N.Z. domicile under Divorce Act, 1908, acquire a N.Z. domicile, & a N.Z. ct. has in such case no jurisdiction to entertain her suit for dissolution of marriage.—*CABLES v. CABLES* (1912), 32 N. Z. L. R. 178.—N.Z.

903 v. ———.]—*On desertion by wife.*—A husband, whose domicile of origin was in V., became domiciled & was married in Q. He was there deserted by his wife. Afterwards he returned to V., & reacquired his domicile of origin. He petitioned in V. for the dissolution of his marriage, on the ground of desertion. The wife had never been in V.:—*Held*: there was jurisdiction to grant a divorce, inasmuch as the domicile of the wife was, in the circumstances, that of the husband.—*BOYD v. BOYD*, [1913] V. L. R. 282.—AUS.

TEODORO (1876), 5 P. D. 79; 49 L. J. P. 20; 42 L. T. 330

903. ——— On desertion by husband.]—*LE SUEUR v. LE SUEUR*, No. 223, *ante*.

904. ———.]—(1) Two domiciled English subjects married in England, & subsequently the husband went to reside in the United States. After a year's residence there he presented a petition for & obtained a divorce on the ground of his wife's desertion, & married again. The wife received no notice of the petition:—*Held*: his domicile at the time of the divorce was English, & consequently the American divorce was invalid.

(2) *Qu.*: whether the domicile of the wife follows the domicile of the husband so as to compel her to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile.—*BRIGGS v. BRIGGS* (1880), 5 P. D. 163; 49 L. J. P. 38; 42 L. T. 662; 28 W. R. 702.

Annotation:—*As to* (1) *Distd. Ingham* (falsely called *Sachs*) *v. Sachs* (1886), 56 L. T. 920.

905. ——— On annulment of marriage by court of husband's domicile—Wife before marriage having different domicile from that of husband.]—A woman domiciled in this country married in England a man domiciled in Greece. He subsequently obtained a decree of nullity in the cts. of his domicile & married again. The first wife petitioned for a dissolution of marriage on the ground of his desertion & adultery:—*Held*: she was justified by the conduct of her husband in invoking the jurisdiction of the ct. in England, inasmuch as she had reverted to her domicile of origin.—*STATHATOS v. STATHATOS*, [1913] P. 46; 82 L. J. P. 34; 107 L. T. 592; 29 T. L. R. 54; 57 Sol. Jo. 114.

Annotation:—*Consd. De Montaignu v. De Montaignu*, [1913] P. 154.

906. ———.]—The rule or theory of law that the domicile of the husband governs the jurisdiction in suits for dissolution of marriage, as distinguished from other matrimonial suits, may be departed from in proper circumstances.

Where a husband or the parents of a husband domiciled abroad has or have obtained a decree of nullity in the ct. of his foreign domicile, & the wife, whose domicile was in England, is thus debarred from obtaining relief in the foreign ct., she may be treated as having a domicile of her own sufficient to give the English ct. jurisdiction to entertain a suit by her for dissolution of the marriage.—*DE MONTAIGU v. DE MONTAIGU*, [1913] P. 154; 82 L. J. P. 125; 109 L. T. 79; 29 T. L. R. 654; 57 Sol. Jo. 703.

Annotation:—*Consd. De Gasquet James v. Mecklenburg-Schwerin*, [1914] P. 53.

Acquisition of domicile.—See Part II., *ante*.

B. As regards Co-respondent.

907. General rule—Does not depend on domicile.—Whatever it is that determines the jurisdiction of this ct. with regard to co-resps. that jurisdiction does not depend upon the domicile of the co-resp. nor is it to be determined by the question whether the co-resp. is or is not a British subject.

The conclusions at which I have arrived after some perplexity & difficulty are as follows:—(1) the jurisdiction of the ct. over the co-resp. both as to damages & costs, in a suit properly instituted here, does not depend on domicile, allegiance or

residence; (2) if a foreign co-resp. is served in England, this ct. has for that reason jurisdiction over him; (3) he can be served abroad, whatever his nationality, & if he is served abroad, the statute authorising such service gives to this ct. jurisdiction over him; (4) in proper cases this ct. may exercise discretionary power, & dismiss, or dispense with, a co-resp. domiciled abroad, but he is not entitled to demand as of right that he be dismissed from the suit (*EVANS, P.*).—*RAYMENT v. RAYMENT & STUART, CHAPMAN v. CHAPMAN & BUIST*, [1910] P. 271; 79 L. J. P. 115; 103 L. T. 430; 26 T. L. R. 634; 53 Sol. Jo. 721.

Annotations:—*As to* (3) *Apprvd. Rush v. Rush, Bailey & Pimenta*, [1920] P. 242. *Generally, Refd. Phillips v. Batho*, [1913] 3 K. B. 25.

908. When co-respondent not domiciled in country where divorce sought dismissed from suit—After appearance under protest.—Where, in a suit for dissolution of marriage, the alleged adulterer, who had been made a co-resp., appeared under protest & pleaded to the jurisdiction, the ct., on the application of petitioner, dismissed co-resp. from the suit on payment of his costs.—*GAYNOR v. GAYNOR & DEGLIANTONI* (1862), 31 L. J. P. M. & A. 116.

Annotations:—*Refd. Grange v. Grange & Arendt* (1892), 61 L. J. P. 125; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist*, [1910] P. 271.

909. ———.]—Co-resp. in a divorce suit, a domiciled Dane, was served in Brussels with the petition & citation, which only alleged adultery at Brussels. He entered an appearance under protest, & then applied to be dismissed from the suit on the ground that he was not subject to the jurisdiction of the ct.:—*Held*: he was entitled to be dismissed from the suit.—*FAIRFAX v. FAIRFAX & DE LA CRUZ* (1909), 99 L. T. 892; 25 T. L. R. 213.

Annotations:—*Refd. Walter v. Walter & Bergmann* (1909), 25 T. L. R. 473; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist*, [1910] P. 271.

910. ———.]—Co-resp. in a divorce suit, a domiciled Austrian was served with the citation & petition in Paris. He entered an appearance under protest, & then applied to be dismissed from the suit on the ground that he was not subject to the jurisdiction of the ct.:—*Held*: he was entitled to be dismissed from the suit.—*WALTER v. WALTER & BERGMANN* (1909), 25 T. L. R. 473.

Annotation:—*Refd. Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist*, [1910] P. 271.

911. After unconditional appearance.—Co-resp., after entering appearance unconditionally, filed an answer alleging that his domicile was German; that the adultery charged, if committed at all, was committed in Germany, & that the citation had been served on him in the United States, & claiming to be dismissed from the suit:—*Held*: co-resp. be dismissed from the suit.—*GRANGE v. GRANGE*, [1892] P. 245; 61 L. J. P. 125; 67 L. T. 360.

Annotations:—*Refd. Baker v. Baker, Baker v. Baker & Dwyer* (1908), 24 T. L. R. 493; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist*, [1910] P. 271.

912. ———.]—Where the ct. had no jurisdiction over co-resp., who was a domiciled foreigner, the ct. dismissed him from the suit, although the adultery was alleged to be committed in England.—*LEVY v. LEVY & DE ROMANCE*, [1908] P. 256; 77 L. J. P. 95; 99 L. T. 312; 24 T. L. R. 466; 52 Sol. Jo. 379.

Annotations:—*Consd. Dodd v. Dodd*, [1906] P. 189. *Refd.*

PART X. SECT. 1, SUB-SECT. 2.—B.

907 i. General rule—Does not depend on domicile—Tenant of shootings cited.—In an action of divorce against a wife, co-defender was designed as residing at Westminster; at the date of the

action he was tenant of shootings in Argyleshire. He was cited both edictally & by a copy of the summons being left for him at the shootings:—*Held*: a co-defender domiciled & resident in England was subject to the jurisdiction of the S. ct., being tenant

of shootings in Scotland, with a shooting lodge, pertinents, & garden, & of grazing ground adjoining thereto.—*FRASER v. FRASER & HIBBERT* (1870), 8 Macph. (Ct. of Sess.) 400; 42 So. Jur. 190.—SCOT.

Sect. 1.—Jurisdiction of court: Sub-sect. 2, B.; sub-3 & 4.]

Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist, [1910] P. 271.

913. ———.]—A wife presented a petition for restitution of conjugal rights, & the husband filed a cross-petition for divorce on the ground of his wife's alleged adultery with the co-resp. Co-resp. was a domiciled Irishman, & was served with the citation in Ireland, where it was alleged the adultery had been committed. Co-resp. now moved the ct. to be dismissed from the petition on the ground that the ct. had no jurisdiction over him:—*Held*: co-resp. must be dismissed from the suit.—*BAKER v. BAKER & DWYER, [1908] P. 257; 77 L. J. P. 96; 99 L. T. 313; 24 T. L. R. 493; 52 Sol. Jo. 413.*

Annotation:—Refd. Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist, [1910] P. 271.

914. When leave to proceed without citing co-respondent not domiciled in country where divorce sought granted—Necessity for notice of proceedings to co-respondent.]—When co-resp. named by petitioner in proceedings for divorce is domiciled & resident abroad, petitioner may be relieved from serving such co-resp. with the petition & citation, on the ground that he is a foreigner domiciled & resident out of the jurisdiction; but it is necessary that notice of the proceedings which have been instituted against him should be given to the co-resp.—*BOGER v. BOGER, [1908] P. 300; 77 L. J. P. 151; 99 L. T. 881; 24 T. L. R. 744; 52 Sol. Jo. 552.*
Annotation:—Refd. Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist, [1910] P. 271.

915. ———.]—Petitioner, a British subject domiciled in England, who charged his wife with adultery committed at Lisbon with two foreigners, applied by motion for leave to proceed without citing either of co-resps., on the grounds that they had left Portugal; that neither he nor resp. knew their addresses; & he had wholly failed to trace them. The petition contained no claim for damages or costs against either of co-resps. Resp. had not been served with notice of the motion, but at her own request had received copies of the affidavits to be used at the hearing of the motion:—*Held*: (1) Matrimonial Causes Act, 1857 (c. 85), ss. 27, 28, 33, showed that a foreign co-resp. domiciled abroad was not entitled as of right to claim to be dismissed from the suit, & in the absence of special grounds the petition ought to be served upon him; (2) the matter was one entirely within the discretion of the judge of the Probate & Divorce Div. & the Ct. of Appeal would not interfere with the exercise of that discretion unless it appeared that the judge had acted upon a wrong principle, or under some misapprehension, or without consideration.—*RUSH v. RUSH, BAILEY & PIMENTA, [1920] P. 242; 89 L. J. P. 129; 122 L. T. 792; 36 T. L. R. 302; 64 Sol. Jo. 323, C. A.*

Annotation:—Generally, Refd. Franklin v. Franklin & Minshall, [1921] P. 407.

Practice generally as regards co-respondents.]—
See HUSBAND & WIFE.

PART X. SECT. 1, SUB-SECT. 3.

917 i. Necessity for residence within jurisdiction at beginning of suit—Domicil immaterial.]—Petitioner left her husband in M. where the parties were domiciled, & came to B.C., bringing her child of the marriage. The husband followed and commenced proceedings in B.C. for the custody of the child. While there, the wife commenced proceedings for a judicial separation:—*Held*: the husband had established sufficient residence to give the ct. jurisdiction to entertain the suit.—*JAMIESON v. JAMIESON (1908),*

14 B. C. R. 59.—CAN.

917 ii. ———.]—There being a distinction between divorce & other remedies for matrimonial misconduct, the ct. has jurisdiction to hear a petition for judicial separation coupled with a claim for damages against co-resp. if the parties have been merely resident, even for a short time, within the territorial jurisdiction.—*HOY v. HOY (1906), 25 N. Z. L. R. 857.—N.Z.*

917 iii. ———.]—The ct. has no jurisdiction to dissolve a marriage where the husband is not domiciled in the Transvaal, but it may in such

SUB-SECT. 3.—JUDICIAL SEPARATION—DIVORCE A MENSÂ ET THORO.

916. Necessity for residence within jurisdiction at beginning of suit—Residence must be bonâ fide.]—In a husband's suit for judicial separation, the wife demurred to the jurisdiction of the ct., on the ground that her husband was a domiciled Irishman. The husband admitted that his domicile of origin was Irish, & that he had carried on business in Dublin up to one month preceding the filing of his petition, but he alleged that he had taken a shop in London where he carried on his business, & had taken a house in Bayswater where he resided, with no intention of returning to Ireland. It was, however, shown that he still carried on business in Dublin, & that the lease of his shop in London was determinable at six months' notice. There was also evidence that his usual place of residence continued to be in Dublin:—*Held*: petitioner had no *bonâ fide* residence in England sufficient to support the jurisdiction of the ct.—*MANNING v. MANNING (1871), L. R. 2 P. & D. 223; 40 L. J. P. & M. 18; 24 L. T. 196; 19 W. R. 479.*

Annotations:—Fold. Burton v. Burton (1873), 21 W. R. 648. Refd. Le Sueur v. Le Sueur (1870), 1 P. D. 139; Le Mesurier v. Le Mesurier, [1895] A. C. 517; Armytage v. Armytage, [1898] P. 178.

917. ——— Domicil immaterial—Place where acts necessitating protection committed immaterial.]—In a proceeding for divorce *a mensâ et thoro* on the ground of cruelty, where the parties resided within its jurisdiction at the commencement of the suit, an ecclesiastical ct. would have granted relief irrespective of their domicile, & it would have made no difference that the necessity for protection arose in consequence of cruelty committed outside its jurisdiction, where the apprehension of further acts of cruelty remained.

Petitioner for a judicial separation, married to resp. in Australia, had been, before her marriage, a domiciled Englishwoman. Her husband's domicile was in Australia where, after her marriage, she resided with him. Owing to cruelty committed by him while they were travelling in Italy she sought the protection of her parents in England, & established a home for herself & her children in this country. He followed her here & required her to return to him with the children, which she was afraid to do owing to her apprehension of a repetition of the cruelty. At the commencement of the suit both parties were living within the jurisdiction:—*Held*: the ct. exercising the power of the Ecclesiastical Ct. under Matrimonial Causes Act, 1857 (c. 85), s. 22, had jurisdiction to entertain the suit.—*ARMYTAGE v. ARMYTAGE, [1898] P. 178; 67 L. J. P. 90; 78 L. T. 689; 14 T. L. R. 480.*

Annotations:—Consd. Chetti v. Chetti, [1909] P. 67. Apprvd. Anghinelli v. Anghinelli, [1918] P. 247. Refd. Von Eckhardstein v. Von Eckhardstein (1907), 23 T. L. R. 539; Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist, [1910] P. 271; Riera v. Riera (1914), 112 L. T. 223; Lord Advocate v. Jaffrey, [1921] 1 A. C. 146.

918. ———.]—Petitioner for a judicial separation had been, before her marriage, a domi-

case grant a decree of judicial separation.—*MURPHY v. MURPHY, [1902] T. S. 179.—S. A.F.*

917 iv. ———.]—*STEWART v. STEWART (1919), 10 C. P. D. 225.—S. A.F.*

domicil.]—In a suit for a divorce *a mensâ et thoro*, in order to give the ct. jurisdiction, it must be shown either that resp.'s domicile was Irish when the suit was instituted, or that he had a sufficient residence in Ireland to give the ct. jurisdiction to grant such relief.—*SPROULE v. HOPKINS, [1903] 2 I. R. 133.—IR.*

ciled Englishwoman. Her husband's domicile was alleged to be Italian. He was engaged as a traveller for a London firm, & his time was principally occupied in travelling abroad on the business of the firm. When not so travelling he lived with petitioner in London. At the commencement of the suit both parties were resident within the jurisdiction:—*Held*: the Divorce Div., exercising the power of the Ecclesiastical Ct. under Matrimonial Causes Act, 1857 (c. 86), s. 22, had jurisdiction to entertain the suit.

Semble: a decree for judicial separation does not affect the status of the parties.—*ANGHINELLI v. ANGHINELLI*, [1918] P. 247; 87 L. J. P. 175; 119 L. T. 227; 34 T. L. R. 438; 62 Sol. Jo. 548, C. A.

919. Necessity for matrimonial home in country where decree sought when matrimonial offence committed—Parties not domiciled in country where decree sought.—*E. v. E.* (1907), 23 T. L. R. 364.

Annotations:—*Consd.* *Von Eckhardstein v. Von Eckhardstein* (1907), 23 T. L. R. 539. *Refd.* *Walker v. Walker* (1912), 107 L. T. 655.

920. ———.]—A wife brought a suit in this country against her husband for a judicial separation upon the ground of her husband's cruelty & adultery. The domicile of the parties was German, but their matrimonial residence was in England. The husband subsequently took proceedings in Germany for dissolution of marriage upon the ground of wifely disobedience on her part in refusing to dismiss her medical attendant; & applied to stay the suit in this country pending the hearing of the German suit for divorce:—*Held*: the ct. had jurisdiction to entertain the suit for judicial separation, & no reason had been shown for a stay.—*VON ECKHARDSTEIN (BARONESS) v. VON ECKHARDSTEIN (BARON)* (1907), 23 T. L. R. 593, C. A.

Law & practice as to judicial separation generally.—*See* HUSBAND & WIFE.

SUB-SECT. 4.—RESTITUTION OF CONJUGAL RIGHTS.

921. Necessity for residence within jurisdiction at beginning of suit—Domicil immaterial.—*FIREBRACE v. FIREBRACE*, No. 104, *ante*.

922. ——— **Defence of mutual vows of chastity—Inquiry as to effect of vows by lex domicilii at time of separation.**—American subjects, born & domiciled in the State of Pennsylvania, contracted a marriage in that state, in the year 1831, being members of the Protestant Episcopal Church in America. Afterwards, the husband was appointed rector of a church in the state of Mississippi, where

he resided with his wife till 1835. At that time the wife became a convert to the Roman Catholic faith. In 1836, both parties went to Rome, where they abjured the Protestant faith, & were formally admitted members of the Roman Catholic Church. In 1838, they returned to America, & resided in the state of Louisiana. In 1843, they again went to Rome, & upon the rescript & allowance of the Pope, on their joint petition, the husband & wife, with his concurrence took the vows of perpetual chastity & religious professions, the husband ultimately taking orders, & the wife entered a religious house as a nun, taking the vows of poverty & obedience, whereupon they separated & lived apart. In 1846, they came to England; the husband became private chaplain in a Catholic family, & the wife the Superioress of a religious community. In 1848, the husband recanted the Roman Catholic faith, & again became a Protestant, when he applied to his wife to return to matrimonial cohabitation, which she refused; thereupon he instituted a suit for restitution of conjugal rights, to which the wife pleaded, as a bar, that the rescript of the Pope, & the acts of the parties at Rome, had the force & effect of a judicial sentence of separation, *a mensâ et thoro*. The Arches Ct. rejected the allegation, on the ground, that the facts pleaded would not, even if proved, constitute a bar to the husband's right to a sentence for restoration of conjugal rights. The wife appealed against this rejection:—*Held*: leave must be given to the wife to reform the allegation by pleading & setting forth, the law of Pennsylvania as applicable to the circumstances pleaded & set forth in case same had been brought to adjudication there, & also the domicile of the husband at the time of the transactions pleaded in the allegation to have taken place at Rome.—*CONNELLY v. CONNELLY* (1851), 7 Moo. P. C. C. 438; 13 E. R. 949, P. C.

Annotation:—*Refd.* *Armstrong v. Armstrong*, [1898] P. 178.

923. **No matrimonial residence in country where decree sought.**—Where neither party to a marriage was domiciled or resident within the jurisdiction, & their only connection with this country at the date of their marriage was that they came over here for one day for the purpose of being married, & their only matrimonial residences were abroad:—*Held*: the ct. could not decree restitution of conjugal rights.—*DE GASQUET JAMES (COUNTESS) v. MECKLENBURG-SCHWERIN (DUKE)*, [1914] P. 53; 83 L. J. P. 40; 110 L. T. 121; 30 T. L. R. 329; 58 Sol. Jo. 341.

Annotation:—*Refd.* *Perrin v. Perrin*, *Powell v. Powell*, [1914] P. 135.

Law & practice as to restitution suits generally.—*See* HUSBAND & WIFE.

PART X. SECT. 1, SUB-SECT. 4.

921 i. Necessity for residence within jurisdiction at beginning of suit—Domicil immaterial.—The ct. cannot give relief by way of restitution of conjugal rights if resp. named in the petition were absent from the jurisdiction at the time the suit was instituted & remained absent, although residence at the date of the suit of both spouses, whatever their domicile might be, would be sufficient to give jurisdiction in suits of this nature.—*WADIA v. WADIA* (1913), 1 L. R. 38 Bom. 125.—*IND.*

h. Whether wife can acquire separate domicile for purposes of suit.—A party who had been domiciled in Spain came to Scotland, where he married a Scotswoman, & a few months thereafter returned with her to Spain; the parties lived together for some years, when they started to

return to Scotland, but on arrival in Ireland the husband left his wife there, stating his intention of not again living with her; he returned to Spain, where he continued domiciled. The wife proceeded to Scotland, where she afterwards resided:—*Held*: the ct. had no jurisdiction to entertain an action of adherence at her instance against her husband.—*A. B. v. C. D.* (1845), 7 Dunl. (Ct. of Sess.) 556; 17 Sc. Jur. 274.—*SCOT.*

j. ———.—A summons of adherence against a husband who had married a Scotswoman in Scotland:—*Held*: incompetent in respect the husband never had a domicile in Scotland & was only there for a few weeks before & after marriage & notwithstanding he had sent his wife to Scotland with an intimation of his intention to reside there permanently.—*GORDON v. GORDON* (1847), 9 Dunl.

(Ct. of Sess.) 1293; 19 Sc. Jur. 553.—*SCOT.*

k. ———.—Under exceptional circumstances a wife may for the purposes of a suit for restitution of conjugal rights acquire a domicile separate from that of her husband.—*Ex p. STANDRING* (1906), E. D. C. 169.—*S. AF.*

l. ———.—*KNOX v. KNOX* (1907), 24 S. C. 441.—*S. AF.*

m. ——— Immaterial if desertion took place within jurisdiction—Although both parties resident outside.—Where a husband domiciled in Transvaal had deserted his wife there, & had left the country & she was residing in England at the time of the trial:—*Held*: the wife was entitled to an order of restitution of conjugal rights at Pretoria or elsewhere.—*ROOTH v. ROTH*, [1911] T. P. D. 47.—*S. AF.*

Sect. 1.—Jurisdiction of court: Sub-sects. 5 & 6.

SUB-SECT. 5.—NULLITY OF MARRIAGE.

924. Marriage celebrated in country where decree sought—Between foreigners not domiciled in country where decree sought.]—C. & D., native subjects of France, & then domiciled in that country, came to London in 1854, & were married by licence according to the law of England, but without the observance of certain formalities & consents required by the law of France in respect of the marriage of its own subjects in foreign countries. C. & D. returned to France, when D., the man, refused to celebrate the marriage according to the French law, & C. instituted a suit for nullity in the French cts., which D. did not defend, & in Dec. 1854, C. obtained a decree of nullity. C. subsequently came to reside in England, & petitioned for a decree of nullity in this ct.; personal service of the citation was effected in Naples on D., who did not appear:—*Held*: (1) D. having entered into a contract in this country, was subject to the jurisdiction of the cts. of this country in respect of the personal status resulting from such contract; (2) the personal status resulting from such contract was to be ascertained by the law of this country in which the contract was made, & not by any special law of the country of the domicile of the parties to the contract.—*SIMONIN v. MALLAC* (1860), 2 Sw. & Tr. 67; 29 L. J. P. M. & A. 97; 2 L. T. 327; 6 Jur. N. S. 561; 164 E. R. 917.

Annotations:—*As to* (1) *Distd.* *Sottomayor v. De Barros* (1877), 3 P. D. 1. *Folld.* *Hay v. Northcote*, [1900] 2 Ch. 262; *Ogden v. Ogden*, [1908] P. 46. *Refd.* *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Linke* (otherwise *Van Aerde*) *v. Van Aerde* (1894), 10 T. L. R. 426; *De Gasquet James v. Mecklenburg Schwerin*, [1914] P. 53. *As to* (2) *Folld.* *Hay v. Northcote*, [1900] 2 Ch. 262. *Refd.* *Le Sueur v. Le Sueur* (1876), 1 P. D. 139. *Generally, Consd.* *Brook v. Brook* (1861), 9 H. L. Cas. 193. *Refd.* *Sottomayor v. De Barros* (1879), 5 P. D. 94; *Re Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Chetti v. Chetti*, [1909] P. 67.

925. ———.]—LINKE (OTHERWISE VAN AERDE) v. VAN AERDE (1894), 10 T. L. R. 426.

Annotations:—*Refd.* *Ogden v. Ogden*, [1908] P. 46; *De Gasquet James v. Mecklenburg Schwerin*, [1914] P. 53.

926. Matrimonial residence—Respondent not domiciled in country where decree sought—Marriage not celebrated in country where decree sought.]—Matrimonial residence within the jurisdiction is sufficient to give the ct. power to declare a bigamous marriage null & void, even though the domicile of the resp. be Irish & the *de facto* marriage

PART X. SECT. 1, SUB-SECT. 5.

*n. Marriage celebrated in country where decree sought—Petitioner not domiciled in country where decree sought.]—Petitioner & resp. were married while both were domiciled in V. At the time of the marriage, resp. was married to a husband who was living. Petitioner afterwards became domiciled in N.S.W. & when so domiciled instituted a suit in V. for nullity of marriage & subsequently remained domiciled in N.S.W. There was no evidence of resp.'s domicile:—*Held*: the ct. had jurisdiction to a decree of nullity.—*CORBETT v. ADAMSON* (1894), 20 V. L. R. 278.—**AUS.***

*o. Marriage not celebrated in country where decree sought—Respondent domiciled & residing in country where decree sought.]—A., a domiciled Irishman, married B., & afterwards, during her lifetime, went through the ceremony of marriage with C. in India. C. presented a petition to have the marriage in India declared null & void & the citation was served upon A. at his residence in Ireland:—*Held*: resp.'s domicile & residence in Ireland gave the ct. jurisdiction.—*

JOHNSON v. COOKE, [1898] 2 I. R. 130.—**IR.**

*p. Necessity of domicile.]—An action by a wife for nullity of marriage was dismissed because deft. was not domiciled in the country where the decree was sought.—*SWIFT v. SWIFT* (1920), 3 W. W. R. 874.—**CAN.***

PART X. SECT. 2, SUB-SECT. 1.—A.

*q. Whether depending on domicile of parties at beginning of suit.]—Where one obtained a divorce from his wife in a foreign state, in which he was *bonâ fide* domiciled, although the wife at the time of the divorce proceedings resided in O.:—*Held*: entire credit must be given to the foreign divorce in O.—*GUEST v. GUEST* (1883), 3 O. R. 344.—**CAN.***

927 i. ———.]—Whether place of marriage material—Marriage in country where divorce sought to be recognised.]—Upon an indictment of deft. for bigamy the defence was, that she had been divorced from her husband by decree of a foreign ct. The first marriage was in Canada & the domicile of both parties was C., but they had both resided for a short time in the foreign country previous to the making of the decree:—*Held*:

was celebrated in the Isle of Man.—*ROBERTS v. BRENNAN*, [1902] P. 143; 71 L. J. P. 74; *sub nom.* *BRENNAN (OTHERWISE ROBERTS) v. BRENNAN*, 86 L. T. 599; 50 W. R. 414; 18 T. L. R. 467.

Annotation:—*Refd.* *Ogden v. Ogden*, [1908] P. 46.

Ground for annulment of marriages.]—See Part IX., ante, & generally, HUSBAND & WIFE.

Recognition of jurisdiction of foreign courts.]—See Sect. 2, sub-sect. 1, post.

SUB-SECT. 6.—ALIMONY.

Jurisdiction of court to allot alimony pendente lite—Where plea to jurisdiction.]—See HUSBAND & WIFE.

SECT. 2.—RECOGNITION OF FOREIGN DECREES AS TO MARRIAGE.

SUB-SECT. 1.—JURISDICTION OF FOREIGN COURTS.

A. Dissolution of Marriage.

927. Whether depending on domicile of parties at beginning of suit—Whether place of marriage material—Marriage in country where decree sought to be recognised.]—*CONWAY v. BEAZLEY*, No. 818, ante.

928. ———.]—Where parties are married according to the law of England, & are divorced by judgment of a foreign ct., such divorce does not affect the rights of the parties acquired by the English marriage.—*M'CARTHY v. DECAIX* (1831), 2 Russ. & M. 614; 2 Cl. & Fin. 568, n.; 9 L. J. Ch. 180; 39 E. R. 528, L. C.

Annotations:—*Distd.* *Harvey v. Farnie* (1882), 8 App. Cas. 43. *Refd.* *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; *Ricardo v. Garcias* (1845), 12 Cl. & Fin. 368; *Geils v. Geils* (1852), 20 L. T. O. S. 145; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Daniell v. Sinclair* (1881), 6 App. Cas. 181. *Mentd.* *Watkin v. Brent* (1836), 1 Curt. 264.

929. ———.]—A foreign tribunal has no authority, so far as any consequences in England are concerned, to pronounce a decree of divorce *a vinculo* in the case of an English marriage between English subjects, unless such subjects are, at the time of such decree pronounced, *bonâ fide* domiciled in the country where that tribunal has jurisdiction, & the suit is prosecuted without collusion.—

the divorce could not be recognised.—*R. v. WOODS* (1903), 23 C. L. T. 220; 6 O. L. R. 41; 2 O. W. R. 338.—**CAN.**

927 ii. ———.]—Where the parties to a Canadian marriage are *bonâ fide* domiciled in a foreign country, a divorce pronounced by the tribunals of that country will be held valid in C.; but C. cts. are not bound by any principle of private international law to recognise a decree of divorce by a foreign ct. when at the date of such decree the spouses had their domicile in C.—*Cox v. Cox*, [1918] 2 W. W. R. 422; 13 Alta. L. R. 285; 40 D. L. R. 195.—CAN.****

927 iii. ———.]—The N.Z. ct. will recognise as valid the decree of an U.S.A. ct. dissolving the marriage of a naturalised citizen of U.S. & his wife, a British subject, although the marriage was solemnised in N.Z.—*GARDNER v. GARDNER* (1897), 15 N. Z. L. R. 739.—N.Z.****

927 iv. ———.]—A decree of divorce duly obtained in the cts. of the country in which the spouses are domiciled at the time is valid elsewhere, & is entitled to recognition in S.—*HUMPHREY v. HUMPHREY'S TRUSTEES* (1895), 33 So. L. R. 99.—SCOT.****

SHAW v. GOULD (1868), L. R. 3 H. L. 55; 37 L. J. Ch. 433; 18 L. T. 833, H. L.

Annotations:—*Consd.* *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Bater v. Bater*, [1906] P. 209; *Re Stirling, Stirling v. Stirling*, [1908] 2 Ch. 344. *Refd.* *Le Sueur v. Le Sueur* (1876), 1 P. D. 139; *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Keyes v. Keyes & Gray*, [1921] P. 204; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146. *Mentd.* *Levy v. Solomon* (1877), 37 L. T. 263; *Re Andros, Andros v. Andros* (1883), 24 Ch. D. 637; *Bonaparte v. Bonaparte*, [1892] P. 402; *Churchward v. Churchward*, [1895] P. 7.

930. ————.]—A marriage, celebrated in England between English subjects, was subsequently dissolved by an American ct. on grounds of divorce similar to those admitted by the law of this country; it appeared that the parties, though resident, had not obtained a domicile in America:—*Held*: the divorce could not be recognised & the marriage was still valid.

Semble: if the parties had acquired a *bond fide* domicile in America, the divorce would have been effectual in this country.—*SHAW v. A.-G.* (1870), L. R. 2 P. & D. 156; 39 L. J. P. & M. 81; 23 L. T. 322; 18 W. R. 1145.

Annotations:—*Consd.* *Green v. Green*, [1893] P. 89. *Refd.* *Le Sueur v. Le Sueur* (1876), 1 P. D. 139.

931. ————.]—*BRIGGS v. BRIGGS*, No. 904, *ante*.

932. ————.]—(1) The English cts. will recognise as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, & an Englishwoman, when the decree of divorce is not impeached by any species of collusion or fraud, although the marriage may have been solemnised in England, & may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.

(2) When an English woman marries a domiciled foreigner, the marriage is constituted according to the *lex loci contractus*; but she takes his domicile & is subject to his law.

A domiciled Scotsman married, in England, an Englishwoman. Immediately after the ceremony the married couple went to Scotland & resided there as their matrimonial home. Two years after, the wife obtained in Scotland a divorce *à vinculo matrimonii*, on the ground of her husband's adultery only. The husband came to England, & married there another Englishwoman, the first wife being still alive. In a suit for a declaration of the nullity of the second marriage at the instance of the second wife:—*Held*: the divorce in Scotland was a sentence of a ct. of competent jurisdiction, not only effectual within that jurisdiction but entitled to recognition in the cts. of this country also.—*HARVEY v. FARNIE* (1882), 8 App. Cas. 43; 52 L. J. P. 33; 48 L. T. 273; 47 J. P. 308; 31 W. R. 433, H. L.

Annotations:—*As to* (1) *Consd.* *Green v. Green*, [1893] P. 89; *Armitage v. A.-G.*, *Gillig v. Gillig*, [1906] P. 135; *R. v. Hamersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwaruddin*, [1917] 1 K. B. 634. *As to* (2) *Apld.* *Bater v. Bater*, [1906] P. 209. *Refd.* *Scott v. A.-G.* (1886), 56 L. T. 924; *Thompson (otherwise Turner) v. Thompson* (1888), 58 L. T. 387; *Turner v. Thompson* (1888), 13 P. D. 37.

933. ————.]—*Fictitious domicile.*—A. & B. were married in England. Subsequently A. sued in England for a divorce on the ground of B.'s adultery with C. The petition was dismissed. Subsequently B. & C. went to Scotland, & there lived in adultery. A., acting in collusion with B. & C., employed D., a Scottish solr., to obtain a divorce in Scotland. An office was taken in Glasgow, where A.'s name was put up, & where A. purported to carry on the business of a tea-merchant. A. only visited the place whilst the

proceedings were pending three times, for a night & a day on each occasion, & never attempted to carry on any business there. A. then petitioned for a divorce in the Scottish cts., & swore an affidavit denying collusion with B. & C. C. was described by an alias, & precautions were taken to conceal the real facts of the case from the Scottish ct. A. obtained a divorce in the Scottish ct., & B. & C. subsequently married in the Isle of Man. C. then petitioned for a declaration of nullity of such marriage:—*Held*: the Scottish cts. had no jurisdiction to dissolve the marriage between A. & B., & the marriage between B. & C. was null & void.—*BONAPARTE v. BONAPARTE*, [1892] P. 402; 62 L. J. P. 1; 67 L. T. 531; 8 T. L. R. 759; 1 R. 490.

Annotation:—*Refd.* *Bater v. Bater*, [1906] P. 209.

934. ————.]—Petitioner, who was, & always had been, a domiciled British subject, married resp., an American lady, in the beginning of the year 1890. After about three months' cohabitation in this country resp. went to America, to visit her mother, & to attend the approaching marriage of her sister. She never returned, although petitioner wrote & telegraphed asking her to do so. Eventually petitioner was served with a citation for divorce, at the suit of his wife, in the ct. of Philadelphia. He was advised that the American ct. had no jurisdiction in the matter, & consequently took no steps to defend that suit, in which a decree was subsequently pronounced, dissolving the marriage upon a ground which, even if true, would not have entitled the wife to have the marriage dissolved in this ct. Resp. subsequently went through a ceremony of marriage with the co- resp. in America, & lived with him there as his wife:—*Held*: (1) the decree of the American ct. was bad, for want of jurisdiction, inasmuch as the domicile of resp. became English by her marriage with petitioner, who was, all his life, a domiciled British subject; (2) petitioner was entitled to a decree *nisi* dissolving his marriage with the resp. upon the grounds of her bigamy & adultery.—*GREEN v. GREEN*, [1893] P. 89; 62 L. J. P. 112; 68 L. T. 261; 41 W. R. 591; 1 R. 507.

935. ————.]—(1) A divorce granted by a foreign ct., being a judgment affecting the status of the parties, stands on the same footing as a judgment *in rem*, & cannot be set aside in this country, even on the ground of fraud, by a person who was no party to the proceedings in which the judgment was pronounced.

(2) The domicile for the time being of the married pair, when the question of divorce arises, affords the only true test of jurisdiction to dissolve their marriage; & the ct. of the *bond fide* existing domicile has jurisdiction over persons originally domiciled in another country to undo a marriage solemnised in that other country; & such a divorce will be recognised by the English cts. even if granted for a cause which would not have been sufficient to obtain a divorce in England. In 1880 a marriage was celebrated in England between two English persons. In 1886 the husband commenced divorce proceedings against the wife for adultery with B., which failed upon proof of the husband's cruelty, & in 1889 he sailed for New York, where he lived in adultery with another woman & acquired a domicile in the State of New York. The wife & B. continued to live in adultery, & in 1890 the wife went to New York for the purpose of obtaining a divorce, & subsequently obtained a decree from the New York ct. for dissolution of her marriage on the ground of her husband's adultery. There was no collusion between the husband & wife, but her matrimonial misconduct in England was

Sect. 2.—Recognition of foreign decrees, as to a
1, A.

not disclosed to the New York ct. In 1893 the wife went through a ceremony of marriage with B. in New York, which, assuming they were then at liberty to marry, was a valid ceremony. In 1903 B. presented a petition for a declaration of nullity of the New York marriage:—*Held* (3) according to the law of the State of New York & of England, the New York ct. had jurisdiction to decree a divorce, as the husband had acquired a domicile in New York; (4) the adultery complained of by the wife was committed in that State, & the wife had elected to make the domicile of the husband her own for the purpose of the divorce proceedings, & had acquired a residence there according to the law of New York, & the petition must be dismissed.—*BATER v. BATER*, [1906] P. 209; 75 L. J. P. 60; 94 L. T. 835; 22 T. L. R. 408; 50 Sol. Jo. 389, C. A.

Annotations:—*As to* (1) **Reid**. *Phillips v. Batho*, [1913] 3 K. B. 25; *Keyes v. Keyes & Gray*, [1921] P. 204. *As to* (2) **Reid**. *Armitage v. A.-G.* (1906), 22 T. L. R. 306; *Casdagli v. Casdagli*, [1918] P. 89.

936. — Marriage not in country where decree sought to be recognised.] — A Scotch divorce is inoperative on the marriage of a domiciled Englishman.

A., a domiciled Englishman married in 1837, at Gretna Green, B. a Scotswoman, & afterwards cohabited with her, without abandoning his English domicile. In 1841 B. committed adultery in Scotland with C. In the same year, on the ground of that adultery, A. obtained a divorce in Scotland. C. then married B., & died in 1855. In 1854, A. having been advised that the Scottish divorce was inoperative in England, presented a petition to the House of Lords for a bill to declare his marriage void from the date of the Scottish divorce. This petition was rejected, & on the passing of Matrimonial Causes Act, 1857 (c. 85), A. instituted a suit for dissolution of marriage on the ground of the adultery in 1841:—*Held*: (1) the Scottish sentence of divorce being inoperative, the ct. had jurisdiction to dissolve the marriage. (2) A. had not been guilty of unreasonable delay in presenting his petition, within the meaning of s. 31 of the Act.—*TOLLEMACHE v. TOLLEMACHE* (1859), 1 Sw. & Tr. 557; Sea. & Sm. 149; 30 L. J. P. M. & A. 113; 2 L. T. 87; 23 J. P. 679; 164 E. R. 858.

Annotations:—As to (1) **Refd.** *Le Sueur v. Le Sueur* (1876), 1 P. D. 139; *Niboyet v. Niboyet* (1878), 39 L. T. 486. **Generally, Refd.** *Green v. Green*, [1893] P. 89. **Mentd.** *Rickard v. Rickard & Bond* (1921), 37 T. L. R. 511.

937. — — —.]—SCOTT v. A.-G., No. 133, *ante*.

938. ——— ——— ———.]—TURNER v. THOMPSON,
No. 214, *ante*.

939. — — — — —.]—A., an Irishman by birth, resided at the Cape of Good Hope from 1842 till 1862. During the earlier part of this period he served in an English regiment stationed at the Cape, & during the latter in the Cape Mounted Rifles. In 1850 he married B. at the Cape, & in 1852 this marriage was dissolved by a sentence of the Colonial ct. on the ground of B.'s adultery. In 1852 he married C. in the lifetime of B., & in 1863 he died intestate. An application by C. for

administration to A. as his widow was opposed on the ground that A. was a domiciled Englishman at the date of his first marriage, & that the sentence of divorce pronounced by the Colonial ct. was inoperative:—*Held*: as upon the evidence there was no proof that A. was a domiciled Englishman, or that his domicile was not at the Cape, the sentence of divorce must be treated as valid.

Qu.: whether if A. had been a domiciled Englishman the divorce would have been invalid in England.—**ARGENT v. ARGENT** (1865), 4 Sw. & Tr. 52; 34 L. J. P. M. & A. 133; 12 L. T. 768; 11 Jur. N. S. 864; 164 E. R. 1434.

940. ———.—]—S., an Austrian subject by birth & parentage, & a Roman Catholic by religion, contracted a valid marriage in Berlin with a lady of same domicile as himself, but described in the marriage certificate as of the Evangelical religion. This marriage, which, by the law of Austria, was absolutely indissoluble, was subsequently dissolved in Berlin, by mutual consent, on a petition presented by the wife. S. subsequently married in England an English Protestant lady, his first wife being still alive. The second wife petitioned for a decree of nullity on the ground that the Berlin divorce did not effectually dissolve the first marriage of S., which, she alleged, was still subsisting & binding:—*Held*: (1) the Berlin divorce was good; (2) the second marriage was good.—INGHAM (FALSELY CALLED SACHS) *v.* SACHS (1886), 56 L. T. 920.

941. — **Divorce recognised by courts of country of domicile.**—The cts. of this country will recognise the binding effect of a decree of divorce obtained in a state where the husband was not domiciled, if the courts of the country or state of his domicile would recognise the validity of the decree.

G., an American citizen temporarily resident & carrying on business in England, but who never abandoned his domicile of origin in the State of New York, married an Englishwoman in England. She afterwards instituted proceedings, which were compromised by a deed of separation. Some years later she instituted, in the State of South Dakota, proceedings for a divorce, to which he put in an answer & cross-claim, the latter being dismissed, & a decree pronounced on the wife's petition, upon a ground which would not constitute a ground for dissolving the marriage either in the cts. of the husband's domicile or in this country. Upon evidence which satisfied this ct. that the cts. of the husband's domicile would recognise a decree so obtained:—*Held*: the South Dakota decree of divorce must be recognised as a valid dissolution of the marriage, & the subsequent marriages of the respective spouses were consequently valid.—*ARMITAGE v. A.-G.*, *GILLIG v. GILLIG*, [1906] P. 135; 75 L. J. P. 42; 94 L. T. 614; 22 T. L. R. 306.

Annotations :—*Refd. Ogden v. Ogden*, [1908] P. 46 ; *R. v. Hammersmith Superintendent Registrar of Marriages*, *Ex p. Mir-Anwaruddin*, [1917] 1 K. B. 634.

942. — Divorce not recognised by courts of country of domicile.]—S., a Scotsman by birth, but long resident in a British colony, where he married, obtained a divorce in the American State of Upper Dakota, after a residence sufficient by the law

936 i. ——— *Marriage not in country where divorce sought to be recognised—Mistake in procedure no bar to recognition.*—A decree of a foreign ct. acting within the jurisdiction conferred upon it by the State within whose boundaries the matrimonial domicile exists is conclusive against all the world, & will be recognised & acted on in N., even though

such et. in arriving at its decision made a mistake in procedure.—**SMART v. RAYMOND** (1903), 24 N. L. R. 347.—**S. AF.**

F. ———— Divorce not recog-
nised by courts of country of domicil—
Act necessary.]—Where there are
doubts as to the operation in Ireland
or out of Ireland of an English decree

of divorce of a domiciled Irishman, the proper course is to apply for an Act of Parliament confirming the decree & removing doubts.—**MALONE'S DIVORCE (VALID ACTION) BILL, [1905] A. C. 314.—IR.**

GRIMSHAW'S DIVORCE BILL (1907),
51 Sol. Jo. 529, H. L.—IR.

there to give him a matrimonial domicile, & afterwards resumed his residence in the colony. Mrs. S. who never was in Upper Dakota, consented by attorney to the decree, after stipulating that no scandalous grounds should be pleaded. She had left her husband some four months before the action commenced, & had since lived with W., a former inmate of S.'s house, whose intimacy with her had caused gossip, & she refused to return to her husband. The divorce was granted on these allegations, & W., who was also of Scottish birth, & fully cognisant of the facts of the divorce, afterwards went through a ceremony of marriage with Mrs. S. in San Francisco, & had a son by her:—*Held*: (1) as S.'s residence in Upper Dakota was not *bonâ fide*, but only to obtain a divorce, he did not acquire a domicile there; (2) as the law as well of Scotland as of the colony did not recognise a matrimonial domicile as conferring divorce jurisdiction, nor recognise a divorce by the cts. of a country not that of the husband's domicile, the divorce was of no effect, & the marriage with W. was invalid.—*Re STIRLING, STIRLING v. STIRLING*, [1908] 2 Ch. 344; 77 L. J. Ch. 717; 99 L. T. 9; 24 T. L. R. 721.

943. ———.]—Resp. married a native of Massachusetts, in the United States, who was also domiciled there, & afterwards obtained a decree of divorce in Dakota on the ground of her husband's cruelty & adultery. The husband was not resident in, nor domiciled in Dakota; he was not served personally with the documents in the proceedings, & did not appear at the hearing. Some years after the decree of divorce had been granted resp., her former husband still being alive, went through a ceremony of marriage in the State of New York with petitioner, who was a British subject & domiciled in this country. At the time of the celebration of the marriage, petitioner & resp. believed the decree of divorce which had been pronounced in Dakota was binding. Upon the evidence adduced it appeared that the latter decree was binding neither in Massachusetts, where resp. was domiciled at the time of the marriage, nor in the State of New York, where the marriage took place:—*Held*: petitioner was entitled to a decree of nullity of the marriage.—*CASS v. CASS (OTHERWISE PFAFF)* (1910), 102 L. T. 397; 26 T. L. R. 305; 54 Sol. Jo. 328.

Restraint of proceedings in foreign courts.]—See Part XVI., Sect. 5, sub-sect. 2, *post*.

Jurisdiction of English courts.]—See Nos. 115, 218, 878, 879, 885, *ante*.

B. Nullity of Marriage.

944. **General rule.]—**A sentence of nullity of marriage, therefore, in the country where it was solemnised, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage, not within its territories nor had between subjects of that country, would be uni-

versally binding. For instance, the marriage, alleged by the husband, is a French marriage; a French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a ct. at Brussels, on a marriage in France, would have the same authority, much less on a marriage celebrated here in England (LORD STOWELL).—*SINCLAIR v. SINCLAIR* (1798), 1 Hag. Con. 294; 161 E. R. 557.

Annotations:—*Consd. Ogden v. Ogden*, [1908] P. 46. *Refd. Connolly v. Connolly* (1850), 2 Rob. Eccl. 201; *Re Truford, Trafford v. Blanc* (1887), 36 Ch. D. 600.

945. **When marriage not celebrated in foreign country where decree made—Marriage in England—Between French subjects—Validity of annulment in France.]—SIMONIN v. MALLAC**, No. 924, *ante*.

946. ——— **Between Frenchman & Englishwoman—Validity of annulment in France.]—OGDEN v. OGDEN**, No. 228, *ante*.

Jurisdiction of English courts.]—See Nos. 924, 925, 926, *ante*.

SUB-SECT. 2.—GROUNDS ON WHICH DECREE GRANTED.

947. **Ground not sufficient by law of country where decree sought to be recognised.]—**On an indictment for bigamy, where the first marriage is in England, it is not a valid defence to prove a divorce *a vinculo matrimonii* out of England before the second marriage, founded on grounds on which a marriage cannot be dissolved *a vinculo matrimonii* in England.—*R. v. LOLLEY* (1812), Russ. & Ry. 237, C. C. R.

Annotations:—*Consd. Munro v. Munro* (1840), 7 Cl. & Fin. 812; *Dolphin v. Robins* (1859), 7 H. L. Cas. 391; *Shaw v. Gould* (1868), L. R. 3 H. L. 55. *Folld. Shaw v. A.-G.* (1870), 39 L. J. P. & M. 81. *Consd. Niboyet v. Niboyet* (1878), 4 P. D. 1. *Apld. Briggs v. Briggs* (1880), 5 P. D. 163. *Consd. & Distd. Harvey v. Farnie* (1882), 8 App. Cas. 43. *Consd. Bater v. Bater*, [1906] P. 209. *Refd. Tovey v. Lindsay* (1813), 1 Dow, 117; *M'Carthy v. Decaix* (1831), 2 Russ. & M. 614; *Munro v. Saunders* (1832), 6 Bli. N. S. 468; *Warrender v. Warrender* (1834), 9 Bli. N. S. 89; *Doe d. Birtwhistle v. Vardill* (1840), West, 500; *Geils v. Geils* (1852), 20 L. T. O. S. 145; *Brook v. Brook* (1861), 4 L. T. 93; *Heath v. Lewis, Ex p. Johnson* (1864), 4 Giff. 665; *Argent v. Argent* (1865), 34 L. J. P. M. & A. 133; *Re Wilson's Trusts* (1865), 35 L. J. Ch. 243; *Le Sueur v. Le Sueur* (1876), 1 P. D. 139; *Green v. Green*, [1893] P. 89; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *R. v. Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwaruddin*, [1917] 1 K. B. 634; *R. v. Wheat, R. v. Stocks*, [1921] 2 K. B. 119. *Mentd. Fenton v. Livingstone* (1859), 33 L. T. O. S. 335; *R. v. Youle* (1861), 7 Jur. N. S. 551; *Sherras v. De Rutzen*, [1895] 1 Q. B. 918.

948. ———.]—*HARVEY v. FARNIE*, No. 932, *ante*.

949. ———.]—*BATER v. BATER*, No. 935, *ante*.

SUB-SECT. 3.—DECREE IMPROPERLY OBTAINED.

950. **Decree obtained by collusion or fraud.]—SHAW v. GOULD**, No. 929, *ante*.

951. ———.]—*BATER v. BATER*, No. 935, *ante*.

PART X. SECT. 2, SUB-SECT. 1.—B.

944 i. **General rule.]—**While English cts. will not pay respect to foreign decrees of nullity as to marriages contracted in E., when that nullity has been held to arise because of some formality under the law of the domicile of the parties not having been complied with, yet they will recognise such decrees, of cts. in the domicile of the parties, when the nullity is held to have arisen because of impotency or bigamy.—*WILCOX v. WILCOX* (1914), 27 W. L. R. 359.—CAN.

*country where decree sought to be recognised.]—*A domestic ct. will recognise the validity of a foreign divorce, although the decree was granted upon causes which would not be considered sufficient in the domestic ct.—*R. v. HAMILTON* (1910), 22 O. L. R. 484; 17 O. W. R. 809; 2 O. W. N. 394; 17 Can. Crim. Cas. 410.—CAN.

947 ii. ———.]—*GARDNER v. GARDNER* (1897), 15 N. Z. L. R. 739.—N.Z.

u. ——— *Cruelty.*]—*HUMPHREY v. HUMPHREY'S TRUSTEES* (1895), 33 Sc. L. R. 99.—SCOT.

*fraud.]—*A. obtained a divorce from his wife in Mo. The evidence of desertion by his wife as alleged by A., & on which the decree for divorce was founded, was untrue:—*Held*: the decree, having been obtained on an untrue statement of facts, would not be recognised in O.—*MAGURN v. MAGURN* (1884), 11 A. R. 178; 3 O. R. 570.—CAN.

950 ii. ———.]—A. had obtained a decree of divorce from his wife from a ct. in O. It was obtained by fraud & false swearing:—*Held*: such decree could not be recognised by a Sask. ct.—*MADAY v. MADAY* (1911), 16 W. L. R. 701; 4 Sask. L. R. 18.—CAN.

PART X. SECT. 2, SUB-SECT. 2.

947 i. **Ground not sufficient by law of**

PART X. SECT. 2, SUB-SECT. 3.

950 i. **Decree obtained by collusion or**

Sect. 2.—Recognition of foreign decrees as to marriage: Sub-sects. 3 & 4. Sect. 3. Part XI. Sects. 1, 2, 3 & 4. Part XII. Sect. 1: Sub-sects. 1 & 2.]

952. Decree obtained by irregularity of process.]

—A judgment or decree pronounced by the ct. of a foreign country will be treated & acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign ct. had jurisdiction over the subject-matter & over the persons brought before it, & the proceedings do not offend against English views of substantial justice.

Where a decree for divorce had been pronounced by the proper ct. in Florida in an undefended action by the husband against the wife on the ground of her violent & ungovernable temper, both the parties being domiciled & resident in Florida:—*Held*: an alleged irregularity in service of process was not a ground for questioning the validity of that decree in an action brought by the wife in the English cts. to enforce a claim arising out of her alleged second marriage to a British subject.—*PEMBERTON v. HUGHES*, [1899] 1 Ch. 781; 68 L. J. Ch. 281; 80 L. T. 369; 47 W. R. 354; 15 T. L. R. 211; 43 Sol. Jo. 365, C. A.

Annotations:—*Reid. Assets Co. v. Mero Roehl*, [1905] A. C. 176; *Bater v. Bater*, [1906] P. 209; *Robinson v. Fenner*, [1913] 3 K. B. 835. *Mentd. Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist*, [1910] P. 271; *De Gasquet James v. Mecklenburg Schwerin*, [1914] P. 53; *Rush v. Rush, Bailey & Pimenta*, [1920] P. 242.

SUB-SECT. 4.—OTHER CASES.

953. Decree dissolving specific marriage—Whether dissolution of all anterior marriages.]—When a foreign tribunal dissolves a specific marriage, should nothing further appear, our

cts. will not assume that the foreign tribunal intended an absolute dissolution of all anterior marriages between the parties, but will regard the dissolution as strictly confined to the particular marriage at which the decree is pointed.—*BIRT v. BOUTINEZ* (1868), L. R. 1 P. & D. 487; 37 L. J. P. & M. 50; 18 L. T. 586; 16 W. R. 816.

954. Effect of foreign decree of divorce—On orders for alimony & custody—After decree for judicial separation.]—*W. v. W.* (1908), cited in *HALSBURY'S LAWS OF ENGLAND*, Vol. 16, p. 595, C. A.

Effect of foreign judgments generally.]—*See Part XIV., post.*

SECT. 3.—RECOGNITION OF OTHER MODES OF DIVORCE.

955. By Jewish Rabbi—Not in country where divorce sought to be recognised—Marriage in country where divorce sought to be recognised—Between Jew & Englishwoman.]—*LEVI v. LEVI* (1910), *Times*, Feb. 18.

956. By Mohammedan writing of divorcement—Marriage in country where divorce sought to be recognised—Between domiciled Indian & Englishwoman.]—A marriage solemnised in this country between a Mohammedan domiciled in India & a Christian woman cannot be dissolved by the husband handing to the wife a writing of divorcement, although that would be an appropriate mode of effecting the dissolution of a Mohammedan marriage according to Mohammedan law.—*R. v. HAMMERSMITH SUPERINTENDENT REGISTRAR OF MARRIAGES, Ex p. MIR-ANWARUDDIN*, [1917] 1 K. B. 634; 86 L. J. K. B. 210; 115 L. T. 882; 81 J. P. 49; 33 T. L. R. 78; 61 Sol. Jo. 130; 15 L. G. R. 83, C. A.

Part XI.—Legitimacy.

SECT. 1.—IN GENERAL.

Test of legitimacy.]—*See, generally*, *BASTARDY*, Vol. III., pp. 358–368.

Validity of marriage.]—*See Part IX., Sect. 1, ante.*

Legitimation by subsequent marriage.]—*See BASTARDY*, Vol. III., pp. 372–375.

SECT. 2.—FOR PURPOSES OF SUCCESSION TO REAL ESTATE.

See ALIENS, Vol. II., p. 123, No. 20; *BASTARDY*, Vol. III., pp. 373, 374, Nos. 137–139, 143, 144, 146.

952 i. Decree obtained by irregularity of process.]—A woman, married in Canada in 1897 to a person who was at the time & always remained a domiciled Canadian, in 1903 went to the State of M., intending to separate from her husband & thenceforth to make her home there, & in 1906 obtained a divorce in M., her husband, however, not being served with any notice of the divorce proceedings nor taking any part therein:—*Held*: the divorce was of no validity or force in O.—*R. v. BRINKLEY* (1907), 14 O. L. R. 234.—*CAN.*

w. Foreign decree granted erroneously.]—Where a foreign ct., having jurisdiction, has granted a divorce, the domestic ct. will not, in the absence of fraud, concern itself to inquire whether the foreign ct. made a mistake.—*C. v. C.* (1917), 39 O. L. R. 571.—*CAN.*

PART X. SECT. 2, SUB-SECT. 4.

954 i. Effect of foreign decree of

divorce—On orders for custody.]—The parents of a child seven years old, British subjects & married in O., where the child was born, removed to U.S., where the husband took out naturalisation papers. The wife applied to the ct. there & obtained a decree granting her a divorce, & the custody of the child. Shortly before the decree was pronounced, & with the object of escaping its effect, the husband returned to O., bringing the child with him. On an application in O. by the wife for the custody of the child an order was made granting her such custody.—*Re DAVIS* (1894), 25 O. R. 579.—*CAN.*

954 ii. ———.]—A foreign divorce awarding the custody of a child to the mother is of such validity in Canada as to render the father liable for taking or enticing away the child with intent to deprive the mother of the possession of said child.—*R. v. HAMILTON* (1910), 17 O. W. R. 809; 2 O. W. N.

Succession to immovables generally.]—*See Part VI., Sect. 1, ante.*

SECT. 3.—FOR PURPOSES OF SUCCESSION TO PERSONAL ESTATE.

See BASTARDY, Vol. III., pp. 372–375, Nos. 135, 140, 141, 147–152.

Succession to movables generally.]—*See Part VI., Sect. 2, ante.*

SECT. 4.—DECLARATIONS OF LEGITIMACY.

See BASTARDY, Vol. III., pp. 369, 370.

394; 22 O. L. R. 484.—*CAN.*

954 iii. ———.]—Appet. & resp. were married in Ill. & had their domicile there. They came to Alta. bringing with them 2 children, who had been born in Ill. Another child was born in Alta. Resp., the wife, left the appet. & took the youngest child with her, but did not leave Alta. The husband went to Cal., & from a ct. there obtained a decree of divorce, which also gave him the custody of the 3 children. He then applied in Alta. for a *habeas corpus* for the production of the youngest child with a view to obtaining custody:—*Held*: granting the validity of the Cal. decree, the decision as to the custody of the youngest child, who was a British subject & was & always had been within the jurisdiction of the Alta. ct., was not binding on ct.—*Re MORT* (1912), 20 W. L. R. 369; 1 W. W. R. 833; 5 D. L. R. 406.—*CAN.*

Part XII.—Assignment of Property on Marriage.

SECT. 1.—WHERE THERE IS NO MARRIAGE CONTRACT OR SETTLEMENT.

SUB-SECT. 1.—IMMOVABLES.

See, generally, HUSBAND & WIFE.

Alienation & assignment of immovables.]—See Part IV., Sect. 3, ante.

Succession to immovables.]—See, generally, Part VI., Sect. 1, ante.

SUB-SECT. 2.—MOVABLES.

Alienation & assignment of movables.]—See, generally, Part V., Sect. 3, sub-sect. 2, ante.

Succession to movables.]—See Part VI., Sect. 2, ante.

957. General rule.]—As to the question whether intimation was necessary, they were to consider the difference between the assignation of a debt by one individual to another, & an assignment of a bkpt.'s personal property for the use of his creditors. To apply the rule of law with respect to intimation to the latter case, would cut up by the roots the use of an English commission in relation to Scottish property. Lord Meadowbank therefore in *Royal Bank of Scotland v. Cuthbert*, *infra*, held that this assignment operated like the transference by marriage. A marriage in England rendered the Scottish property of the wife her husband's without intimation; & such must be the law in cases like the present, if an English commission were to have any effect in Scotland. But if intimation were necessary, it had been given in the present case (LORD ELDON, C.).—*SELKRIG v. DAVIES* (1814), 2 Dow, 230; 2 Rose, 97; 3 E. R. 848, H. L.

Annotations:—Consol. Banco de Portugal v. Waddell (1880), 5 App. Cas. 161. *Refd. Ex p. Cridland* (1814), 3 Ves. & B. 94; *Re Mowat, Ex p. Geddes* (1824), 1 Gl. & J. 414; *Cockerell v. Dickens* (1840), 1 Mont. D. & De G. 45; *Fergusson v. Spencer* (1840), 2 Scott, N. R. 229; *Scott v. Bentley* (1855), 1 K. & J. 281; *Re Douglas, Ex p. Wilson* (1872), 7 Ch. App. 490; *Ewing v. Orr Ewing* (1885), 10 App. Cas. 460, n; *Re Artola Hermanos, Ex p. Chale* (1890), 59 L. J. Q. B. 254. *Mentd. Randall v. Randall* (1835), 7 Sim. 271; *Darby v. Darby* (1856), 3 Drew. 495; *Re Oriental Steam Co.* (1874), 22 W. R. 622.

PART XII. SECT. 1, SUB-SECT. 1.

*y. Marriage in community—Presumptions as to in South Africa.]—*If there is a presumption that the law of a foreign country is similar to that of South Africa, the ct. must presume not only that a marriage contracted there is ordinarily in community, but that community can be averted by an ante-nuptial contract.—*SCHNAIDER v. JAFFE* (1916), 7 C. P. D. 696.—S. AF.

*z. — Interest of wife in English realty—Governed by English law.]—*The interest of a wife, married in community at the Cape, in a trust estate in realty situate in England, must be regulated by English law, & does not fall into the community.—*POPPE v. HOME, EAGER & Co.* (1841), 1 Men. 212.—S.

*a. — Foreign immovables purchased by husband during subsistence of marriage—Fall within community.]—*Immovable property situated abroad, purchased during the subsistence of a marriage by the husband, domiciled in the Cape at the time of his marriage, falls within the community created by such marriage.—*CHIWELL v. CARLYON* (1897), 14 S. C. 61; 7 C. T. R. 83.—S. AF.

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PART XII. SECT. 1, SUB-SECT. 2.

957 i. General rule.]—When a lady of fortune having a great deal of money in Scotland, or stock in the banks or public eos. there, marries in London, the whole property is *ipso jure* her husband's. It is assigned to him. The legal assignment of a marriage operates without regard to territory all the world over.—*ROYAL BANK OF SCOTLAND v. CUTHBERT* (1812), 1 Rose, 462.—SCOT.

957 ii. —.]—The property rights of spouses, where no ante-nuptial contract has been entered into between them, are regulated by the law of the country in which the spouses were domiciled at the date of the marriage.—*BLATCHFORD v. BLATCHFORD* (1861), R. 3.—S. AF.

957 iii. —.]—The mutual rights of a husband & wife, as to personalty of each at the time of their marriage, are governed by the law of the matrimonial domicile.—*PINK v. PERLIN & Co.* (1898), 40 N. S. R. 260.—CAN.

958 i. Rights governed by lex domicilii of husband at time of marriage—Property acquired by wife after marriage—Vested in husband by lex domicilii—Wife's right against husband's creditors.]—BUCKINGHAM (DUCHESS) v.

958. Rights governed by lex domicilii of husband at time of marriage—Property acquired by wife after marriage—Vested in husband by lex domicilii—No equity to a settlement.]—Where a wife is entitled to a share under Stat. Distributions, & is resident in Prussia, by the laws of which one moiety of the effects of the husband must come to her on his death, the ct. will not require him to make any settlement.

Pltf. having come to this ct. to obtain money found by the report of the Deputy Remembrancer to be due to his wife, upon the distribution of an intestate's effects, the ct. took into consideration whether they should order the money recovered to be settled on the wife or paid to the husband. Upon reference to the Master, he certified that by the laws of Prussia, of which country they were inhabitants, the whole personalty of the husband & wife was, during the coverture, at the absolute disposal of the husband; but on the death of either, would be divided between the survivor & the heirs of deceased. The wife made no application to the ct., either to have it settled or otherwise:—*Held*: the money must be paid to the husband.—*SAWER v. SHUTE* (1792), 1 Anst. 63; 145 E. R. 801.

Annotation:—Distd. Re Tweedale's Trust (1859), 33 L. T. O. S. 283.

959. — — — —.]—By the law of Scotland, a husband became by his marriage absolutely entitled to all his wife's personal property of whatever nature:—*Held*: the law of the domicile of the parties governed, & the wife in such a case had no equity to a settlement out of an equitable chose in action in England.—*LOWE v. SMITH* (1854), cited in 2 Eq. Rep. 537.

Annotation:—Refd. M'Cormick v. Garnett (1854), 2 Eq. Rep. 536.

960. — — — —.]—(1) Where a husband & wife are domiciled in Scotland, in which country a wife has no equity to a settlement the ct. here will order payment of the wife's legacy to an assignee of the husband.

(2) A question of foreign law, being one of fact, must be decided in each cause on evidence adduced

WINTERBOTTOM (1851), 13 Dunl. (Ct. of Sess.) 1129; 23 Sc. Jur. 532, 688.—SCOT.

958 ii. — — — —.]—*LEVINE v. CLAFLIN* (1881), 31 C. P. 600.—CAN.

*b. — Wife's interest in English personalty.]—*An Englishman having, while resident in Scotland, married a Scotswoman, also then resident & domiciled there:—*Held*: the legal effect of the marriage, in regard to funds in England left to the wife by an Englishman by an English will & which vested in her during the continuance of the spouses to reside in S., must be regulated by the law of S.—*CLARKE v. NEWMARSH* (1836), 14 Sh. (Ct. of Sess.) 488; 32 Fac. Coll. 395.—SCOT.

*c. — Marriage in community.]—*The interest of a wife married in community at the Cape, in a trust estate in personalty in England, must be regulated by the law of the Cape, as the matrimonial domicile, & falls within the community.—*POPPE v. HOME, EAGER & Co.* (1841), 1 Men. 212.—S. AF.

*d. Marriage in community—When presumed in South Africa—Marriage contracted abroad.]—**SCHNAIDER v. JAFFE* (1916), 7 C. P. D. 696.—S. AF.

F F

Sect. 1.—Where there is no marriage contract or settlement: Sub-sects. 2 & 3. Sect. 2: Sub-sect.

in it, & not by a decision or on evidence adduced in another case although similarly circumstanced.—*M'CORMICK v. GARNETT* (1854), 5 De G. M. & G. 278; 2 Eq. Rep. 536; 23 L. J. Ch. 777; 23 L. T. O. S. 136; 18 Jur. 412; 2 W. R. 408; 43 E. R. 877, L. J.

961. — Wife's interest in produce of English realty—Vested in husband on marriage by Scottish law—No equity to a settlement.]—By a decree made in a cause I., the wife of J., & H., as the administrator of C., were declared to be entitled in equal moieties to the money to arise from a freehold messuage & premises in England, which had been conveyed to trustees for sale. Before the decree was drawn up, J. presented a petition to the ct., stating that he & his wife were born in Scotland & were domiciled there, that by the law of Scotland marriage operated as an assignment of the wife's personal estate to the husband, that he was entitled to recover the whole without her concurrence & without her being entitled to any settlement; & it prayed that the freehold house might be conveyed to him & H. & their heirs:—*Held*: petitioner being entitled to the produce of the real estate might elect & take the estate itself, but the fact of the parties electing must be recited in the decree.—*HITCHCOCK v. CLENDINEN* (1850), 12 Beav. 534; 19 L. J. Ch. 238; 15 L. T. O. S. 410; 50 E. R. 1165.

—*Revocation of ante-nuptial will by marriage.]—See No. 145, ante.*

962. Dissolution of marriage by courts of domicile—Proprietary rights inter se—Regulated by lex domicilii.]—*SWAAGMAN v. SWAAGMAN* (1908), *Times*, Feb. 17.

SUB-SECT. 3.—EFFECT OF CHANGE OF DOMICIL AFTER MARRIAGE.

963. Vested rights not affected—Community of property according to matrimonial domicile—Not affected by subsequent acquisition of English domicile—Movable goods.]—A Frenchman & Frenchwoman married in France without any contract, so that according to French law their rights *inter se* as to property were subject to the law of community of goods. They came to England & were permanently domiciled there. The husband became a naturalised British subject,

PART XII. SECT. 1, SUB-SECT. 3.

963 i. Vested rights not affected—Community of property according to matrimonial domicile—Not affected by subsequent change of domicile.]—The property rights of spouses, where no ante-nuptial contract has been entered into between them, are regulated by the law of the country in which the spouses were domiciled at the date of the marriage & are not affected by a subsequent change of domicile even in respect of property acquired in such new domicile.—*BLATCHFORD v. BLATCHFORD* (1861), R. 3.—S. AF.

963 ii. — — — — — Immovable property.]—A. & B. were married in Scotland in community of property, as understood by Scottish law. Subsequently they became domiciled in the Cape. A., the wife, died intestate. B. subsequently died, leaving a will disposing of all the immovable property to other persons than the children of the marriage. The children claimed one-half of the joint estate as it existed at their mother's death:—*Held*: the

law of the domicile of the marriage must regulate the rights of the wife & under that law the wife not being entitled to one-half of the joint estate, the children were not so entitled.—*BLACK v. BLACK'S EXECUTORS* (1884), 3 S. C. 200.—S. AF.

iii. — — — — —.]—Immovable property situated abroad, purchased by a husband domiciled in the Cape, after he changes his domicile falls within community, & the rights of the spouses thereto are not affected by the change.—*CHIWELL v. CARLYON* (1897), 14 S. C. 61; 7 C. T. R. 83.—S. AF.

e. — — — — — Wife's separate property governed by law of matrimonial domicile—Not affected by subsequent change of domicile—Movable property.]—*BROOKS v. BROOKS* (1896), 2 Terr. L. R. 289.—CAN.

f. — — — — — Mutual rights of spouses as to personality—Not affected by subsequent change of domicile.]—The mutual

amassed a large fortune & died in England, leaving his wife surviving & having made an English will by which he disposed of all his property:—*Held*: as to movable goods the rights of the wife under the French marriage law as to community of goods were not affected by change of domicile, & the widow was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France.—*DE NICOLS v. CURLIER*, [1900] A. C. 21; 69 L. J. Ch. 109; 81 L. T. 733; 48 W. R. 269; 16 T. L. R. 101, H. L.; *revsq.* S. C. *sub nom.* *Re DE NICOLS*, *DE NICOLS v. CURLIER*, [1898] 2 Ch. 60, C. A.

Annotation:—Refd. Eddy v. Eddy, [1900] A. C. 299.

964. — — — — — Realty & leaseholds.]—In the circumstances (No. 963, *ante*):—*Held*: the change of domicile did not alter the right to community of goods in respect of realty and leaseholds.—*Re DE NICOLS*, *DE NICOLS v. CURLIER*, [1900] 2 Ch. 410; 69 L. J. Ch. 680; 82 L. T. 840; 48 W. R. 602; 16 T. L. R. 461; 44 Sol. Jo. 573.

SECT. 2.—WHERE THERE IS MARRIAGE CONTRACT OR SETTLEMENT.

SUB-SECT. 1.—WHAT LAW GOVERNS.

A. In General.

See, generally, HUSBAND & WIFE; SETTLEMENTS. Law governing contracts.]—*See, generally*, Part VII., *ante*.

Law governing contracts to marry.]—*See* Part IX., *ante*.

965. English subjects may stipulate rights to be governed by foreign law.]—*ESTE v. SMYTH*, No. 978, *post*.

966. Law of intended matrimonial domicile—Settlement on faith of promise of husband to reside in England—Governed by English law.]—A settlement on a marriage in England & in English form was made between a domiciled Turkish subject & an English lady, on the faith of his promise to reside in England:—*Held*: it was to be governed by English law.—*COLLISS v. HECTOR* (1875), L. R. 19 Eq. 334; 44 L. J. Ch. 267; 39 J. P. 295; 23 W. R. 485.

967. Law of matrimonial domicile excluded—By express or implied intention of parties.]—*Re FITZGERALD*, *SURMAN v. FITZGERALD*, No. 297, *ante*.

rights of a husband & wife, as to personal property of each at the time of their marriage, are governed by the law of the matrimonial domicile, & are not affected by a subsequent change of domicile.—*PINK v. PERLIN & Co.* (1898), 40 N. S. R. 260.—CAN.

PART XII. SECT. 2, SUB-SECT. 1.—A.

g. General rule.]—By the comity of nations a contract travels abroad, & as between the parties to it & their representatives, attaches to the testator's real estate in places other than the domicile. Marriage carried out in consideration of such a contract, & in accordance with the laws of the domicile, will, in its incidents touching the real estate of one of the parties, as between those parties & their representatives, be respected & sustained, as to those incidents, in a country other than the domicile, when there is no direct legislation there to the contrary.—*Re KLAUKIE'S WILL* (1873), 1 B. C. R. 76.—CAN.

B. Capacity of Parties.

See, generally, CONTRACT; HUSBAND & WIFE; INFANTS & CHILDREN; SETTLEMENTS.

Capacity as to contracts.]—*See, generally,* Part VII., Sect. 2, sub-sect. 2, *ante*.

968. Capacity to enter into—Ante-nuptial contract—Governed by lex domicilii at time of entering into contract—Infant.]—*Re COOKE'S TRUSTS*, No. 48, *ante*.

969. ————.]—Applt., the widow of a domiciled Scotsman, brought an action in the Ct. of Session for the reduction of an ante-nuptial contract, by which, in consideration of a provision made by her husband, she purported to discharge her legal rights of *terce & jus relictæ*. The contract was executed in Ireland by applt., who was then an infant domiciled in Ireland, but it was contemplated that she & her husband should reside, & they actually resided during their married life in Scotland. The grounds upon which applt. sought to obtain reduction of the contract were, that being an infant she was incapable of contracting by the law of Ireland, & minority & lesion according to the law of Scotland, but no evidence was adduced before the Ct. of Session as to the Irish or English law with regard to the capacity of an infant to enter into contracts:—*Held*: (1) notwithstanding the absence of such evidence in the ct. below, the wife's incapacity according to Irish law being a substantial ground of reduction on the record, judicial notice of the English law prevailing in Ireland might be taken; (2) the capacity of applt. to bind herself by the marriage contract must be determined by the law of her domicile, *i.e.*, the Irish or English law, & under such law she could not as an infant incur an obligation which was not shown to be for her benefit, & she was at liberty to avoid the contract & claim her legal rights as a Scottish widow.—*COOPER v. COOPER* (1888), 13 App. Cas. 88; 59 L. T. 1, H. L.

Annotations:—As to (2) Consd. Viditz v. O'Hagan, [1900] 2 Ch. 87. *Generally, Mentd. Dreyfus v. Peruvian Guano Co.* (1889), 43 Ch. D. 316; *North-Western Bank v. Poynter, Son & Macdonalds* (1894), 11 R. 125.

970. ————.]—A lady of eighteen, when domiciled in England, entered into an ante-nuptial marriage contract in Scottish form for the settlement of her property. The marriage was subsequently dissolved in Scotland at the instance of the husband:—*Held*: a contract of this character was unaffected by Infants' Relief Act, 1874 (c. 62), s. 1, & as regarded the lady, it was voidable as distinguished from void.—*DUNCAN v. DIXON* (1890), 44 Ch. D. 211; 59 L. J. Ch. 437; 62 L. T. 319; 38 W. R. 700; 6 T. L. R. 222.

Annotation:—Mentd. Carter v. Silber (1892), 66 L. T. 473.

971. ——— Post-nuptial contract—Relating to reversionary interest of married woman domiciled abroad—Governed by lex domicilii.]—*GUEPRATTE v. YOUNG*, No. 665, *ante*.

972. ——— Marriage with deceased wife's

sister abroad—Wife confirming settlement by will.]—In 1854 A. went through the marriage ceremony in Prussia with C., his deceased wife's sister. After the marriage, & in consideration thereof, C. settled property upon certain trusts, reserving to herself, however, a power of appointment. Subsequently by her will C. confirmed the trusts of the settlement. On the death of C. both the will & settlement were admitted to probate:—*Held*: the settlement was valid.—*SEALE v. LOWNDES* (1868), 17 L. T. 555.

973. ——— Wife's power of appointment under prior settlement—Governed by English law.]—*Re MÉGRET, TWEEDIE v. MAUNDER*, No. 598, *ante*.

974. Capacity to affirm or repudiate—Ante-nuptial contract—Female infant—Governed by lex domicilii of husband.]—Prior to the marriage in 1864 of an Irish lady under twenty-one with an Austrian, marriage articles in English form were executed by her & her intended husband by which it was declared & agreed by & between the parties thereto that, in case the marriage should take place, the then personal property & certain after-acquired personal property of the lady should be vested in trustees upon the usual trusts of an English marriage settlement. After the marriage the husband retained his Austrian domicile. In 1880 a settlement in English form, which purported to be made in pursuance of the articles, was executed by the husband & wife in Paris. The wife afterwards executed appointments of new trustees of the settlement, & in 1880 she exercised in favour of one of her daughters a power of appointment reserved to her by the settlement. In 1893 the husband & wife executed in Austria in accordance with Austrian law a notarial act, by which they purported to revoke & annul the marriage articles & the settlement of 1880, & to vest in the wife the unrestricted administration of all her property. In 1896 the husband & wife & their four children, all of whom had attained twenty-one, brought an action against the trustees in the Ch. Div., claiming a declaration that by virtue of the notarial act of 1893 the marriage articles & the settlement were wholly cancelled & annulled & were void by Austrian law. By Austrian law a husband & wife had a right to revoke their marriage contract, notwithstanding the birth of issue & acts of ratification, & this right of revocation could not be waived, & was not lost by lapse of time:—*Held*: (1) inasmuch as upon her marriage the wife acquired the Austrian domicile of her husband, & became subject to Austrian law, she never could ratify the settlement or deprive herself of the right to repudiate it, the result being that she never had the power, either before or after her marriage, of making an irrevocable contract; (2) the English doctrine, that the voidable contract of an infant bound him if he did not repudiate it within a reasonable time

PART XII. SECT. 2, SUB-SECT. 1.—B.

974 i. Capacity to affirm or repudiate—Ante-nuptial contract—Female infant—Governed by lex domicilii of wife.]—F., an infant domiciled in New Zealand, while on a visit to Scotland, executed an ante-nuptial settlement, which purported to bind her after-acquired property. She married, & through her husband acquired a Scottish domicile. At the time of her marriage she was possessed of no property, but subsequently, she being then of full age, her father transferred to her certain lands in N.Z. She executed a power of attorney to her brothers in N.Z. to manage this estate for her. Later, while on a visit to N.Z., she

formally repudiated the settlement:—*Held*: (1) her capacity to enter into the settlement & her right of repudiation in respect thereof were governed by N.Z. law; (2) her repudiation was valid, being made within a reasonable time after attaining majority.—*BAIRD v. FERGUSSON* (1911), 31 N. Z. L. R.

974 ii. ——— Capacity of wife—Governed by lex domicilii of husband.]—A Scotswoman, in contemplation of marriage with A., a domiciled Englishman, executed a trust deed, making a settlement of her whole property. The deed was in Scots form, & contained provisions consistent only with Scots

law, & two of the three trustees were Scotsmen. She subsequently married A., & acquired an English domicile. In an action by her against the trustees for declarator that she was entitled to revoke the trust deed:—*Held*: (1) her capacity to revoke as a married woman domiciled in England must be determined according to English law; (2) inquiry as to English law must be limited to her capacity to revoke, & should not include any question as to the revocable nature of the deed in itself.—*SAWREY-COOKSON v. SAWREY-COOKSON'S TRUSTEES* (1905), 8 F. (Ct. of Sess.) 157; 43 Sc. L. R. 209; 13 S. L. T. 605.—*SCOT*.

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after he attained twenty-one, had no application ; (3) the wife was not bound by the marriage articles or by the settlement, & the revocation by the notarial act of 1893 was effectual.—*VIDITZ v. O'HAGAN*, [1900] 2 Ch. 87 ; 69 L. J. Ch. 507 ; 82 L. T. 480 ; 48 W. R. 516 ; 16 T. L. R. 357 ; 44 Sol. Jo. 427, C. A.

Annotations :—*As to* (1) *Consd. Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333. *Refd. Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573. *As to* (3) *Distd. Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333.

C. Form.

Form of contracts.]—See, generally, Part VII., ante ; CONTRACT.

Formalities of marriage.]—See Part IX., ante.

975. Governed by lex loci contractus—Contract entered into in England—By married woman domiciled abroad—Formalities of lex domicilii not complied with.]—GUEPRATTE v. YOUNG, No. 665, *ante*.

976. — Settlement executed in England—Personal property in England—Invalid by foreign matrimonial domicil.]—In contemplation of the marriage between a French gentleman & an English lady, both resident in France, a settlement was executed in English form of a sum of stock, to which the lady became entitled under the exercise of the discretionary power of certain trustees in whom same was vested, which discretionary power was exercised by the trustees upon the faith that the settlement would be made. The trusts of the settlement had been previously arranged between all the parties, & were for the benefit of the lady & her future husband, successively for life, with ultimate provisions for the children of the marriage. The marriage took place in France, but in consequence of the settlement not having been executed before a notary public in French form & duly registered, it had no validity in France. The husband filed his bill, praying payment to him of the trust fund, & charging that the settlement was wholly inoperative :—*Held* : the contract entered into by the settlement was not governed by the *lex domicilii* of the husband & wife, but by the law of England, where it was made & was to be performed, & the marriage having taken place upon the faith of its validity, the trust fund was subject to its provisions.—*VAN GRUTTEN v. DIGBY* (1862), 31 Beav. 561 ; 1 New Rep. 79 ; 32 L. J. Ch. 179 ; 7 L. T. 455 ; 9 Jur. N. S. 111 ; 11 W. R. 230 ; 54 E. R. 1256.

Annotations :—*Consd. Vidity v. O'Hagan*, [1900] 2 Ch. 87. *Refd. Re Bankes, Reynolds v. Ellis* (1902), 50 W. R. 663 ; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

Form of contract denoting intention of parties—As to what law applicable to interpretation of contract.]—See Sub-sect. 1, E., post.

D. Validity.

Law giving essential validity of marriage.]—See Part IX., ante.

977. Assignment of bond by husband to wife—Marriage abroad in virtue of prior ante-nuptial

agreement—Valid by foreign law—Valid in England.]

—The bill was exhibited by pltf., a *feme covert*, & her friends against her husband & two others, M. & S. The case was that pltf., being a Dutch-woman, brought £4,000 portion to her husband, who agreed with her before marriage to leave a complete maintenance for herself & her children, not expressing what. The marriage took effect, but he declining in estate, her friends called on him, & he thereupon assigned certain bonds, wherein M. was bound to him ; & a letter of attorney was made after to S. to receive the money upon the bonds, who received the money of him. The bill was to have the money from M. & S. :—*Held* : the agreement & assignment of the debt in Holland, where such agreement between husband & wife & such assignment of bonds were good, were to be allowed here.—*ASHCOMB'S CASE* (1674), 1 Cas. in Ch. 232 ; 22 E. R. 776.

978. Settlement to regulate English marriage—Followed by valid English marriage—Valid in England—Though marriage & settlement inoperative by foreign law.]—English subjects on their marriage may stipulate that their marriage rights shall be regulated by the law of a foreign country, & the English ct. will enforce such a contract.

A marriage settlement, made in France between English subjects, stipulated that the custom of Paris should regulate their community & the other clauses of the contract. As to £2,000, part of the wife's fortune, the husband was to be chargeable to his wife, & it was to remain her *bien personnel*. By the general law of France a wife could make a will. A marriage contract was then entered into in Paris between them, according to the formalities required by the French law, in anticipation of a marriage to be solemnised *suivant la loi*. A valid English marriage took place at the embassy, but no marriage ceremony took place according to the French forms & solemnities :—*Held* : (1) the rights were to be regulated by those which French subjects would have under such a contract & marriage valid in France, & whether the contract was valid or not in France, still here the wife had a power to dispose of the property by will ; (2) on the construction of the instrument the marital right over the property was excluded ; (3) a will executed according to English, though not according to French formalities, effectually disposed of this property ; (4) the marriage *suivant la loi* was fulfilled by the English marriage, & the settlement, being to regulate an English marriage, was valid here, notwithstanding that according to the French law the marriage & the settlement might be inoperative.—*ESTE v. SMYTH* (1854), 18 Beav. 112 ; 2 Eq. Rep. 1208 ; 23 L. J. Ch. 705 ; 22 L. T. O. S. 341 ; 18 Jur. 300 ; 2 W. R. 148 ; 52 E. R. 44.

Annotations :—*As to* (1) & (4) *Refd. Duncan v. Cannan* (1854), 18 Beav. 128 ; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

979. Covenant to settle after-acquired property—Valid in England—Though illegal by law of matrimonial domicil.]—(1) Where by the law of a foreign country a decree of judicial separation

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h. Post-nuptial settlement of immovable property—Governed by lex rei sitæ.]—A. married a Frenchwoman in British India sans contract. Subsequently, he executed a marriage settlement dealing with certain immovable property in Calcutta, settling the same on certain trusts. The property was sold later & the proceeds invested in certain funds. In a suit by the trustees for directions, the question

was whether the deed was invalid & inoperative & whether French or English law should govern the disposal :—*Held* : if the settlor were of French domicil, his having married a Frenchwoman sans contract did not imply such a special contract as would take away the operation of the ordinary rule that *lex rei sitæ* would govern immovable property.—*BONNAUD v. CHARRIOL* (1905), 1 L. R. 32 Calc. 631 ; 9 C. W. N. 394.—**IND.**

j. Registration of ante-nuptial contract in foreign country—Presumption as to necessity of.]—As under the common law of South Africa, registration is not necessary to give an ante-nuptial contract validity as against creditors of the spouses, there is therefore no presumption that registration is necessary for that purpose in a foreign country.—*SCHNAIDER v. JAFFE* (1916), 7 C. P. D. 696.—S. AF.****

pronounced by a ct. in such country has no effect on the property rights of the husband & wife, property falling into possession after the pronouncement of the decree is bound by the covenant.

On the marriage of an Englishwoman with an Italian, property in England was made the subject of a settlement in English form. The settlement was executed by the intended husband & wife in Italy, where the marriage took place. By the law of Italy the settlement would have been invalid, not only through informalities attending its execution, but also because it contained dispositions of property prohibited by that law:—*Held*: (2) the settlement must be construed according to English law; (3) the covenant to settle after-acquired property on the trusts of the settlement was valid, & could be enforced, even though by the law of the matrimonial domicile such trusts were illegal.—*Re BANKES, REYNOLDS v. ELLIS*, [1902] 2 Ch. 333; 71 L. J. Ch. 708; 87 L. T. 432; 50 W. R. 663; 46 Sol. Jo. 601.

Annotations:—*As to* (2) & (3) *Reid*. *Lloyd v. Prichard*, [1908] 1 Ch. 265. *Generally*, *Mentd. Bagot v. Chapman* (1907), 23 T. L. R. 562.

E. Interpretation and Effect.

(a) In General.

Of contracts generally.—*See* Part VII., *ante*.

980. Factors for consideration—Ambiguous contracts.—*LANSDOWNE v. LANSDOWNE*, No. 402, *ante*.

981. Lex loci contractus applicable—Not when instrument furnishing means of interpretation.—*LANSDOWNE v. LANSDOWNE*, No. 402, *ante*.

982. — Not when manifest intention to exclude.—*CHAMBERLAIN v. NAPIER*, No. 1004, *post*.

983. — When law of matrimonial domicile expressly excluded.—A marriage was solemnised in Scotland in 1857 between B., domiciled in Mauritius, & K., a domiciled Scotswoman. Before the marriage a settlement was made in Scottish form of the money brought into settlement by the wife, & another settlement was made in English form of the property settled by the husband. Each settlement contained a provision that the law of Mauritius should not apply so far as it was, or might be, at variance, or inconsistent with, the provision, clauses & agreements contained in the settlements. In the English settlement there was a limitation on the death of the husband & remarriage of the wife to the persons who would have been entitled to the husband's estate if he had died without issue & unmarried under the English Stat. Distribution. The husband by the law of Scotland had a testamentary power to revoke this limitation if that law applied:—*Held*: the law of Scotland applied.—*Re MUSPRATT-WILLIAMS, MUSPRATT-WILLIAMS v. HOWE* (1901), 84 L. T. 191.

Annotation:—*Reid. Re Megrét, Tweedie v. Maunday* (1901), 84 L. T. 192.

984. Lex situs applicable—Covenant to settle after-acquired property—Realty not capable of being transferred by lex situs without consideration.—A covenant to settle after-acquired property does not extend to real property abroad which, according to the *lex loci*, is not capable of being transferred except for adequate pecuniary consideration.—*Re PEARSE'S SETTLEMENT, PEARSE v. PEARSE*, [1909] 1 Ch. 304; 78 L. J. Ch. 73; 100 L. T. 48; 57 Sol. Jo. 82.

(b) Express Stipulation as to Law applicable.

Contracts generally.—*See* Part VII., *ante*.

985. To be bound by foreign law—Contract by

foreigners abroad—Incorporating foreign custom.]

—The marriage contract of two French people married in France made certain provision as to the wife's property, different from that made by the custom of Paris, & provided that the rest should go according to the custom. They fled to England from persecution & several years later the wife died. On a bill brought by her relations:—*Held*: the property was to go according to the contract, & the custom of Paris applied just as though its provisions had been set out as part of the contract.—*FOUBERT v. TURST* (1703), 1 Bro. Parl. Cas. 129; 2 Eq. Cas. Abr. 475; 1 E. R. 464; *sub nom. FEAUBERT v. TURST*, Prec. Ch. 207, H. L.

Annotations:—*Consd. Rainy v. Ellis* (1872), 26 L. T. 602. *Reid. Lashley v. Hog* (1804), 2 Coop. temp. Cott. 449; *Breadalbane v. Chandos* (1837), 4 Cl. & Fin. 43; *Duncan v. Cannan* (1853), 2 Eq. Rep. 593.

986. — Contract by English subjects abroad.—*ESTE v. SMYTH*, No. 978, *ante*.

987. To be bound by English law—Articles drawn up in foreign language—Executed by English subjects abroad.—Where articles were executed at Florence by English subjects & were drawn up in the Italian language, & it was expressed in the deed itself that it was an instrument intended to be construed according to English law:—*Held*: a construction should be put upon the articles without a settlement being executed, even though such construction would involve the removal of the entire fund from the settlement.—*BYAM v. BYAM* (1854), 19 Beav. 58; 24 L. J. Ch. 209; 1 Jur. N. S. 79; 3 W. R. 95; 52 E. R. 270.

Annotation:—*Mentd. Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139.

988. — Settlement in English form—Husband domiciled in Scotland—Scottish law of forfeiture excluded.—By a settlement in English form made upon the marriage of a husband, whose domicile was in Scotland, with a wife, whose domicile was in England, the income of certain settled property was to be paid to the wife during her life for her separate use without power of anticipation, & after her death to the husband during his life, & subject to these life interests the property was to be held in trust for the issue of the marriage, with remainders over in default of issue, & the settlement expressly provided that the deed should be construed, & that the rights of all persons claiming thereunder should be regulated, according to the law of England. After the marriage the spouses resided in Scotland, & the husband obtained in the Ct. of Session a decree of divorce against the wife on the ground of her adultery:—*Held*: the effect of the provision in the settlement was to exclude the Scottish law of forfeiture under stat. of 1573, c. 55, in case of divorce for adultery, & the husband was not entitled to the income of the settled funds for his life as if the wife were dead.—*MONTGOMERY v. ZARIFI* (1918), 88 L. J. P. C. 20; 119 L. T. 380, H. L.

See, also, No. 297, *ante*.

(c) No express Stipulation as to Law applicable.

Contracts generally.—*See* Part VII., *ante*.

989. General rule.—Where a contract is made between persons domiciled in a foreign country & in a form known to the law of that country, the ct., in administering the rights of parties under it, will give it the same construction & effect as the foreign law would have given to it. If, therefore, a domiciled Scotsman would be held entitled in Scotland by virtue of a marriage contract executed there in the Scottish form to receive whatever property accrued during coverture to his wife,

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this ct. will enforce his right as against any such property coming within its jurisdiction, & will not raise an equity for a settlement in favour of the wife in opposition to the provisions of the contract.

—ANSTRUTHER v. ADAIR (1834), 2 My. & K. 513; 39 E. R. 1040, L. C.

Annotations:—Consd. *Di Sora v. Philipps* (1863), 10 H. L. Cas. 625. *Reid. Duncan v. Cannan* (1854), 18 Beav. 128; *Thurburn v. Steward* (1871), L. R. 3 P. C. 478; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573. *Mentd. Breadalbane v. Chandos* (1836), 4 Cl. & Fin. 44.

990. Contract in Scottish form—Executed in Scotland—Between persons domiciled in Scotland.]

—ANSTRUTHER v. ADAIR, No. 989, *ante*.

991. ——— Husband domiciled in England.]

—Where previously to the marriage of a domiciled Englishman to a domiciled Scotswoman in Scotland, a settlement was executed in Scottish form:

—*Held*: questions arising out of the terms of the settlement & affecting the husband's property in England could not be decided without information as to the construction which would be put upon the instrument by a Scottish ct., & a case should be sent to the Ct. of Sess. under British Law Ascertainment Act, 1859 (c. 63), to ascertain the law of Scotland applicable to the settlement. —EGLINTON (EARL) v. LAMB (1867), 15 L. T. 657.

992. Implied intention to be bound by Scottish law.]—In 1849 an Englishman domiciled in England married a Scottish lady in Scotland. Previously to the marriage the parties executed a contract of marriage in the Scottish form. The intended husband thereby bound himself, his heirs, exors. & successors to pay to the intended wife, in case she should survive him, an annuity of £200, & further to pay £3,000 to the children of the marriage after his death. After the marriage the parties resided in England. In 1870 the husband died there, having by his will dated in 1863, but which did not in any way refer to the marriage contract, given his residuary estate to trustees upon trust to pay the income thereof to his wife for life, with remainder as to the capital to his children equally at twenty-one. The wife died in England in 1886, having made a will appointing exors. During her widowhood she never received the annuity under the contract, but enjoyed the income of her husband's residuary estate. There were two children of the marriage, both of whom survived their father, but predeceased their mother, having attained twenty-one. The husband's estate being insufficient to satisfy both the arrears of the widow's annuity & the £300 payable to the children, the question was raised, by originating summons, whether the contract

was to be construed according to Scottish law, under which the provision of an annuity to the wife on marriage imported a *jus crediti* in her favour, entitling her to rank *pari passu* with her husband's other creditors, the children having only a *spes successionis*, or according to the English law:—*Held*: (1) the intention of the parties on entering into the contract must be considered; (2) the fact that it was entered into in the Scottish form led to the inference that it was to be construed not according to the law of England, but according to the law of Scotland; (3) as the husband's assets were not more than enough to satisfy the paramount claim of the wife's representatives to the arrears of her annuity, the claim of the children in the division of the assets failed. —*Re BARNARD, BARNARD v. WHITE* (1887), 56 L. T. 9; 3 T. L. R. 281.

Annotations:—As to (2) *Reid. Re Bankes, Reynolds v. Ellis* (1902), 50 W. R. 663; *Re Fitzgerald, Surman v. Fitzgerald* (1904), 90 L. T. 266.

993. ———.]—Re FITZGERALD, SURMAN v. FITZGERALD, No. 297, *ante*.

994. ———.]—Where the trustees of a marriage contract, which was executed in form & substance as a Scottish settlement between an Englishman & a Scotswoman, desired to appoint the Public Trustee to be sole trustee of the settlement on the ground that the matrimonial domicile, the present trustees, the beneficiaries, & the trust investments were all English:—*Held*: the settlement still remained a Scottish settlement to be construed according to Scottish law, & there was no statutory power enabling the Public Trustee to accept the trusteeship of what was a foreign settlement.—*Re HEWITT'S SETTLEMENT, HEWITT v. HEWITT*, [1915] 1 Ch. 228; 84 L. J. Ch. 358; 59 Sol. Jo. 177.

995. Executed in Scotland & England—Parties domiciled in England & Scotland.]—A deed in the Scottish form made between parties, some of whom were domiciled in Scotland, & the others in England, will be construed partly according to the law of Scotland, & partly according to the law of England, that is to say, so far as it concerns the Scottish parties, according to the Scottish law, & so far as it concerns the English parties, according to the English law.—*DUNCAN v. CAMPBELL* (1842) 12 Sim. 616; 6 Jur. 677; 59 E. R. 1269.

Annotation:—Consd. *Re Barnard, Barnard v. White* (1887), 56 L. T. 9.

996. Executed in England.]—DUNCAN v. CANNAN, No. 1007, *post*.

997. Contract in English form—Executed in England—Property in England & abroad.]—Previously to the marriage of the son of an Englishman with the daughter of a Scotsman proposals for a settlement were agreed upon between the fathers of the intended husband & wife, which

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990 i. Contract in Scottish form—Executed in Scotland—Scottish & Irish property comprised.]—A., entitled to estates in Scotland & in Ireland, by a marriage contract executed in Scotland, & in Scots form, settled his estates to himself & the heirs male of his body, & bound himself to execute all dispositions & conveyances in Scots & Irish forms for rendering the destination of the estates more complete:—*Semble*: the contract should be construed according to Irish law, as to the Irish estates.—*DAIZELL v. DAIZELL* (1857), 6 I. C. L. R. 483.—IR.

991 i. Husband domiciled in England.]—A Scotswoman, in contemplation of marriage, executed a trust deed, making a settlement of her

property. The deed in Scots form contained provisions consistent only with Scots law, & two of the three trustees were Scotsmen. She subsequently married & acquired an English domicile:—*Held*: the deed was a Scots deed, & the question whether it was *suâ natura* revocable must be determined by Scots law.—*SAWREY-COOKSON v. SAWREY-COOKSON'S TRUSTEES* (1905), 8 F. (Ct. of Sess.) 157.—SCOT.

991 ii. ———.]—A marriage contract between a domiciled Englishman & a domiciled Scotswoman was prepared by Scots solicitors, in favour of Scots trustees & in Scots form. It contained provisions peculiar to Scots law, & provided that the fund contributed by the wife should, on the death of the survivor of the spouses, belong to the wife's "own heirs, exors., or

assignees." On the death of the husband after his wife:—*Held*: the wife's heirs were entitled to the fund according to the Scots law of succession & not according to the English law.—*BATTYE'S TRUSTEE v. BATTYE*, [1917] S. C. 385.—SCOT.

k. Contract in English form—Executed in England—Scottish parties.]—A marriage took place in England between two natives of Scotland. The marriage settlement was executed as a deed of indenture in English form. Within four weeks after the marriage, another deed of indenture also in English form was executed in England:—*Held*: the legal import & effect of the latter deed, which was part of the marriage settlement, must be adjudged by English law.—*RAMSAY v. COWAN* (1833), 11 Sh. (Ct. of Sess.) 967.—SCOT.

proposals, after providing for all the purposes usual in settlements of that description, stipulated that the settlement should contain all usual & necessary clauses. A settlement was afterwards executed in the English form, all the parties being then in England, & related to estates of the husband's family in England, Ireland & Jamaica, & to the money portion of the wife. No clause was introduced relating to any claim which the intended wife might have under the law of Scotland to any part of her father's property. The wife having become entitled by the law of Scotland on the death of her father, to a share of his personal estate by way of legitim:—*Held*: an injunction to prevent the payment of the wife's legitim, which was applied for on the ground that under the stipulation for the insertion in the settlement of usual & necessary clauses, a clause to bar legitim ought to have been introduced, should be refused.—*BREADALBANE v. CHANDOS* (1837), 2 My. & Cr. 711; 7 L. J. Ch. 28; 40 E. R. 811, L. C.

Annotations:—*Mentd.* *Henderson v. Henderson* (1843), 3 Hare, 100; *Boyse v. Colclough* (1854), 1 K. & J. 124; *Wood v. Dwaris* (1856), 25 L. J. Ex. 129.

998. ——— Property abroad.—Previously to his marriage with pltf. R. executed two settlements in England, by the first of which he transferred to the trustees certain mtges. of freehold premises in Sierra Leone, & granted certain freehold premises in Australia upon trust to sell the mortgaged & freehold premises with the joint consent of R. & his wife, & hold the proceeds, & also the rents & profits until sale, upon the trusts declared by the second settlement, which was of even date, the first of such trusts being for the separate use of the wife for life. The second settlement recited the first, but contained no express trusts of the rents & profits of the settled estate until sale. The first settlement provided that during their joint lives deft. & his wife should be permitted to reside in, & enjoy, all, or any part of, the settled premises rent free. Deft. on his own statement was not a domiciled Englishman at the time of the execution of the settlements & marriage. Separation took place shortly after the marriage, & a bill was filed by the wife to execute the trusts of the settlements:—*Held*: (1) whether deft.'s domicile was English or not, the question did not affect the jurisdiction of the ct. over him; (2) on the construction of the settlements, there was no resulting trust of the rents & profits of the settled estates until sale in favour of R., & although, owing to the separation, a joint occupation had become impossible, deft. could not take them for himself while the premises were in the occupation of others, but pltf. was entitled thereto for life for her separate use.—*RAINY v. ELLIS* (1872), 27 L. T. 463, L. JJ.

999. ——— On faith of husband residing in England.—*COLLISS v. PECTOR*, No. 966, *ante*.

1000. ——— English trustees—Husband domiciled abroad.—By an English settlement, executed in England on the marriage in 1838 of an English lady with a domiciled Italian, the lady assigned certain property belonging to her, consisting of French Rentes, shares in the Bank of France & English govt. securities to four trustees, of whom one was an Italian & the other three were English, upon trusts, after the death of the sur-

vivor of the husband & wife, for the children of the marriage. The settlement contained provisions usually inserted in English settlements including a power for the trustees to reinvest in British or French securities. From the date of the marriage until their deaths the husband & wife resided in Italy. The Italian trustee having died, an English trustee was appointed in his place. The husband survived the wife, & died in 1877, leaving two children, the only issue of the marriage, the several trust funds being then in the names of the four English trustees. Both the children being domiciled Italians, the question arose whether under Succession Duty Act, 1853 (c. 51), duty was payable on their succession to their father in respect of the French Rentes & bank shares:—*Held*: succession duty was payable, inasmuch as the settlement was a British settlement, the trustees or persons having the legal ownership were subject to British jurisdiction, & the *forum* for deciding any claim by the children in respect of the trust funds was a British ct.—*Re CIGALA'S SETTLEMENT TRUSTS* (1878), 7 Ch. D. 351; 47 L. J. Ch. 166; 38 L. T. 439; 26 W. R. 257.

Annotations:—*Consd.* *A.-G. v. Folce* (1894), 10 T. L. R. 337; *A.-G. v. Jewish Colonisation Assn.*, [1901] 1 K. B. 123. *Refd.* *Re Smyth*, *Leach v. Leach*, [1898] 1 Ch. 89; *A.-G. v. Johnson*, [1907] 2 K. B. 885. *Mentd.* *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400.

1001. ———.—*Re MEGRET, TWEEDIE v. MAUNDER*, No. 598, *ante*.

1002. ——— Executed abroad—Husband domiciled abroad.—An Englishwoman married a domiciled Frenchman. Articles were, previous to the marriage, executed in the English form, by which the wife became entitled to £200 a year. Her husband afterwards separated from her, & subsequently the French ct. condemned her for adultery:—*Held*: the contract of marriage was English, & the rights of the parties were to be regulated by the English law, & further property of the wife having fallen into possession, & the moral conduct of both parties being reprehensible, the income of the fund must be equally divided between them.—*WATTS v. SHRIMPTON* (1855), 21 Beav. 97; 52 E. R. 795.

1003. ——— Property in England.—*Re BANKES, REYNOLDS v. ELLIS*, No. 979, *ante*.

1004. Contract in English & Scottish forms—English & Scottish property comprised—Executed in Scotland—Implied intention to be bound by English law as to part.—By a marriage contract dated in 1857 & made in Scotland, on the marriage of a domiciled Englishman with a domiciled Scotswoman, real estate in England & a sum of consols were brought into settlement on the part of the husband, & property in Scotland was brought into settlement on the part of the wife. There was an absolute trust for sale & conversion of the husband's property, & investment of the proceeds, which were to be held in trust for the husband & wife successively for life, & after the decease of the survivor in trust for such child or children of the intended marriage, & if more than one, in such shares & in such manner & form, & to vest at such time or times, & to be subject to such powers & restrictions as the husband & wife by deed, or the survivor, by deed or will, should appoint. The other trusts of the husband's property were in English form, & the trustees were

1004 i. Contract in English & Scottish forms—Executed in Scotland—Implied intention to be bound by Scottish law.—A marriage contract was executed at Aberdeen according to both the Scots & English forms; but its entire phraseology & purposes were otherwise according to Scots law & practice,

& the trustees under it were Scotsmen resident in Scotland. The husband was & continued to be a domiciled Englishman; the wife was at the date of the marriage a domiciled Scotswoman:—*Held*: in accordance with the implied intention of parties the marriage contract was to be construed

according to Scots law.—*CORBET v. WADDELL* (1879), 7 R. (Ct. of Sess.) 200; 17 Sc. L. R. 106.—*SCOT*.

i. Contract in foreign form—Executed abroad in accordance with *lex loci*—Property in Scotland—Effect of surrender of rights b. wife.—A widow,

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to have the usual powers for advancement, maintenance & accumulation according to the law of England. The trusts declared of the wife's property were exclusively in Scottish form, the phraseology of the general clauses was mainly Scottish, & the deed was registered in the Ct. of Session in Scotland. The trustees named were six in number, four of whom were Scottish. There were five children of the marriage. The husband having died in 1870, the wife by deed in 1871, appointed the whole of the trust funds brought into settlement by the husband to the eldest child of the marriage:—*Held*: notwithstanding the general rule, that the construction of a contract regarding personal estate is to be determined by the *lex loci contractus*, yet here, in accordance with the manifest intention of the parties, as evidenced by the frame of the instrument, the marriage contract must, so far as the husband's property was concerned, be construed according to English Law.—*CHAMBERLAIN v. NAPIER* (1880), 15 Ch. D. 614; 49 L. J. Ch. 628; 29 W. R. 194.

Annotations:—Reid. Re Barnard, Barnard v. White (1887), 56 L. T. 9; *Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578.

1005. ——— Implied intention to be bound by English & Scottish law.]—*Re MACKENZIE, MACKENZIE v. EDWARDS-MOSS*, No. 224, *ante*.

F. Effect of Change of Domicil after Marriage.

1006. Rights governed by law of new domicil.]—A native of Scotland settled in London as a merchant, intermarried with a native of England. There was a marriage contract. At the dissolution of the marriage by the death of the wife the domicil of the husband was in Scotland:—*Held*: the marriage contract not being so conceived as to bar a claim to legal provisions, pursuer, a daughter of the marriage, had a claim in the right of her mother, to a share of the movable estate of her

who had been married abroad & who in an ante-nuptial contract framed according to the *lex loci* accepted a certain provision in lieu of her legal provisions:—*Held*: barred, by that contract, though drawn in a form which could not affect heritage, from claiming a locality, terce or aliment out of her husband's estate in Scotland.—*SEAFIELD (COUNTESS) v. SEAFIELD (EARL)* (1814), 17 Fac. Coll. 553.—*SCOT*.

m. Ratification of Scottish ante-nuptial contract—Executed in England.]—A married woman who had acquired an English domicil executed in England a ratification of a Scots trust deed executed by her in Scotland before her marriage, while still a domiciled Scotswoman:—*Held*: the deed was an English deed, & English law must be applied to discover its effect as a ratification, & its nature as a revocable or irrevocable deed.—*SAWREY-COOKSON v. SAWREY-COOKSON'S TRUSTEES* (1905), 8 F. (Ct. of Sess.) 157.—*SCOT*.

PART XII. SECT. 2, SUB-SECT. 1.—F.

1006 i. Rights governed by law of new domicil.]—A husband & wife who had been married in Scotland, afterwards removed to England. The wife afterwards returned to S. & died there, but the domicil of the parties at the dissolution of the marriage was in E. At the date of the marriage, the wife possessed an heritable bond, which she afterwards uplifted, & deposited the

price in a Scots bank in her own name. The wife having left a trust settlement, & the sum in the bank being claimed by her trustees, on the ground that it was a *surrogatum* for the heritable bond, & also by the surviving husband, as falling under the *jus mariti*:—*Held*: the parties having been domiciled in E., at the dissolution of the marriage, the question of right to the property must be regulated by the law of E.—*HALL'S TRUSTEES v. HALL* (1854), 16 Dunl. (Ct. of Sess.) 1057; 26 Sc. Jur. 570.—*SCOT*.

1006 ii. —.]—The domicil of the husband at the date of the marriage was Jamaica; at the date of its dissolution by the wife's death, it was Scotland:—*Held*: the claims of the children to goods in communion must be regulated by Scots law.—*KENNEDY v. BELL* (1864), 2 Macph. (Ct. of Sess.) 587; 36 Sc. Jur. 285.—*SCOT*.

n. Scottish settlement—Intention to be bound by Scottish law—Not affected by subsequent change of domicil.]—An ante-nuptial contract of marriage was entered into between an Englishman residing in Scotland & a Scotswoman. The contract was prepared by a Scots solicitor, was in Scots form, & contained a provision that a fund provided by the wife should after her death, failing issue, belong to her "next-of-kin, excluding her husband." Some years after the marriage the parties moved from Scotland to England, & the wife died domiciled there:

father, at the time of her mother's death.—*LASHLEY v. HOG* (1804), 2 Coop. temp. Cott. 449; 47 E. R. 1243, H. L.

Annotations:—Distd. De Nicols v. Curlier, [1900] A. C. 21. *Reid. Duncan v. Cannan* (1854), 18 Beav. 128.

1007. Scottish settlement—Power of wife to give valid discharges for reversionary interest in chose in action—Not affected by change of domicil to England.]—Under a Scottish settlement executed in England, a wife had, by the general law of Scotland, power to give valid discharges for a reversionary interest in a chose in action comprised in it:—*Held*: the removal of her domicil to England did not superinduce a disability in her to give a receipt to trustees for the amount.—*DUNCAN v. CANNAN* (1855), 7 De G. M. & G. 78; 3 Eq. Rep. 403; 24 L. J. Ch. 460; 25 L. T. O. S. 2; 1 Jur. N. S. 291; 3 W. R. 318; 44 E. R. 31 L. JJ.

1008. ——— Validity of by Scottish law as testamentary disposition—Not affected by change of domicil to England.]—*In the Goods of REID*, No. 555, *ante*.

On infant's capacity to contract.]—*See Nos. 968, 969, 970, ante*.

Effect when no marriage contract or settlement.]—*See Sect. 1, sub-sect. 3, ante*.

SUB-SECT. 2.—VARIATION OF MARRIAGE SETTLEMENTS.

1009. Power of English court to vary—On English decree of divorce—Though settlement in Scottish form.]—A decree for dissolution of marriage having been granted on the husband's petition, it appeared that resp., a Scotswoman, was married in Scotland to petitioner, an Englishman, & that in contemplation of the marriage there had been a settlement of her property according to the Scottish law:—*Held*: that under Matrimonial Causes Act, 1859 (c. 61), s. 5, the ct. had power to order a variation of the settlement.—*NUNNELEY v. NUNNELEY* (1890), 15 P. D. 186; 63 L. T. 113; 39 W. R. 190.

Annotation:—Expld. & Folld. Forsyth v. Forsyth, [1891] P. 363.

—*Held*: it was the intention of the parties that the wife's next-of-kin entitled to succeed to the fund, should be ascertained according to Scots law.—*LISTER'S JUDICIAL FACTOR v. SYME*, [1914] S. C. 204.—*SCOT*.

o. Canadian settlement—Not affected by change of domicil to another province.]—Pltf.'s husband entered into an ante-nuptial contract in Quebec with her concerning their rights & property, present & future. He subsequently moved to Ontario, where he died intestate:—*Held*: (1) the contract governed all his property movable & immovable, though situate in O., provided that the laws of O. relating to realty had been complied with; (2) it made no difference whether the matrimonial domicil of the parties at the time of the contract & marriage was in O. or Q.—*TALLIFER v. TALLIFER* (1881), 21 O. R. 337.—*CAN*.

p. Foreign marriage out of community—Wife's rights secured by ante-nuptial settlement—Not affected by change of domicil to Cape Colony.]—Where spouses having a foreign domicil are married out of community, & rights are secured to the wife by ante-nuptial contract, validly made at the domicil of the marriage, but not registered in the Cape, the subsequent removal of the parties to the Cape does not deprive the wife of her rights.—*BOSMAN'S TRUSTEE v. BOSMAN* (1897), 14 S. C. 323; 7 C. T. R. 323.—*S. AF*.

1010. ——— parties domiciled in Scotland at time of marriage.]—The ct. has power to entertain a petition for variation of settlements although petitioner & resp. were domiciled in Scotland at the time of the marriage, & although the settlements were made in Scottish form.—*FORSYTH v. FORSYTH*, [1891] P. 363; 61 L. J. P. 13; 65 L. T. 556.

Annotation:—*Mentd. Hartopp v. Hartopp*, [1899] P. 65.

1011. ——— Petition based on colonial nullity decree.]—There is no jurisdiction to entertain a petition to vary settlements based on a decree of nullity of marriage obtained in a colonial ct.—*MOORE v. BULL*, [1891] P. 279.

1012. On separation by agreement—Marriage contract adopting foreign law—Reference to registrar to draw deed of separation—Registrar going beyond terms of agreement.]—In a suit by the wife for dissolution of marriage the parties at the hearing agreed on certain terms of separation, which were made an order of ct., & it was referred to the registrar to draft a deed of separation, embodying these terms with the usual clauses, & with full power to determine all questions as to the form of the deed, & all questions arising out of the terms of the settlement. The agreement, in addition to the usual conditions as to molestation, custody of, & access to, children, stipulated that the husband should receive £250 a year out of the annual income secured to the wife by the marriage contract, & that the husband should give up to the wife all articles of plate, jewelry, etc., belonging to her. The parties, being English subjects, had been married in Paris, & the marriage contract declared that they adopted the French law as ruling the civil conditions of their marriage. The contract stipulated that the parents of petitioner as her dowry should pay over to the husband & wife a sum of 200,000 francs, & that they should further pay an annuity of 30,000 francs for the benefit of the wife & her children, same to lapse if the donors died before the recipient & the children of the marriage, & in the case of the death of the wife without children before her parents, they contracted to pay the husband an annuity of 12,500 francs. The contract also contained various conditions as to the investment & devolution of property acquired by the wife at & after her marriage, the power of disposing of property

movable & immovable by the husband & wife mutually in each other's favour, the mutual liability for debts contracted by either, etc. The deed of separation prepared by the registrar proposed that the income of 30,000 francs secured by the marriage contract should thereafter be deemed to be the sole property of the wife, & that all real & personal property, movable or immovable, now belonging or thereafter accruing to the wife, should be her separate property, independent of the control of her husband, & that all such property, not disposed of by her will or gift, should go to such persons as would have been entitled to it, if the husband had died in her lifetime. It also required resp. to relinquish all rights conferred on him by the marriage contract as to the investment of property acquired by the wife after marriage, & as to the rights of inheritance of the survivor to the property of the party who died first, & finally it stipulated that either of the parties should be at liberty to apply to the proper French tribunal for the ratification of the deed or of any of its provisions. Resp. refused to execute the deed on the ground that it was *ultra vires* as varying the conditions of the marriage contract, & on a motion under Supreme Ct. of Jud. Act, 1884 (c. 61), s. 14, to nominate some person to sign the deed:—*Held*: (1) under the terms of the agreement, the registrar had power to determine the questions arising under the French law as to whether a separation of bodies effected a separation of goods, or whether a separation of goods was brought about by the agreement, even though a contrary effect might be inferred from its terms, & also, whether an intention that separation of goods should not take place could be gathered from the agreement; (2) the parties on signing the agreement could only be taken to have intended that the deed should embody & carry out the modifications of the marriage contract relating to the respective proportions of the income to be paid to the husband & wife & to the giving up by the husband of all articles belonging to the wife, & the registrar had exceeded his powers in dealing with the pecuniary relations of the parties under the other terms of the marriage contract; (3) the deed must be referred back to the registrar to be reformed.—*DE RICCI v. DE RICCI*, [1891] P. 378; 61 L. J. P. 17.

Part XIII. Rights and Liabilities of Spouses inter se and in respect of their Children.

SECT. 1.—OF SPOUSES INTER SE.

See, generally, HUSBAND & WIFE.

1013. Marriage celebrated abroad—Right of wife to dower in England.]—A marriage celebrated in Scotland, but not between persons who go thither for the purpose of evading the laws of England, will entitle the woman to dower in England.—*ILDERTON v. ILBERTON* (1793), 2 Hy. Bl. 145; 126 E. R. 476.

Annotations:—*Consd.* Doe d. Birtwhistle v. Vardill (1835), 2 Cl. & Fin. 571; Warrender v. Warrender (1835), 2 Cl. & Fin. 488. *Expld.* Birtwhistle v. Vardell (1840), 7 Cl. & Fin. 895. *Consd.* Fenton v. Livingstone (1859), 33 L. T. O. S. 335. *Refd.* Neal v. De Garay (1797), 7 Term Rep. 243; R. v. Millis (1844), 10 Cl. & Fin. 534. *Mentd.* Price v. Clark & Pugh (1795), 3 Hag. Ecc. 265; Bowdell

v. Parsons (1808), 10 East, 359; Hartley v. Hodgson (1818), 8 Taunt. 171; Sussex Peerage Case (1844), 11 Cl. & Fin. 85; Jackson v. Spittall (1870), L. R. 5 C. P. 542; Galway County Petn., Trench v. Nolan (1872), 27 L. T. 69.

1014. ——— Foreign separation decree—Right of wife to execute conveyance to bar estate tail—Without concurrence of husband.]—*Ex p.* CALABRITTO (AMELIA, DUCHESS OF) (1856), 4 W. R. 206.

SECT. 2.—IN RESPECT OF CHILDREN.

See, generally, INFANTS & CHILDREN.

1015. As to property—Right of parent to income of child's property under foreign law—Not recognised in England—Parties domiciled & resident in

PART XIII. SECT. 1.

q. General rule.]—The rights of spouses as regards property acquired during marriage are regulated by the law of the matrimonial domicile.—

GUNN v. GUNN, [1910] T. P. D. 423.—S. AF.

PART XIII. SECT. 2.

r. As to custody—Parents domiciled abroad—Foreign divorce suits

pending—Renouncement of claim by mother.]—The parents of a child were foreigners. They lived apart, & had brought cross actions for divorce in the U.S. etc. The child was placed

Sect. 2.—In respect of children. Sects. 3 & 4

England.]—By the law of Holland the surviving parent is entitled to the income of the children's property until they attain eighteen. By a judicial compromise of a suit in Holland two infant children, who were domiciled in this country, were adjudged to be entitled to one-fourth of their deceased mother's personal estate:—*Held*: their father was not entitled to the income of their property until they attained eighteen.—*GAMBIER v. GAMBIER* (1835), 7 Sim. 263; 4 L. J. Ch. 81; 58 E. R. 838.

1016. As to custody—Marriage of Englishwoman to Mohammedan—Legitimacy of child—Mother's right to access.]—S., an Englishwoman, had married according to the Mohammedan ritual N., a Mohammedan, he being already married. The children of this marriage had been recognised by N. as his children & his heirs according to Mohammedan law. By an agreement between S. & N. the children were brought up as Mohammedans, & S. & N. having separated, they went with their father to India, & remained there until the father's death four years afterwards. By his will N. appointed certain persons guardians of the children. S. now moved that an order be made giving her the custody of her children, as she admitted that her union with N. was not a marriage, & therefore contended that, as her children were illegitimate, she had the right to the custody of them:—*Held*: S. had no absolute right to the custody, & the ct. would consider what was best for the interests of the children, & having regard to the nature of their birth, the religion in which they had been educated, & the mode of life which had been adopted for them, it was best for them to remain in the custody of the guardians whom the father had appointed.—*Re ULLEE*; (*THE NAWAB NAZIM OF BENGAL'S INFANTS*) (1885), 54 L. T. 286; 2 T. L. R. 8, C. A.

Annotation:—*Mentd. R. v. Barnardo, Jones' Case*, [1891] 1 Q. B. 194.

1017. As to maintenance — Liability of English father for maintenance of adult son—Son pauper lunatic relieved in Scotland.]—In Mar. 1896, a pauper lunatic of full age was found destitute in a Scottish parish, & in the same year he was again found destitute in another Scottish parish. The parishes having relieved him they claimed & recovered the cost of doing so from pltfs., the responsible authority for the pauper's parish settlement. Since 1896, pltfs. continued to pay for his maintenance in a pauper lunatic asylum. The pauper lunatic was the son of a domiciled Englishman, who died leaving assets in 1915. Pltfs. claimed to recover the cost of maintenance from the father's exors. on the ground that by Poor Law (Scotland) Act, 1845 (c. 83), s. 71, a relieving parish might recover from a parent or

other person responsible, & that by the common law of Scotland a father must provide even for his adult son:—*Held*: the liability of the parent fell to be determined by the law of his domicile, & inasmuch as by English law a parent is not liable for the maintenance of his adult child except under a justices' order pltfs. could not recover the sums which they had had to expend for the maintenance of the lunatic.—*COLDINGHAM PARISH COUNCIL v. SMITH*, [1918] 2 K. B. 90; 87 L. J. K. B. 816; 118 L. T. 817; 82 J. P. 170; 26 Cox, C. C. 260; 16 L. G. R. 376.

SECT. 3.—GUARDIANSHIP OF INFANTS.

See, generally, INFANTS & CHILDREN.

1018. Jurisdiction of English court to appoint—Infant domiciled in Scotland—Property in Scotland.]—A Scotsman by deed duly made in the Scottish form, having all his property in Scotland, appointed his wife & eight other persons, all domiciled & resident in Scotland, to be tutors & curators of his infant daughter. Upon his death his widow & four only of the eight accepted the trusts of the deed. The widow afterwards, with consent of her co-trustees, brought the infant to England, & after residing for three years in various places there for the health of both, the widow died, recommending the infant to the care of her grandfather, who was then residing in England. The grandfather filed a bill in Ch. in the infant's name for the sole purpose of making her a ward of ct. & preventing her removal to Scotland, & upon a contest arising between him & the Scottish tutors for the guardianship of the infant, the Lord Chancellor made an order in the usual form referring it to the master to approve of proper persons to be guardians:—*Held*: (1) the Scottish testamentary tutors were not testamentary guardians in England, according to 12 Car. 2, c. 24; (2) the ct. had jurisdiction to appoint guardians to the infant, although her domicile & all her property were situate in Scotland; (3) the ct. was bound to appoint guardians to the infant, being made a ward by the mere filing of the bill, & although the Scottish testamentary tutors had the exclusive control of all her property, answerable to the Scottish cts. only, they had no authority over the infant in England, nor power to protect her, nor were they entitled by virtue of the deed of appointment or by international law to be confirmed or appointed her guardians in England.—*JOHNSTONE v. BEATTIE* (1843), 10 Cl. & Fin. 42; 1 L. T. O. S. 250; 7 Jur. 1023; 8 E. R. 657, H. L.; *affg. S. C. sub nom. BEATTIE v. JOHNSTONE* (1841), 1 Ph. 17, L. C.

Annotations:—As to (2) *Expld. Hope v. Hope* (1854), 19 Beav. 237; *Scott v. Bentley* (1855), 1 K. & J. 281. *Consd. Re Tweeddale's Settlement* (1859), John. 109; *Stuart v. Butc, Stuart v. Moore* (1861), 9 H. L. Cas. 440. *Refd. Lockwood v. Fenton* (1852), 1 Sm. & G. 73; *Re Dawson*,

by the father in custody of a person in Canada. The mother applied to have the child delivered up to her on the ground that by the law of the state of Michigan she was entitled, when living apart from her husband, to the custody of the child until it should arrive at the age of twelve, subject, however, to the right of the ct. to interfere with & remove it for cause assigned. An *ex p.* order had been made in the wife's divorce suit in her favour, directing the father to give up the child to her. The wife earlier had given a formal document to her husband renouncing all claim to the custody of the child:—*Held*: (1) the parents being foreigners, & the domicile of the child not having, under the circumstances, been changed, the law of the state of M. must govern; (2) the mother having voluntarily

given up the custody of the child to the father, she should not have it re-delivered to her.—*Re KINNEY* (1875), 6 P. R. 245.—**CAN.**

s. — Jurisdiction of Scottish courts to entertain petition by wife—Husband domiciled in England.]—A husband being domiciled in England:—*Held*: Scottish cts. had no jurisdiction to entertain a petition by his wife resident in England, for access to their minor children resident with their father in Scotland.—*BARKWORTH v. BARKWORTH*, [1913] S. C. 759; 50 Sc. L. R. 504; 1 S. L. T. 299.—**SCOT.**

PART XIII. SECT. 3.

t. Right to custody as between husband & wife—By what court determined—How enforced.]—The ct. of the

matrimonial domicile has jurisdiction to determine the guardianship, as between husband & wife, of the minor children. The ct. decides only the right to such custody; for the actual enforcement of the right further application is required to the *forum* of the place where the children are, or where the custodian *de facto* is.—*COOMBE v. COOMBE*, [1909] T. H. 241.—**S. AF.**

u. Jurisdiction of court to appoint—In civil matters & administration—Though mother entitled to represent infant by foreign law.]—Even where according to Italian law, the mother, in default of the father, can represent her minor children in civil matters & administration, Canadian cts. may nevertheless appoint another person as tutor to take all necessary proceed-

Dawson v. Jay (1854), 2 W. R. 311; Ewing v. Orr Ewing (1883), 9 App. Cas. 34. *As to* (3) *Consd.* Stuart v. Bute, Stuart v. Moore (1861), 9 H. L. Cas. 440. *Reid.* Lockwood v. Fenton (1852), 1 Sm. & G. 73; *Re* Dawson, Dawson v. Jay (1854), 2 W. R. 311; Scott v. Bentley (1855), 1 K. & J. 281; Ewing v. Orr Ewing (1883), 9 App. Cas. 34. *Generally, Mentd.* Hoskins v. Matthews (1856), 8 De G. M. & G. 13; Moorhouse v. Lord (1863), 10 H. L. Cas. 272; Ewing v. Orr Ewing (1885), 10 App. Cas. 453; *Re* Beaumont, [1893] 3 Ch. 490; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *A.-G. v. Winans* (1901), 85 L. T. 508.

1019. Infant domiciled abroad—Part of property in England—Guardian appointed by foreign court.]—The ct. will not, from any supposed benefit to infant subjects of a foreign country, part of whose property is here, & who have been sent to this country for the purposes of education, interfere with the discretion of the guardian who has been appointed by a foreign ct. of competent jurisdiction, when he wishes to remove them from England in order to complete their education in their own country. But the ct. will refuse to discharge an order by which guardians had been appointed over the children in this country, & merely reserve to the foreign guardian the exclusive custody of the children, to which he is entitled by the order of the ct. of his own country.—*NUGENT v. VETZERA* (1866), L. R. 2 Eq. 704; 35 L. J. Ch. 777; 15 L. T. 33; 30 J. P. 820; 12 Jur. N. S. 781; 14 W. R. 960.

Annotations:—Expld. *Re* Agar-Ellis, *Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49. *Consd.* *Re* Willoughby (1885), 30 Ch. D. 324.

1020. Guardians appointed by foreign court—Scottish testamentary guardians—Not testamentary guardians in England.]—*JOHNSTONE v. BEATTIE*, No. 1018, *ante*.

1021. ——— Having exclusive control over property of infant in Scotland—No authority over infant in England.]—*JOHNSTONE v. BEATTIE*, No. 1018, *ante*.

1022. ——— Not entitled to be appointed guardians of infant in England.]—*JOHNSTONE v. BEATTIE*, No. 1018, *ante*.

1023. ——— Seeking to remove infant out of England—Infant a British subject & American citizen—Application refused.]—Although the ct. will under special circumstances allow an infant ward to go out of the jurisdiction, yet it will not compel the removal of an infant ward out of the jurisdiction.

An infant, being a British subject, & also an American citizen, & having lost both father & mother, was brought over to England from the United States, where her property was situate, by a paternal aunt with whom she resided. An application was then made by a maternal aunt, who had been appointed her guardian by the ct. in America, to have the custody of the infant delivered to her with the view of taking the infant back to America:—*Held*: the ct. should not interfere, since it had no right to make such an order, even if on other grounds it had thought proper to accede to the application.—*DAWSON v.*

JAY, Re *DAWSON* (1854), 3 De G. M. & G. 764; 23 L. T. O. S. 53; 2 W. R. 366; 43 E. R. 300, L. C. *Annotations:—Consd.* *Hope v. Hope* (1854), 4 De G. M. & G. 328. *Expld. & Distd.* *Stuart v. Moore, Re Bute* (1861), 4 L. T. 382. *Distd.* *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704.

1024. ——— Foreign infant—Discretion not interfered with on ground of supposed benefit.]—*NUGENT v. VETZERA*, No. 1019, *ante*.

1025. ——— Scottish tutor in Scotland—No right to custody of infant as against English guardian.]—In 1859 the Ch. Ct. appointed S. & E. to be guardians of an infant, who was seised, as tenant for life & in fee, of estates in England & Scotland. In the same year P. was appointed tutor-at-law in Scotland to the infant. In 1860 the Ch. Ct. approved a scheme for the maintenance & education of the infant, & ordered E. to deliver him up to his other guardian, S., & discharged her from the guardianship for having clandestinely carried the infant to Scotland to evade the order of the ct. As E. persisted in retaining the infant after the service of the order a petition to the Ct. of Session in Scotland was presented by S., praying the enforcement of the order of the Ch. Ct. The consideration of his petition was adjourned from July 20 to Nov., 1860. In the meantime P., the tutor-at-law in Scotland, by application to the Ct. of Session in Oct. & Nov. restrained E. from taking the infant out of the jurisdiction of the ct. & compelled her to deliver him over to G. for temporary residence. On Feb. 7, 1861, on the petition of P. the Ct. of Session pronounced an interlocutor, forbidding S. & all others from removing the pupil from its jurisdiction:—*Held*: the appointment of S. as sole guardian should be confirmed, with directions to carry out the scheme of the Ch. Ct.—*STUART v. BUTE, STUART v. MOORE* (1861), 9 H. L. Cas. 440; 4 L. T. 382; 7 Jur. N. S. 1129; 9 W. R. 722; 11 E. R. 799; *sub nom.* *BUTE'S GUARDIANSHIP*, 4 Macq. 1, H. L.; *reversg.* *S. C. sub nom.* *BUTE (MARQUESS) v. STUART*, 2 Giff. 582. *Annotations:—Expld. & Distd.* *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704. *Reid.* *Brown v. Collins* (1883), 25 Ch. D. 56.

1026. Removal of guardians—Appointed on undertaking as to religion of foreign infant—Removed on failure to carry out undertaking—On application of foreign guardians.]—Two persons had been named by the adoptive mother of an Italian infant to be her guardians, on an undertaking by their solr. that the child should be brought up as one of their own, & her religion respected. On the application of the guardians appointed by the Italian ct. on proof of circumstances showing that the undertaking had not been observed:—*Held*: the guardians should be removed & new guardians appointed.—*Re SAVINI, SAVINI v. LOUSADA* (1870), 22 L. T. 61.

SECT. 4.—SUCCESSION ON DEATH.

To immovables.]—*See* Part VI., Sect. 1, *ante*.

To movables.]—*See* Part VI., Sect. 2, *ante*.

ings for the minor children.—*BYERS Co., Ltd. v. BARTOLUCCI* (1918), Q. R. 27 K. B. 359; 42 D. L. R. 486.—*CAN.*

v. ——— Infant domiciled in England—Property in Scotland.]—*WEBB v. CLELAND'S TRUSTEES* (1904), 6 F. (Ct. of Sess.) 274; 41 Sc. L. R. 229; 11 S. L. T. 581.—*SCOT.*

w. Guardians appointed by foreign court—Infant domiciled & resident abroad—Right to receive payment of infant's money collected within jurisdiction.]—*Held*: duly appointed tutors in Quebec of an infant domiciled & residing there, which province had also been the domicile of the father at his

death, were entitled to have paid over to them from Ontario administrators of the father's estate, there being no creditors, money coming to the infant from the estate, which had been collected in Ontario.—*HANRAHAN v. HANRAHAN* (1890), 19 O. R. 396.—*CAN.*

1026 i. Removal of guardians—Jurisdiction of South African court—Conditional appointment by English court—Breach of condition.]—*Held*: under Charter of Justice, s. 30, the Supreme Ct. had jurisdiction to order a mother of two minor children, then in Cape Town on the way to Australia, to whom custody of the children had been allowed by an English ct. on

condition that the children were not removed from the jurisdiction of the ct., to hand over the children to L., who had been duly appointed guardian on the mother's breach of the condition.—*LEYLAND v. CHETWYND* (1901), 18 S. C. 239.—*S. AF.*

y. ——— Jurisdiction of Indian court—To order guardians to give up custody of Hindu infants resident in England.]—The High Ct. of Madras has no jurisdiction to make an order directing a guardian of Hindu infants, who are residing in England, to hand the infants over to their father in India.—*BESANT v. NARAYANAH* (1914), 30 T. L. R. 560, P. C.—*IND.*

Part XIV.—Foreign Judgments.

SECT. 1.—IN GENERAL.

1027. What is a foreign judgment—Judgment of colonial court.]—The judgment of a colonial ct. of the British Empire comes within the category of a foreign judgment (LORD CAMPBELL, C.J.).—*BANK OF AUSTRALASIA v. NIAS*, No. 1042, *post*.

See, also, No. 104, *ante*.

1028. Contents of foreign judgment—"Reasons for decision" appended to judgment.]—(1) Final decrees & judgments of foreign cts. of competent jurisdiction can be examined & impeached, not only for the purpose of allowing deft. to show that the foreign ct. had not jurisdiction on the subject matter of the suit, or that he was never summoned to answer & had no opportunity of making his defence, or that the judgment was fraudulently obtained, but also for such error as shows upon the face of the judgment itself that the judges, without any extrinsic evidence, had come to an erroneous conclusion either of law or fact.

(2) *Semble*: the reasons for decision appended to the judgment of a foreign ct. form part of the judgment itself.

(3) Pltfs., who were foreigners, & had always resided beyond seas, obtained judgment in 1842 in a foreign ct. against H. In 1855 they filed their bill to enforce the foreign judgment against the estate of H., who had died in 1846:—*Held*: although the Stat. Limitations did not apply, yet in the absence of evidence accounting for the delay, they were not entitled to the assistance of the ct. to enforce their demand.

(4) The distinction was considered between the case of a successful party in a foreign ct. seeking to enforce a foreign judgment in this country & the case of a deft. in a foreign ct. setting up a foreign judgment as a bar to the same demand in this country.—*REIMERS v. DRUCE* (1857), 23 Beav. 145; 26 L. J. Ch. 196; 28 L. T. O. S. 298; 3 Jur. N. S. 147; 5 W. R. 211; 53 E. R. 57; *subsequent proceedings*, 29 L. T. O. S. 35, L. J.

Annotations:—*As to* (1) *Consd. Lang v. Purves* (1862), 15 Moo. P. C. C. 389. *Reid. Simpson v. Fogo* (1863), 1 Hem. & M. 195.

See, generally, JUDGMENTS & ORDERS.

SECT. 2.—ESSENTIALS TO RECOGNITION OF FOREIGN JUDGMENTS.

SUB-SECT. 1.—MUST BE JUDGMENT OF PROPER COURT.

1029. Political court—Commissary court in France.]—(1) A plea of a foreign sentence was overruled, being in a commissary ct. only, that is of a political nature, for determining disputes relating to French actions.

PART XIV. SECT. 1.

z. What is a foreign judgment—"Call order" made by English Court of Chancery.]—Cts. in India treat a "call order" made by Ct. of Ch. in England upon a contributory of a co. registered in England & being wound up under authority of the Ct. of Ch. as a foreign judgment.—*LONDON, BOMBAY & MEDITERRANEAN BANK v. HORMASJI PESTANJI FRAMJI* (1871), 8 Bom. O. C. 200.—IND.

a. — Decree for account made by English Court of Chancery.]

Creditors of a resident in Ireland filed a bill in the English Ct. of Ch., & obtained a decree for an account:—*Held*: the proceedings in the English Ct. of Ch. were in the nature of a foreign judgment, & were to be treated as such in Ireland.—*HOULDITCH v. DONEGAL* (1834), 2 Cl. & Fin. 470; 8 Bl. N. S. 301.—IR.

PART XIV. SECT. 2, SUB-SECT. 2.—A.

1034 i. Presumption in favour of jurisdiction.]—A declaration on a judgment of the High Ct. of Justice, Exch. Div., omitted to state that it

(2) The general question is whether the judgment of a foreign ct. can be pleaded in bar here to relief & discovery. No case or authority has been cited for this purpose, & I should be very cautious how I allow it as a precedent. The judgment of a ct. abroad is evidence of a debt at law (LORD HARDWICKE, C.).—*GAGE v. BULKELEY* (1744), 3 Atk. 215; Belt's Sup. 409; Ridg. temp. H. 263; 28 E. R. 563, L. C.

Annotations:—*As to* (2) *Reid. Bayley v. Edwards* (1792), 3 Swan. 703. *Generally, Mentd. Story v. Fry* (1842), 1 Y. & C. Ch. Cas. 603.

1030. Superior court—In Ireland—Since Union.]—A judgment obtained in one of the superior cts. in Ireland since the Union is not a record in England, & *assumpsit* is maintainable upon such a judgment.—*HARRIS v. SAUNDERS* (1825), 4 B. & C. 411; 6 Dow. & Ry. K. I 471; 3 L. J. O. S. K. B. 239; 107 E. R. 1112.

Annotation:—*Reid. Thelwall v. Yelverton* (1864), 16 C. B. N. S. 813.

See, now, Judgments Extension Act, 1868 (c. 54).

1031. Court of equity—In English colony.]—*HENLEY v. SOPER*, No. 1115, *post*.

1032. ———.]—*HENDERSON v. HENDERSON*, No. 1116, *post*.

1033. Executor's court of dealing—In Danish colony.]—*PRICE v. DEWHURST*, No. 383, *ante*.

SUB-SECT. 2.—MUST BE JUDGMENT OF COURT OF COMPETENT JURISDICTION.

A. In General.

1034. Presumption in favour of jurisdiction.]—A declaration in debt on the judgment of a foreign court need not state that the court had jurisdiction over the parties or cause.

We presume that the judgment of a foreign ct. is correct (PATTESON, J.).—*ROBERTSON v. STRUTH* (1844), 5 Q. B. 941; 1 Dav. & Mer. 772; 3 L. T. O. S. 75; 8 Jur. 404; 114 E. R. 1503.

Annotation:—*Consd. Barber v. Lamb* (1860), 8 C. B. N. S. 95.

1035. ———.]—It is the duty of cts. of equity to give credit to foreign cts. for doing justice within their jurisdiction.—*PENNELL v. ROY* (1853), 3 De G. M. & G. 126; 22 L. J. Ch. 409; 21 L. T. O. S. 14; 17 Jur. 247; 1 W. R. 237; 43 E. R. 50, L. J.

Annotations:—*Reid. North London Ry. v. G. N. Ry.* (1883), 11 Q. B. D. 30. *Mentd. Maunsell v. Mid. G. W. Ry.* (of Ireland) & G. N. & W. (of Ireland) Ry. (1863), 8 L. T. 347; *Stevens v. Chown, Stevens v. Clark*, [1901] 1 Ch. 894.

1036. ———.]—The presumption where a foreign ct. has purported to act properly & within its jurisdiction is *omnia rite esse acta*.—*TAYLOR v. FORD* (1873), 29 L. T. 392; 22 W. R. 47.

1037. ——— Rebuttal of presumption.]—The rule as to the recognition of the judgment of a foreign

was duly constituted:—*Held*: the declaration was good.—*BEER v. PATRICK* (1880), 1 N. S. W. L. R. 157.—AUS.

1034 ii. ———.]—In construing an order of a foreign ct. made under authority of an Act of Parliament, the domestic ct. will be slow to inquire into the question of the foreign ct.'s jurisdiction to make the order, & will construe such order, if possible, in a way most favourable to the jurisdiction of that ct.—*Re ANNAND* (1888), 14 V. L. R. 1009.—AUS.

ct. by cts. of this country is that *prima facie* the foreign ct. will be given credit for having acted properly & within its jurisdiction if the persons affected are citizens of the country where the judgment is given. The burden of showing want of jurisdiction lies on those who impeach the judgment, which can only be done by showing either that by law there is no jurisdiction, or that the judgment is contrary to natural justice.—**WALKER v. MAHON** (1886), 2 T. L. R. 548, C. A.

1038. —.]—The order of a Master in Lunacy in England is *prima facie* evidence of the facts stated therein, & if uncontradicted ought to be regarded as sufficient evidence, being made by a competent tribunal in a matter within its jurisdiction, not only in this country, but in all His Majesty's dominions.—**HARVEY v. R.**, [1901] A. C. 601; 70 L. J. P. C. 107; 84 L. T. 849; 17 T. L. R. 601, P. C.

Annotation:—**Mentd.** **Hill v. Clifford**, **Clifford v. Timms**, **Clifford v. Phillips**, [1907] 2 Ch. 236.

1039. Essentials to establishment of jurisdiction.]—(1) To a declaration in a case for an injury done to pltf.'s ship on the high seas by deft.'s ship, then being under the care, direction, & management of certain mariners & servants of deft., by their negligence, deft. pleaded, that the ship ran foul of pltf.'s ship on the high seas, out of the British dominions; that at that time deft. was, & still is, a subject of France, & a holder & proprietor of shares in, & acting director of, a society or co. established in France, according to the laws of that kingdom, & that, at the time of the collision, the co. were the owners of the ship, & by their mariners & servants, did commit the above grievances; & that deft. never was possessed of or interested in the ship otherwise than as holder & proprietor of shares; & that, by the law of France, deft. was not responsible for or liable to be sued or impleaded individually, or in his own name or person, in respect of the causes of action, but the co. alone, or the master or person in command of the ship for the time being, was responsible for & liable to be sued & that deft. never was master, or in command of the ship:—*Held*: if this plea was to be construed as meaning to aver, that by the law of France deft. was not liable for the acts of the master, but that a body established by that law, & in the nature of an English corp., were the proprietors of the vessel, & alone liable for the acts of the master, the plea was a good defence to the action, but if the plea meant only, that in the French cts. the mode of proceeding would be to sue deft. jointly with the other shareholders of the co., under the name of their assocn., the plea was bad.

(2) Deft. also pleaded that the co. sued pltf. in the Commercial ct. of Havre according to the law of France, where pltf. defended & was condemned in damages, & that by the law of France, the judgment so recovered in the French ct. was an absolute & final bar to any action by pltf. against deft. in respect of the grievances & causes of action:—*Held*: the plea was bad in form, for not commencing & concluding by way of estoppel, & in substance, for not showing that pltf. was a French subject, or resident or present in France when the suit at Havre was commenced, so that he might be bound, by reason of allegiance, or domicile, or temporary presence, by a decision of the French ct. *Qu.*: whether, even with such allegations, the plea would have been a bar to the action.

(3) The pleas do not state that pltf. was a French subject, or resident or even present in France when the suit began so as to be bound by

reason of allegiance, or domicile, or temporary presence by a decision of a French ct., & he did not select the tribunal & sue as pltf. in any of which cases the determination might have bound him. (*per* CUR.)—**GENERAL STEAM NAVIGATION Co. v. GUILLOU** (1843), 11 M. & W. 877; 13 L. J. Ex. 168; 152 E. R. 1061.

Annotations:—*As to* (1) **Appld.** **The M. Moxham** (1876), 1 P. D. 107. *Refd.* **The Zollverein** (1856), 27 L. T. O. S. 180; **Newby v. Colts Patent Firearms Co.** (1872), L. R. 7 Q. B. 293; **Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co.** (1883), 10 Q. B. D. 521. *As to* (2) **Consd.** **Schibsby v. Westenholz** (1870), L. R. 6 Q. B. 155. *Refd.* **Volnet v. Barrett** (1885), Cab. & El. 554. *Generally*, **Mentd.** **Cammell v. Sewell** (1860), 5 H. & N. 728.

1040. —.]—The cts. of this country consider deft. bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where deft. in the character of pltf. has selected the *forum* in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the *forum* in which the judgment was obtained, & possibly, where deft. has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction (**FRY, J.**).—**ROUSILLON v. ROUSILLON**, No. 740, *ante*.

1041. —.]—In actions *in personam* there are five cases in which the cts. of this country will enforce a foreign judgment: (1) Where deft. is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where deft. in the character of pltf. has selected the *forum* in which he is afterwards sued; (4) where he has voluntarily appeared; & (5) where he has contracted to submit himself to the *forum* in which the judgment was obtained (**BUCKLEY, L.J.**).—**EMANUEL v. SYMON**, No. 1052, *post*.

1042. Absence of jurisdiction—Effect of—Generally.]—By an Act of the colonial legislature of New South Wales, it was provided that a banking co. should sue & be sued in the name of its chairman, & that execution on any judgment against the co. might be issued against the property of any member for the time being, in like manner as if such judgment had been obtained against such member personally. In *assumpsit* against a member of the co. on a judgment obtained in the colony against the chairman:—*Held*: (1) the colonial legislature had authority to pass the Act, & there was nothing repugnant to the law of England, or to natural justice, in enacting that actions on contracts made by the co. in the colony, instead of being brought against the shareholders individually, should be brought against the chairman whom they had appointed to represent them; (2) a judgment recovered in such an action, after service of process on the chairman, had the same effect beyond the territory of the colony which it would have had if deft. had been personally served with process & he being a party to the record, the recovery had been personally against him; (3) although in an action on a foreign or colonial judgment the judgment is examinable to a certain extent, as, for the purpose of showing want of jurisdiction, or that deft. was not summoned, or that the judgment was fraudulently obtained, yet such judgment is not examinable upon the merits, as, for the purpose of showing that the contract sued upon was not made, or was procured by fraud or that the judgment was erroneous.

(4) The question whether the judgment of a colonial ct. is a foreign judgment discussed. (*See* No. 1027, *ante*).—**BANK OF AUSTRALASIA v. NIAS**

Sect. 2.—Essentials to recognition of foreign judgments: Sub-sect. 2, A., B. & C.]

(1851), 16 Q. B. 717; 20 L. J. Q. B. 284; 16 L. T. O. S. 483; 15 Jur. 967; 117 E. R. 1055.

Annotations:—As to (1) Foll. *Kelsall v. Marshall* (1856), 1 C. B. N. S. 241. **As to (2) Consd.** *Copin v. Adamson*, *Copin v. Strachan* (1874), L. R. 9 Exch. 345; *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49. **As to (3) Consd.** *Reimers v. Druce* (1857), 23 Beav. 145; *Apld. Castrique v. Behrens* (1861), 3 E. & E. 709. **Consd.** *Scott v. Pilkington* (1862), 2 B. & S. 11; *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Ochsenbein v. Papellier* (1873), 8 Ch. App. 695; *Volnet v. Barrett* (1885), Cab. & El. 554; *Vadala v. Lawes* (1890), 25 Q. B. D. 310. **Expld.** *Robinson v. Fenner*, [1913] 3 K. B. 835. **Refd.** *Thompson v. Bell* (1854), 3 E. & B. 236; *Barber v. Lamb* (1860), 8 C. B. N. S. 95; *Lang v. Purves* (1862), 15 Moo. P. C. C. 389; *Philpott v. Adams* (1862), 7 H. & N. 888; *Vanquelin v. Bonard* (1863), 15 C. B. N. S. 341; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600.

1043. —.]—**REIMERS v. DRUCE**, No. 1028, *ante*.

1044. —.]—(1) Pltf., the widow of a French subject, was, according to the laws of France, donee of the universality of the real & personal estates belonging to the succession of her late husband & his rights & liabilities thereupon became vested in her & she became entitled to enforce those rights in her own name. She subsequently paid to the indorsee of bills drawn & indorsed by deceased & accepted by deft. the amount due upon them, & recovered judgment against deft. for the amount in a ct. of competent jurisdiction in France:—**Held:** pltf. was entitled to sue deft. in England in her own name, without having first taken out administration in England to her deceased husband.

(2) The judgment of a foreign ct. may be impeached in this country by an averment of any facts showing that the ct. was not a ct. of competent jurisdiction, but not by an averment of facts which might have been set up by way of defence in the foreign ct. & might have been tried & decided there.—**VANQUELIN v. BOUARD** (1863), 15 C. B. N. S. 341; 3 New Rep. 122; 33 L. J. C. P. 78; 9 L. T. 582; 10 Jur. N. S. 566; 12 W. R. 128; 143 E. R. 817.

Annotations:—As to (2) Consd. *Pemberton v. Hughes*, [1899] 1 Ch. 781. **Refd.** *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228.

— In particular instances.]—See Sub-sect. 2, B.—G., *post*.

B. Defendant not Subject of Foreign Country.

1045. Meaning of "subject"—Person born in British colony—Whether "subject" of colony.]—The fact that a person is born in a British colony does not make him a subject of that colony, so as to make a judgment recovered against him in his absence in the colonial ct. enforceable in this country.

Deft. was born in the Colony of Victoria, Australia, & resided for twenty-six years there until 1890, when he came to live in England.

PART XIV. SECT. 2, SUB-SECT. 2.—B.

1046 i. Judgment not recognised.]—Judgment was given against deft. in O., he was served in British Columbia, where he resided & was domiciled. Pltf. sued in British Columbia on this judgment:—**Held:** deft. was not subject to the O. Cts.—**WAISH v. HERMAN** (1908), 13 B. C. R. 314.—**CAN.**

1046 ii. —.]—The mere making of a contract within the jurisdiction of a foreign ct. does not necessarily render that ct. competent to adjudicate upon

all the obligatory relations which flow directly or indirectly from it.—**MATHAPPA v. CHELLAPPA** (1876), I. L. R. 1 Mad. 196.—**IND.**

1046 i. —.]—**Judgment recovered in defendant's absence.]—**An *ex p.* judgment of a French ct. against a native of British India not residing in French territory upon a cause of action which arose in British India imposes no duty on deft. to pay the amount decreed so as to bar a suit in British India.—**HINDE & CO. v. PONNATH BRAYAN** (1880), I. L. R. 4 Mad. 359.—**IND.**

Neither of his parents was born in Victoria. Since 1890 he visited Victoria on several occasions, the last being in 1906. In 1911 pltf. issued a writ against him in the Supreme Ct. of Victoria to recover a sum of money as being due on accounts stated. The writ was served on deft. in England, but he did not appear, & pltf. signed judgment in the ct. of Victoria against him in default of appearance. In an action in England upon the judgment, pltf. contended that, as deft. was born in Victoria, he was a subject of that Colony, & that therefore the judgment was enforceable here:—**Held:** deft. was a subject of the King, & not a subject of Victoria so as to render the judgment recovered against him in his absence binding upon him in this country, & the judgment was not enforceable here.—**GIBSON (GAVIN) & CO., LTD. v. GIBSON**, [1913] 3 K. B. 379; 82 L. J. K. B. 1315; 109 L. T. 445; 29 T. L. R. 665.

1046. Judgment not recognised.]—**GENERAL STEAM NAVIGATION CO. v. GUILLOU**, No. 1039, *ante*.

1047. —.]—**WALKER v. MAHON**, No. 1037, *ante*.

1048. Judgment recovered in defendant's absence.]—In an action upon the judgment of a French ct., given against defts. for default of appearance, pltf. were Danes resident in France, & defts. were Danes resident in London, carrying on business there, & having no property in France, & the contract in respect of which the judgment was obtained was not made in France. By the law of France a French subject may sue a foreigner though not resident in France, & for this purpose an alien, if resident in France, is considered by the French law as a French subject. The mode of citation is by serving the summons on the *Procureur Impérial*. The practice of the Imperial Govt. is to forward the summons thus served to the consulate of the country where deft. is resident, with directions to intimate the summons, if practicable, to deft.; but this is not required by law, & only done from a regard to fair dealing. The French consulate in London served defts. with a copy of the citation, but defts. in no way interfered in the proceedings in France:—**Held:** (1) the true principle on which foreign judgments are enforced in England is, that there is a duty or obligation to submit to the decree of a ct. of competent jurisdiction, & anything which negatives that duty is a defence to the action; (2) defts., not being at the commencement of the suit French subjects, nor owing temporary allegiance to France, nor having been there when the obligation was contracted, nor in any way interfered in the proceedings, were not subject to the jurisdiction of the French cts.; (3) they were under no obligation to submit to a jurisdiction which these cts. assumed to exercise over absent foreigners, & consequently the judgment could not be enforced in this country.

(4) *Semble:* if at the time the obligation was contracted deft. were within the foreign country but left it before the suit was instituted, he would

1048 ii. —.]—**CHRISTIE v. DELANNEY** (1889), I. L. R. 26 Calc. 931; 3 C. W. N. 614.—**IND.**

1048 iii. —.]—A judgment of a foreign ct., obtained in default of appearance against a deft., cannot be enforced in a ct. in British India, where the deft. at the time the suit commenced was not a subject of, nor resident in, the country in which judgment was obtained.—**KASSIM MAMOOJEE v. ISUF MAHOMED SULLIMAN** (1902), I. L. R. 29 Calc. 509; 6 C. W. N. 829.—**IND.**

be bound by the judgment.—*SCHIBSBY v. WESTENHOLZ* (1870), L. R. 6 Q. B. 155; 40 L. J. Q. B. 73; 24 L. T. 93; 19 W. R. 587.

Annotations:—As to (1) *Consd.* *Copin v. Adamson*, *Copin v. Strachan* (1874), L. R. 9 Exch. 345; *Meyer v. Ralli* (1876), 1 C. P. D. 358. *Consd. & Distd.* *Rousillon v. Rousillon* (1880), 14 Ch. D. 351. *Distd.* *Volnet v. Barrott* (1885), 55 L. J. Q. B. 39. *Consd.* *Nouvion v. Freeman* (1889), 15 App. Cas. 1; *Gibson v. Gibson*, [1913] 3 K. B. 379; *Harris v. Taylor*, [1915] 2 K. B. 580. *Refd.* *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *Crozat v. Brogden* (1894), 63 L. J. Q. B. 325; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Feyerick v. Hubbard* (1902), 71 L. J. K. B. 509; *Rayment v. Rayment & Stuart*, *Chapman v. Chapman & Bulst.*, [1910] P. 271. As to (2) *Refd.* *Meek v. Wendt* (1888), 21 Q. B. D. 126. As to (3) *Foll.* *Turnbull v. Walker* (1892), 67 L. T. 767. *Refd.* *Bouchet v. Tulledge* (1894), 11 T. L. R. 87. As to (4) *Consd. & Expld.* *Gurdial Singh v. Faridkote*, [1894] A. C. 670. *Consd.* *Emanuel v. Symon*, [1908] 1 K. B. 302. *Generally, Refd.* *Ochsenbein v. Papeller* (1873), 8 Ch. App. 695; *Re Trufort*, *Trafford v. Blanc* (1887), 36 Ch. D. 600; *Frails*, *Times v. Carr* (1899), 81 L. T. 50; *The Duplex*, [1912] P. 8. *Mentd.* *R. v. L. G. Board*, *Ex p. Arlidge*, [1914] 1 K. B. 160.

1049. ———.]—To an action on a French judgment *deft.* pleaded, (a) he was not duly served with process, he had no notice of the alleged action, & he had no opportunity, according to the law, rules & regulations of the foreign ct. in which the judgment was obtained, of defending himself; (b) the action upon which the judgment was obtained was upon a contract entered into in this country & not elsewhere, before the judgment he was never resident or domiciled within the jurisdiction of the ct., nor was he a native of France, nor did he ever owe allegiance to that country, nor was he at the time of contracting the alleged obligation in France or within the jurisdiction of the ct.:—*Held*: the first of these two pleas was bad; & the second good.—*DUFLOS v. BURLINGHAM* (1876), 34 L. T. 688.

Annotation:—*Refd.* *Volnet v. Barrott* (1885), 55 L. J. Q. B. 39.

1050. ———.]—*ROUSILLON v. ROUSILLON*, No. 740, *ante*.

1051. ———.]—*GURDYAL SINGH (SIRDAR) v. FARIDKOTE (RAJAH)*, No. 3, *ante*.

1052. ———.]—Neither the fact of possessing property situate in a foreign country nor the fact of entering into a contract of partnership in that country to deal with that property is sufficient to give the cts. of the foreign country jurisdiction in an action *in personam* over a British subject not resident in the foreign country at the date of the

action, who has neither appeared to the process nor expressly agreed to submit to the jurisdiction of the foreign ct.

In 1895 *deft.*, who was then residing & carrying on business in Western Australia, entered into a partnership for the working of a gold mine situate in the Colony & owned by the partnership. *Deft.* ceased to carry on business in Western Australia, & in 1899 left the Colony permanently & came to live in England. In 1901 *plffs.*, being partners other than *deft.*, brought an action in Western Australia claiming a decree for dissolution of the partnership, sale of the mine & taking of the partnership accounts. The writ was served on *deft.* in England, but he entered no appearance, & took no step to defend the action. The ct. decreed a dissolution of the partnership & the sale of the mine, & on taking accounts found a sum to be due from the partnership. *Plffs.* paid the sum, & brought an action in England to recover the share which they alleged to be due from *deft.*:—*Held*: *deft.*, not being domiciled in Western Australia, nor resident there at the date of the action in that Colony, & not having appeared to the process or expressly agreed to submit to the jurisdiction of that ct., was not bound by its finding or decree, & the action in this country, which was based on that finding & decree, could not be maintained.—*EMANUEL v. SYMON*, [1908] 1 K. B. 302; 77 L. J. K. B. 180; 98 L. T. 304; 24 T. L. R. 85, C. A.

Annotations:—*Consd.* *Gibson v. Gibson*, [1913] 3 K. B. 379; *Phillips v. Batho*, [1913] 3 K. B. 25; *Harris v. Taylor* (1914), 111 L. T. 564.

1053. ———.]—*GIBSON (GAVIN) & Co., LTD. v. GIBSON*, No. 1045, *ante*.

C. Defendant not Resident in Foreign Country.

1054. Judgment not recognised—Judgment recovered in defendant's absence.]—No action will lie upon a foreign judgment on the face of which it appears that *deft.*, not resident within the jurisdiction of the foreign ct., was neither served with process nor came in to defend the action.

The law will not raise an *assumpsit* upon a judgment obtained by default in one of the colonies against a party who upon the face of the proceedings appeared only to have been summoned by nailing up a copy of the declaration on the court

PART XIV. SECT. 2, SUB-SECT. 2.—C.

1054 i. Judgment not recognised—Judgment recovered in defendant's absence.]—In a personal action where certain causes of jurisdiction do not apply, a decree pronounced *in absentem* by a foreign ct., to the jurisdiction of which *deft.* has not in any way submitted himself, is an absolute nullity.—*SEEGNER v. MARKS* (1895), 21 V. L. R. 491.—AUS.

1054 ii. ———.]—Judgment had been obtained in Q.; service of the writ had been effected by advertisement. *Deft.* never resided in or carried on business in Q., & had no personal knowledge of the proceedings. In an action on the judgment:—*Held*: *deft.* was not bound by it.—*SCHNEIDER v. WOODWORTH* (1844), 1 Man. L. R. 41.—CAN.

1054 iii. ———.]—No action will lie on a foreign judgment, if *defts.* were not resident within the jurisdiction of the foreign Court & had no property or agent there, & were neither served with process in the foreign country nor defended the suit; though the judgment may have been obtained according to the practice of the foreign ct.—*CYR v. SANFACON* (1853), 2 All. 641.—CAN.

1054 iv. ———.]—In an action on

a foreign judgment, *deft.* was not, at commencement of foreign action or previously, resident or domiciled within the jurisdiction of the foreign ct., or a subject of that country, & he was not served with process in the action, & had no notice of it or opportunity of defending himself:—*Held*: the judgment would not be recognised.—*BEATY v. CROMWELL* (1883), 9 P. R. 547.—CAN.

1054 v. ———.]—In an action to enforce a personal judgment obtained in Dak., it appeared that *deft.* had been born in Wis., had been living, at the time of judgment, & for many years previously, in N.W. Territories, & had not appeared in Dak. ct. or submitted to its jurisdiction:—*Held*: *deft.* was not bound by judgment.—*DAKOTA LUMBER CO. v. RINDERKNECHT* (1905), 6 Terr. L. R. 210; 1 W. L. R. 481; 2 W. L. R. 275.—CAN.

1054 vi. ———.]—In an action brought in O. upon a judgment recovered in Quebec, against an incorporated co., who, at the time the action was begun, had no office or agent in Quebec:—*Held*: the judgment in Quebec must be treated in O. as a nullity.—*VEZINA v. WILL H. NEWSOME CO.* (1907), 10 O. W. R. 17; 14 O. L. R. 658.—CAN.

1054 vii. ———.]—*Pltf.* brought action on a judgment recovered by him against *deft.* in N.W. Territories. At the time of commencing proceedings leading up to judgment he was not a resident within N.W. Territories nor was he a subject or citizen of the N.W. Territories:—*Held*: the action must be dismissed.—*McLORG v. STANNING* (1908), 7 W. L. R. 701.—CAN.

1054 viii. ———.]—A foreign judgment obtained by default against one who, at the time of the foreign action, was a resident of Alta., & was served with process in the foreign action in Alta., will not be enforced in Alta.—*BELOCOURT v. NOEL* (1913), 23 W. L. R. 368; 3 W. W. R. 926; 9 D. L. R. 788.—CAN.

1054 ix. ———.]—*DAVIDSON v. SHARPE* (1920), 1 W. W. R. 888; 52 D. L. R. 186; 60 S. C. R. 72.—CAN.

1054 x. ———.]—A Scotch decree on an arrestment *jurisdictionis fundandae causae* against a *deft.* not present in Scotland, & who did not appear in the suit, does not create any personal liability in Ireland.—*IR. LITTLES* (1847), 10 I. Eq. R. 275.—IR.

1054 xi. ———.]—A judgment of a foreign ct. obtained on default of

Sect. 2.—Essentials to recognition of foreign judgments: Sub-sect. 2, C., D., E. & F.]

house door, it not appearing that he had ever been present in the colony or subject to the jurisdiction of the colonial ct. at the time of the suit commenced or afterwards.—**BUCHANAN v. RUCKER** (1808), 9 East, 192; 103 E. R. 546.

*Annotations:—***Consd.** *Don v. Lippman* (1837), 5 Cl. & Fin. 1; *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155; *Aboulouf v. Oppenheimer* (1882), 10 Q. B. D. 295. **Distd.** *Gibson v. Gibson*, [1913] 3 K. B. 379. **Refd.** *Douglas v. Forrest* (1828), 4 Bing. 686; *Houlditch v. Donegal* (1834), 8 Bl. N. S. 301; *Cowan v. Braidwood* (1840), 1 Man. & G. 882; *Ricardo v. Garcias* (1845), 12 Cl. & Fin. 368; *Sheehy v. Professional Life Insce.* (1857), 4 Jur. N. S. 27; *Cookney v. Anderson* (1863), 1 De G. J. & Sm. 365; *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Foley v. Maillardet* (1864), 1 De G. J. & Sm. 389; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Turnbull v. Walker* (1892), 67 L. T. 767; *Pemberton v. Hughes*, [1899] 1 Ch. 781. **Mentd.** *Sadler v. Robins* (1808), 1 Camp. 253; *Guinness v. Carroll* (1830), 1 B. & Ad. 459; *Wildes v. Russell* (1866), Har. & Ruth. 689; *Liverpool Marine Credit Co. v. Hunter* (1867), 36 L. J. Ch. 567; *R. v. L. G. Board, Ex p. Arldge*, [1914] 1 K. B. 160.

1055. ———.]—A party here is not bound by a colonial judgment, unless it appear that either he was summoned, or it be proved that he was once resident within the jurisdiction; & it is not sufficient that on the face of the proceedings, he is described to be an absentee.—**CAVAN v. STEWART** (1816), 1 Stark. 525, N. P.

*Annotations:—***Refd.** *Douglas v. Forrest* (1828), 4 Bing. 686; *Turnbull v. Walker* (1892), 67 L. T. 767; *Gibson v. Gibson*, [1913] 3 K. B. 379. **Mentd.** *Aireton v. Davis* (1833), 3 Moo. & S. 138.

1056. ———.]—**COWAN v. BRAIDWOOD**, No. 1083, *post*.

1057. ———.]—**SCHIBSBY v. WESTENHOLZ**, No. 1048, *ante*.

1058. ———.]—**DUFLOS v. BURLINGHAM**, No. 1049, *ante*.

1059. ———.]—**ROUSILLON v. ROUSILLON**, No. 740, *ante*.

1060. ———.]—An action was brought in this country upon a judgment obtained by pltfs. against defts. in a New Zealand ct. The writ & statement of claim in the action were served upon defts. in England, but they did not appear, & judgment was given against them in default of appearance. Defts. were not natives of New Zealand & were not resident or domiciled there:—**Held:** as there was no appearance, & no submission by defts. to the jurisdiction of the ct., & as they were not resident or domiciled in that country, the judgment of the ct. was without jurisdiction, & could not be sued upon in this country.—**TURNBULL v. WALKER** (1892), 67 L. T. 767; 9 T. L. R. 99; 37 Sol. Jo. 81; 5 R. 132.

*Annotations:—***Distd.** *Gibson v. Gibson*, [1913] 3 K. B. 379. **Refd.** *Phillips v. Batho*, [1913] 3 K. B. 26.

1061. ———.]—**GURDYAL SINGH (SIRDAR) v. FARIDKOTE (RAJAH)**, No. 3, *ante*.

1062. ———.]—**EMANUEL v. SYMON**, No. 1052, *ante*.

1063. ———.]—Deft. was sued on a decree

appearance of deft. cannot be enforced under Supreme Ct. Act, 1882, when deft. at the time when the action was commenced was not resident in the country in which the judgment was obtained.—**WALLACE v. BASTINGS** (1899), 18 N. Z. L. R. 639.—**N.Z.**

1054 xii. ———.]—No action can be maintained upon a foreign judgment unless the ct. rendering the judgment had jurisdiction of the defendant's person, & an attachment of the defendant's property by the foreign ct. does not of itself give such ct. jurisdiction of defendant's person.—**ACUTT, BLAINE & CO. v. COLONIAL MARINE ASSURANCE Co.** (1882), 1 S. C. 402.—**S. AF.**

1054 xiii. ———.]—**MENDELSSOHN v. MENDELSSOHN'S EXECUTOR**, [1908] T. H. 190.—**S. AF.**

PART XIV. SECT. 2, SUB-SECT. 2.—E.

b. Sufficiency of appearance—Appearance by attorney—Either admission—Or waive of personal service.]—**TURCOTTE v. DAWSON** (1879), 30 C. P. 23.—**CAN.**

c. ———.]—Unauthorized by defendant—Resident within jurisdiction.]—A judgment was recovered against B. in a foreign ct. on which action was brought in Sask. In the original

pronounced by a judge in Poona. Process was issued in that ct. on Dec. 1, 1906, & reached deft. about Christmas, 1906, & required him to enter an appearance before Jan. 7, 1907. Deft. was domiciled & resident in this country when the summons reached him, & had no opportunity of entering an appearance within the time specified. It was stated on the face of the decree that deft. had ceased to be domiciled in India in 1900:—**Held:** the decree could not be enforced in an English ct.—**JAFFER v. WILLIAMS** (1908), 25 T. L. R. 12.

1064. ———.]—**GENERAL STEAM NAVIGATION Co. v. GUILLOU**, No. 1039, *ante*.

1065. Judgment recognised—Defendant served when temporarily resident in foreign country.]—Deft. duly served with process while temporarily present in a foreign country is amenable to the jurisdiction of its cts. so as to be bound by their judgment. The cts. of this country will enforce a judgment so obtained.—**CARRICK v. HANCOCK** (1895), 12 T. L. R. 59; 40 Sol. Jo. 157.

*Annotation:—***Consd.** *Harris v. Taylor*, [1915] 2 K. B. 580.

D. Defendant not having selected Forum.

See Nos. 1039, 1052, *ante*.

E. Defendant not having appeared voluntarily.

No appearance by defendant—Judgment not recognised.]—See Nos. 1054–1063, *ante*.

1066. Sufficiency of appearance—Appearance by attorney—Defendant not living within jurisdiction.]—An action may be maintained upon a foreign judgment obtained by default, which states that deft. appeared by attorney, without proving that the attorney mentioned had authority to appear, or that deft. was living within the jurisdiction of the foreign ct.—**MOLONY v. GIBBONS** (1810), 2 Camp. 502, N. P.

1067. Whether appearance voluntary or involuntary — Appearance to protect property from seizure.]—**GABORIAU v. MAXWELL** (1908), *Times*, Dec. 12.

1068. ———.]—**Appearance to obtain release of property.]**—It is no answer to an action upon a judgment of a foreign ct. given against deft. who is not resident or domiciled in or under allegiance to the foreign country, that deft. only entered an appearance to the process of the foreign ct. in order to protect from seizure property of his which may be in or which may thereafter come into that country. Such an appearance is voluntary, & is not an appearance under duress, as is an appearance when the foreign ct. has before appearance seized property of deft., so that he appears in order to release & protect property so seized in the foreign country before appearance.—**VOINET v. BARRETT** (1885), 55 L. J. Q. B. 39; 34 W. R. 161; 2 T. L. R. 122, C. A.

*Annotations:—***Consd.** *Bolssière v. Brockner* (1889), 6 T. L. R. 85. **Refd.** *The Duplex*, [1912] P. 8; *Guiard v. De Clermont & Donner*, [1914] 3 K. B. 145.

action B. was not resident within the ct.'s jurisdiction but had been served with process there & an appearance entered for him by an attorney having no authority so to act:—**Held:** B. had not submitted to the foreign ct.'s jurisdiction.—**READ v. FERGUSON** (1912), 22 W. L. R. 751.—**CAN.**

1067 i. Whether appearance voluntary or involuntary—Appearance to protect property from seizure.]—Appearance is not voluntary, if made only to save property which is in the hands of a foreign tribunal.—**VRERARAGHAVA AYYAR v. MUGA SAIT** (1914), 1 L. R. 39 Mad. 24.—**IND.**

1069. —.]—Pltfs., owners of a British ship, commenced an action *in rem* & caused a vessel within the jurisdiction to be arrested in respect of a collision on the high seas. The owners of the vessel arrested were foreigners domiciled abroad. They appeared & obtained the release of their vessel by giving bail to the value of ship & freight. They then defended the action, denying their liability & counterclaiming for the damage they had sustained by reason of the collision. The foreign vessel was found alone to blame, & judgment was pronounced in the usual form condemning defts. & their bail in the amount of the damage sustained by pltfs., together with the costs of the claim & counter-claim. Defts. moved to vary the decree by limiting it to the value of their vessel, freight & costs:—*Held*: apart from any application for a statutory limitation of liability, the appearance of defts. being voluntary & their proceedings in the action amounting to a submission to the jurisdiction of the ct., they were personally liable to the full extent of pltfs.' proved claim.—*THE DUPLEX*, [1912] P. 8; 81 L. J. P. 9; 106 L. T. 347; 27 T. L. R. 577; 12 Asp. M. L. C. 122.

1070. — — — Application to reopen judgment by default—Under which conditional order of attachment issued.]—Pltf. who resided & carried on business in Paris, commenced proceedings in the Tribunal of Commerce of the Seine against defts., who were merchants carrying on business in London, for breach of contract. A notification of those proceedings was sent to the French Consul in London, who informed defts. that certain legal documents had been received by him for them & requested them to take them up. Defts., although they had reason to suspect to what the documents related, declined to take them. Thereafter judgment by default for damages & costs, was entered against defts. in the Tribunal of Commerce, & intimation thereof was given in the same way as in connection with the commencement of the proceedings, but defts. took no notice thereof until pltf. obtained the issue of a *saisie-arrêt* or conditional order attaching any money belonging to them in the hands of the Crédit Lyonnais bank in Paris. Defts. had a sum of £4 or £8 due to them in the bank at the time, & the bank intimated to them that the *saisie-arrêt* had been issued, whereupon defts. filed an opposition in the Tribunal of Commerce asking that the default judgment should be reopened. The Tribunal of Commerce allowed the opposition, heard the case on the merits, & gave judgment for defts. with costs. Pltf. appealed to the Ct. of Appeal in Paris, & that ct. held that, the first judgment of the Tribunal of Commerce having been executed by pltf., defts.' opposition was too late & therefore was not receivable, & accordingly pltf.'s appeal was allowed. Pltf. now sued on the judgment of the Ct. of Appeal restoring the first judgment of the Tribunal of Commerce:—*Held*: the judgment was enforceable inasmuch as (a) defts. had voluntarily appeared in the French proceedings, & (b) the judgment took its whole force & effect from the decision of the Ct. of Appeal & was not merely

the original default judgment.—*GUIARD v. DE CLERMONT & DONNER*, [1914] 3 K. B. 145; 83 L. J. K. B. 1407; 111 L. T. 293; 30 T. L. R. 511.

1071. — — — Appearance under protest.]—*BOISSIÈRE & Co. v. BROCKNER & Co.* (1889), 6 T. L. R. 85.

Annotations:—*Refd.* *Harris v. Taylor* (1914), 111 L. T. 564. *Mentd.* *R. v. L. G. Board, Ex p. Arlidge*, [1914] 1 K. B. 160.

1072. — — — "Conditional" appearance to set aside writ.]—Pltf. brought an action against deft. in the High Ct. of the Isle of Man claiming damages for criminal conversation with pltf.'s wife. Deft. was at no material time domiciled or resident in the Isle of Man. Pltf. obtained leave to serve deft. with a writ of summons out of the jurisdiction & deft. was duly served with a writ in England. Deft. subsequently appeared conditionally & applied to the ct. to set aside the order for service out of the jurisdiction & the writ on the ground (*inter alia*) that deft. was domiciled in England. The ct. dismissed the application. Deft. took no further part in the proceedings & pltf. eventually recovered judgment in the action for damages & costs. Pltf. then brought this action against deft. to enforce the judgment:—*Held*: deft. by reason of his application to the Isle of Man ct. had voluntarily submitted to the jurisdiction of that ct. & the judgment was enforceable against him in England.—*HARRIS v. TAYLOR*, [1915] 2 K. B. 580; 84 L. J. K. B. 1839; 113 L. T. 221, C. A.

Annotation:—*Refd.* *Moreland v. Eloy, Eloy v. Moreland*, [1916] 1 K. B. 85.

F. Defendant not having agreed to submit to Jurisdiction.

No submission to jurisdiction—Judgment not recognised.]—*See* No. 1060, *ante*.

1073. What amounts to voluntary submission to jurisdiction—Shareholder in foreign company—Bound by memorandum of association—To elect foreign domicile.]—To an action on a French judgment, deft. pleaded that he was not during the accruing of the cause of action or any part of the proceedings nor from thence hitherto resident in France, or within the jurisdiction of the ct., nor subject to the laws of France; that he was never served with any process or notice whatever; nor had he any notice whatever of any proceedings in the action; nor did he appear in ct. or have any opportunity of defending himself against the claim, & the proceedings were taken in his absence, & without his knowledge, privity & consent. Replication, that deft. became a shareholder in a certain co. in France, subject to all the liabilities, & rights attaching thereto; that deft. was resident in England, & by reason thereof, it became necessary by the law of France, for deft. to elect a domicile in France, at which the directors of the co. might notify to him all proceedings relative to the co., or deft. as such shareholder; that, by the law of France all legal proceedings affecting any party having his real domicile out of that kingdom, left for him at such elected domicile, were as valid as if left at his real domicile in France; that deft. made election of domicile at a place in Paris, & gave notice thereof to pltfs.; that the assets of the co. being insufficient to discharge their debts, deft. as

1072 i. — — — Conditional appearance.]—*McFADDEN v. COLVILLE RANCHING Co.* (1915), 30 W. L. R. 909; 8 W. W. R. 163.—CAN.

d. — — — Subsequent plea to jurisdiction.]—A deft. domiciled in Alta. where all his assets were, when sued in O. appeared there without prejudice to his right to dispute the ct.'s jurisdiction, & subsequently pleaded to the jurisdiction & also

upon the merits:—*Held*: by such procedure he had attorned to the jurisdiction of O. ct. & its judgment upon such issues would be given effect to in Alta.—*RICHARDSON v. ALLEN* (1915), 34 W. L. R. 606; 10 W. W. R. 720.—CAN.

PART XIV. SECT. 2, SUB-SECT. 2.—F.

e. What amounts to voluntary submission to jurisdiction—Entering appear-

ance.]—Where deft. voluntarily appears in a foreign jurisdiction he at once renders himself amenable to that jurisdiction, & if a judgment be afterwards obtained against him, without fraud, he has no defence to such judgment when sued upon it in the country of his residence.—*VICTORIAN PHILLIP-STEPHEN PHOTO-LITHO, ETC. Co. v. DAVIS* (1890), 11 N. S. W. L. R. 257; 7 N. S. W. W. N. 9.—AUS.

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a shareholder, was, by the law of France liable to pay a certain sum, & to be sued for same by plffs.; that plffs., for the recovery thereof, caused a summons to be left at his elected domicile, requiring him to appear in ct. at a certain time & place; that deft. did not appear, according to the exigency of the summons whereupon plffs. recovered judgment by default. On special demurrer to the replication:—*Held*: (1) the facts stated in the replication afforded an answer to the plea; (2) the word notice in the plea, meant actual notice alone, & consequently, the replication did not amount to an argumentative denial of that notice, but consisted of a statement of facts showing that no such notice need be given.—*VALLEE v. DUMERGUE* (1849), 4 Exch. 290; 18 L. J. Ex. 398; 14 L. T. O. S. 108; 154 E. R. 1221.

Annotation:—*Generally, Consd.* *Copin v. Adamson, Copin v. Strachan* (1874), L. R. 9 Exch. 345.

1074. ————*]*—To a declaration claiming a sum recovered by a judgment in a French ct., deft. pleaded that he was not a native of France, or at any time before judgment resident or domiciled within the jurisdiction of the French ct., or served with any process or summons in the suit, nor did he appear therein; nor had he any notice or knowledge of any process or summons, or any proceedings in the suit, or any opportunity of defending himself. Replication, that deft. was the holder of shares in a co. having its legal domicile in Paris, & thereby became subject to all the liabilities, rights & privileges attaching or belonging to shareholders & in particular to the conditions contained in the statutes or articles of association. That by those statutes or articles, it was provided & agreed that all disputes arising during the liquidation of the co. between the shareholders of the co., the administrators, the comrs. or between the shareholders themselves, with respect to the affairs of the co., should be submitted to the jurisdiction of the French ct.; that every shareholder provoking a contest must elect a domicile at Paris, & in default election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the co. was situate, & that all summonses, etc., should be validly served at the domicile formally or impliedly chosen; that the co. became bkpt., & by the law of France the amount unpaid upon deft.'s shares became payable to pltf. as the co.'s assignee in bkptcy.; that deft. made default & provoked a contest; that he never elected a domicile; that pltf. thereupon caused a summons to be served at the office, which summons required deft. to appear in the French ct. to answer to pltf.'s claim; that by the law of France that office was the deft.'s implied domicile of election for the purpose of service, & the service was regular; & that deft. was bound to appear, but did not, whereupon pltf. recovered judgment by default against him for the amount unpaid on his shares:—*Held*: the replication was good, although it did not allege that deft. ever had any notice or knowledge of the statutes or articles, or of their provisions.—*COPIN v. ADAMSON* (1875), 1 Ex. D. 17; 45 L. J. Q. B. 15; 33 L. T. 560; 24 W. R. 85, C. A.

Annotations:—*Consd.* *Rousillon v. Rousillon* (1880), 14 Ch. D. 361. *Foll.* *Feyerick v. Hubbard* (1902), 71 L. J. K. B. 509. *Reid.* *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49; *Emanuel v. Symon*, [1908] 1 K. B. 302. *Mentd.* *Wood v. Wood* (1874), 43 L. J. Ex. 153; *Re Studer, Ex p. Chatteris* (1875), 32 L. T. 290.

1075. ——— *Clause in contract for settlement of disputes by specified jurisdiction.*—A clause in a contract made between a British subject resident

& domiciled in England & a foreigner that all disputes relating to the agreement & its fulfilment should be determined by the jurisdiction of the foreign country, gives the cts. of the foreign country jurisdiction to deal with such disputes, & to bind the British subject by a judgment of the foreign ct. duly given against him in default of his appearance, where all the requirements of the law of that foreign country as to citation, service of process & otherwise, have been complied with; & an action upon such judgment may be maintained in the cts. of this country against the British subject.—*FYERICK v. HUBBARD* (1902), 71 L. J. K. B. 509; 86 L. T. 829; 50 W. R. 557; 18 T. L. R. 381; 46 Sol. Jo. 318.

Annotation:—*Consd.* *Jeannot v. Fuerst* (1909), 100 L. T. 816.

1076. ——— *]*—By agreement made between pltf. & defts., the latter obtained the exclusive sale in Great Britain & her Colonies of pltf.'s products for five years from Jan. 1, 1906, & defts. agreed to do business with pltf. to the amount of 10,000 francs the first year, & 15,000 francs afterwards; & in case of breach of contract to pay an indemnity of 5,000 francs, the French Tribunals of Commerce alone to have jurisdiction. On May 2, 1907, pltf. issued a writ in the Tribunal de Commerce de Lyon, requiring defts. to appear on June 4, 1907. The writ recited the agreement between the parties, stated that the turnover for 1906 was only 796 francs, & claimed the penalty of 5,000 francs. Service of the writ was, in accordance with the French Code of Civil Procedure, effected by leaving it at the office of the *Procureur-Général* on May 2. The writ was also sent to the French Consulate in London on May 31, & notice was given to defts. the same day. Defts. received the notice, but ignored it. On June 2, defts. not appearing before the Tribunal, the case was, without notice to them, adjourned till June 18, when it came on in their absence, & judgment by default was given for the amount claimed. Service of the judgment was effected by leaving it at the office of the *Procureur-Général*, & on Aug. 8 notice was given of it to defts. through the French Consulate in London & was ignored by them. In Nov. notice of the execution of the judgment & a certificate of *nulla bona* were sent to defts. Thereafter, plffs. sued defts. in England on the French judgment:—*Held*: defts. were liable for the amount of the judgment, inasmuch as (a) there was nothing in the proceedings before the French Tribunal that was contrary to natural justice, notwithstanding that the defendants were informed of the commencement of those proceedings at a time when it was practically impossible for them to appear on the day named, & (b), there was in France a final judgment in existence & binding on defts. at the time when the action was commenced in the English ct.—*JEANNOT v. FUERST* (1909), 100 L. T. 816; 25 T. L. R. 424; 53 Sol. Jo. 449.

1077. ——— *Of court awarding damages against shipowner—Appearance in court of another country to prevent arrest of ship.*—After a collision between a French vessel D. & a British vessel C., the C. proceeded to a Belgian port. The owners of the D., intending to bring an action in France against the owners of the C., in respect of the collision, took proceedings in Belgium to arrest the C., as permitted by Belgian law, to answer the judgment which they might obtain in their action in France, & which might become enforceable in Belgium. The agents of the owners of the C. to prevent arrest, gave bail in the Belgian proceedings. Subsequently, the owners of the D. brought their intended action in France, & served notice of it

upon the owners of the C. in the United Kingdom, but the owners of the C. did not appear, & judgment went against them by default. Then the owners of the D. took further proceedings in Belgium to obtain a decree to make the French judgment enforceable there. In those proceedings the owners of the C. appeared & opposed the making of the decree, which was nevertheless made, but without any enquiry by the ct. into the merits of the collision:—*Held*: the conduct of the owners of the C. in the Belgian proceedings did not amount to a submission to the jurisdiction of the French ct., & the rights of the parties in respect of the collision were not *res judicata*, so as to bar an action in this country by the owners of the C. against the owners of the D. in respect of the collision.—*THE CHALLENGE & DUC D'AUMALE*, [1904] P. 41; 73 L. J. P. 2; 89 L. T. 481; 9 Asp. M. L. C. 497; *affd.* on other grounds, [1905] P. 198, C. A.

1078. — Possession of real property in foreign country—Partner in firm in foreign country.]—*EMANUEL v. SYMON*, No. 1052, *ante*.

1079. — Application to set aside writ.]—*HARRIS v. TAYLOR*, No. 1072, *ante*.

1080. — Instructions to counsel to appeal against decree.]—Deft., a domiciled Englishman, was a member of a firm carrying on business in Belgium. The members of the firm were declared bkpt. in the Belgian cts. Deft. instructed counsel to appeal against the decision of the Belgian cts., but his appeal was dismissed. An action was brought in England by the Belgian trustee in the bkpcy. against deft. for a declaration that all deft.'s assets in this country were vested in the trustee, & for the appointment of a receiver:—*Held*: as the Englishman had, by instructing counsel to appeal against the decree, submitted to the jurisdiction of the Belgian cts., & as the proceedings were not contrary to natural justice, they were valid, & deft.'s movable property in this country vested in the Belgian trustee, & a receiver must be appointed.—*BERGEREM v. MARSH* (1921), 91 L. J. K. B. 80; 125 L. T. 630.

G. Defendant not having had Notice of Proceedings.

1081. Necessity for notice.]—*CAVAN v. STEWART*, No. 1055, *ante*.

1082. —.]—In an action of debt on a judgment in the Ct. of Common Pleas in Ireland, deft., though he cannot contest the merits of the action or the propriety of the decision, may show that the ct. had not properly jurisdiction as to deft. under the circumstances.

Where deft. pleaded to such action that he was never arrested upon, or served with, nor at any time had notice of, any process of the ct. at the suit of pltf. for the cause of action on which the judg-

ment was obtained, nor ever appeared in the action:—*Held*: the plea was a good defence, & a replication alleging that, before obtaining the judgment, deft. had notice of a writ of summons, issuing out of the ct. for the cause of action on which the judgment was so obtained, was bad.—*FERGUSON v. MAHON* (1839), 11 Ad. & El. 179; 3 Per. & Dav. 143; 9 L. J. Q. B. 146; 113 E. R. 382.

Annotations:—*Refd.* *Robertson v. Strutt* (1844), 8 Jur. 404; *Reynolds v. Fenton* (1846), 16 L. J. C. P. 15; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Thelwall v. Yolverton* (1864), 16 C. B. N. S. 813; *Pemberton v. Hughes*, [1899] 1 Ch. 781. *Mentd.* *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 341; *Thorburn v. Barnes* (1867), L. R. 2 C. P. 384.

1083. —.]—To an action of *assumpsit* upon a decree obtained against deft. in the Ct. of Session in Scotland, the latter pleaded that he was not, at the time of the commencement of the suit in the Scottish ct. or at any time during the proceedings therein, in Scotland, or at any place within the jurisdiction of the ct. nor was he at any time before the making or pronouncing of the decree, in any manner, according to the course & practice of the ct., notified, nor did he then know, of the proceedings, so that he could or might by himself, his proctor, attorney or agent, appear or plead, or in any way defend himself in the action; nor did he appear to any of the proceedings; whereby the decree was & is contrary to natural justice, & wholly inoperative & void:—*Held*: (1) the plea was insufficient; (2) the statement in the plea, that the decree was contrary to natural justice, etc., was to be regarded as a mere conclusion of law from the facts previously alleged, & was not traversable.—*COWAN v. BRAIDWOOD* (1840), 1 Man. & G. 882; 9 Dowl. 26; Drinkwater, 40; 2 Scott, N. R. 138; 10 L. J. C. P. 42; 133 E. R. 589.

Annotation:—*Mentd.* *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301.

1084. Whether proceedings so conducted as to deprive defendant of opportunity of defence.]—In *assumpsit* on a judgment or decree of the Tribunal of Commerce at Brussels, deft. pleaded, that he was not at any time served with any process issuing out of that ct., at suit of pltf., for the causes of action upon which the judgment or decree was obtained, nor had he at any time notice of any such process, nor did he appear in the ct. to answer pltf.:—*Held*: bad, inasmuch as the plea did not show that the proceedings against deft. in the Belgian ct. were so conducted as to deprive deft. of the opportunity of defending himself therein.—*REYNOLDS v. FENTON* (1846), 3 C. B. 187; 16 L. J. C. P. 15; 7 L. T. O. S. 207; 10 Jur. 668; 136 E. R. 75.

Annotation:—*Refd.* *Meyer v. Ralli* (1876), 35 L. T. 838.

1079 i. — Application to set aside judgment.]—A motion by deft., after a judgment in *absentem* against him, to set it aside & give him leave to defend, cannot be taken as a submission to the jurisdiction before the judgment, & does not overcome the jurisdictional objection in an action on the judgment of a foreign ct.—*BANK OF OTTAWA v. ESDALE* (1920), 1 W. W. R. 913; 51 D. L. R. 485; 15 Alta. L. R. 269.—CAN.

1080 i. — Instructions to counsel to move to set aside judgment.]—Deft. on hearing of a judgment having been entered against him in a foreign ct., instructed counsel to move in that ct. to set the judgment aside; but the application was refused on the ground that it was too late:—*Held*: this did not preclude deft. from disputing the

validity of the judgment in the action thereon in Ontario.—*MCLEAN v. SHIELDS* (1885), 9 O. R. 699.—CAN.

i. — Judgment by consent in foreign court.]—A judgment by confession is an instance of a party voluntarily submitting himself to the jurisdiction of the ct., whereby competence is acquired to deal with the matter submitted.—*BITTER v. FAIRFIELD* (1900), 21 C. L. T. 73; 32 O. R. 350.—CAN.

g. — Principals carrying on business in foreign country—Power of attorney—General powers.]—Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the cts. of that country by giving that agent a power-of-attorney containing very wide powers including

right to institute or defend any suits that might be brought against them touching any matters connected with their business or otherwise.—*RAMANATHAN CHETTIAR v. KALIMUTHU PILLAI* (1914), 1 L. R. 37 Mad. 163.—IND.

PART XIV. SECT. 2, SUB-SECT. 2.—G.

h. Necessity for notice—Whether to contributory of company who has signed memorandum of association.]—A judgment had been obtained in Scotland by the liquidators of a S. co. against a shareholder resident in Victoria as a contributory, without notice being given to him of such proceedings. He had signed the memorandum of assocn. of the co., which was registered under Companies Act, 1862, which provided that such proceedings should be *ex parte*, &

Sect. 2.—Essentials to recognition of foreign judgments: Sub-sect. 2, G.;

1085. —.]—**BANK OF AUSTRALASIA v. NIAS**, No. 1042, *ante*.

1086. —.]—To a declaration upon a judgment obtained in one of the superior cts. in Ireland, against an incorporated co. in England, defts. pleaded, they were not served with any summons or process issuing out of the Irish ct., in the action in which the judgment was obtained, & plffs., irregularly & behind the backs of defts., caused an appearance to be entered for defts. in that action, & thereby obtained the judgment, when defts. were not within the jurisdiction of the ct., & had not been served with any summons or other process to appear to the action:—*Held*: the plea was bad, as it did not distinctly allege that defts. did not know of the summons in the Irish ct., or that they did not appear thereto.—**SHEEHY v. PROFESSIONAL LIFE ASSURANCE CO.** (1853), 13 C. B. 787; 22 L. J. C. P. 244; 17 Jur. 651; 1 W. R. 450; 138 E. R. 1411; *subsequent proceedings* (1857), 3 C. B. N. S. 597, Ex. Ch.

Annotations:—**Consd.** Royal Mail Steam Packet Co. v. Braham (1877), 2 App. Cas. 381. **Mentd.** Ingate v. Lloyd Austriaco (1858), 4 C. B. N. S. 704; Thompson v. Parish (1859), 5 Jur. N. S. 986; Wildes v. Russell (1866), L. R. 1 C. P. 722; Thorburn v. Barnes (1867), L. R. 2 C. P. 384.

1087. —.]—**REIMERS v. DRUCE**, No. 1028, *ante*.

1088. —.]—The ct. will not entertain a suit for enforcing a foreign judgment against a deft. unless deft. has been duly served with notice of the proceedings in the foreign ct. & has had an opportunity for making his defence there.—**GRIFFIN v. BRADY** (1869), 39 J. L. Ch. 136; 18 W. R. 130.

1089. —.]—**DUFLOS v. BURLINGHAM**, No. 1049, *ante*.

1090. —.]—**ROUSILLON v. ROUSILLON**, No. 740, *ante*.

1091. Sufficiency of notice—Copy of declaration nailed on court-house door.]—**BUCHANAN v. RUCKER**, No. 1054, *ante*.

1092. — Process served on public officer—No provision for public officer to communicate with defendant.]—To render a foreign judgment void, on the ground that it is contrary to the law of the country where it was given, it must be shown clearly & unequivocally to be so. Where the law of a British colony required that, in a suit instituted against an absent party, the process should be served upon the A.-G. in the colony, but it was not expressly provided that the A.-G. should communicate with the absent party:—*Held*: such law was not so contrary to natural justice, as to render void a judgment obtained against a party who had resided within the jurisdiction of the ct. at the time when the cause of action accrued, but had withdrawn himself before the proceedings were com-

without notice to the contributories. In an action on the Scots judgment:—*Held*: he had, by signing the memorandum of assocn. contracted that proceedings might be taken against him in his absence, & without notice.—**JAMIESON v. ROBB** (1881), 7 V. L. R. 170.—**AUS.**

j. —.]—In debt on a judgment of a foreign ct., deft. pleaded that he was never served with any process whereby he could be or was notified of the action:—*Held*: bad on demurrer.—**MCPHERSON v. McMILLAN** (1846), 3 U. C. R. 30.—**CAN.**

k. —.]—No action will lie on a foreign judgment on the face of

which it appears that deft. was not served with process of the foreign ct. & that he had no knowledge that proceedings had been taken against him.—**WANDERERS HOCKEY CLUB v. JOHNSON** (1913), 18 B. C. R. 367; 25 W. L. R. 434.—**CAN.**

l. —.]—**DAVIDSON v. SHARPE**, (1920), 1 W. W. R. 888; 52 D. L. R. 186; 60 S. C. R. 72.—**CAN.**

m. —.]—Defts., British subjects, purchased goods from plff. in French territory. Plff. sued defts. in the French ct. & obtained judgment against them; defts. had no actual notice of the proceedings. In a suit brought in British India on the judgment of the French ct.:—*Held*:

menced.—**BEQUET v. MACCARTHY** (1831), 2 B. & Ad. 951; 109 E. R. 1396.

Annotations:—**Distd.** Gurdial Singh v. Faridkote. [1894] A. C. 670. **Consd.** Feyerick v. Hubbard (1902), 71 L. J. K. B. 509; Emanuel v. Symon, [1908] 1 K. B. 302. **Refd.** Alivon v. Furnival (1834), 1 Cr. M. & R. 277; Don v. Lippmann (1837), 5 Cl. & Fin. 1; Ferguson v. Mahon (1839), 11 Ad. & El. 179; Smith v. Nicholls (1839), 7 Dowl. 282; Meyer v. Ralli (1876), 1 C. P. D. 358; Rousillon v. Rousillon (1880), 14 Ch. D. 351. **Mentd.** R. v. Baines (1840), 4 Per. & Dav. 362; Musgrove v. Pandelis (1919), 88 L. J. K. B. 915.

1093. —.]—**SCHIBSBY v. WESTENHOLZ**, No. 1048, *ante*.

1094. — Action against chairman of company—Action against shareholder on judgment recovered against chairman.]—**BANK OF AUSTRALASIA v. NIAS**, No. 1042, *ante*.

1095. — Substituted service on defendant's agent—& by post on defendant out of jurisdiction.]—**SHEEHY v. PROFESSIONAL LIFE ASSURANCE CO.**, No. 1086, *ante*.

1096. — Personal service on defendant's solicitor—& substituted service by post on defendant out of jurisdiction.]—(1) Declaration on a judgment in the Ct. of Exch. in Ireland. Plea, that deft. was never served with any writ, nor had any notice of the action. Replication, that the ct., under the provisions of an Act of Parliament in that behalf, & upon an affidavit of plff.'s attorney, made an order directing that personal service of the writ & plaint on deft.'s attorney, & the transmission of copies thereof, & of the order in a registered letter to deft., addressed to his place of business in London, should be deemed good service of the writ upon deft., unless cause was shown to the contrary in six days after service of the rule making the order on deft.'s attorney, & such transmission by post as aforesaid, & that such service & transmission were effected as directed by the ct., & that the rule of ct. making the order was made absolute. Rejoinders, that the order of the ct. was obtained on the strength of the affidavit of plff.'s attorney, which affidavit was untrue, & plff. never had any right of action against deft. in respect of the cause of action in respect of which the judgment was obtained:—*Held*: the rejoinders were bad, & the replication good.

(2) The repugnancy to natural justice in respect of which a foreign judgment is impeachable in an action thereon is a repugnancy to natural justice in reference to the conduct or mode of procedure of the foreign ct., & not in reference to the merits of the action (**BRAMWELL, B.**).—**CRAWLEY v. ISAACS** (1867), 16 L. T. 529.

Annotations:—**Refd.** Abouloff v. Oppenheimer (1882), 10 Q. B. D. 295. **Mentd.** R. v. L. G. Board, *Ex p.* Arlidge, [1914] 1 K. B. 160.

1097. — Notice given too late for defendant to appear in time.]—**JEANNOT v. FUERST**, No. 1076, *ante*.

1098. — Substituted service by registered post.]—**PHILLIPS v. BATHO**, No. 1149, *post*.

want of notice to defts. was fatal to the suit.—**BANGARUSAMI v. BALASUBRAMANIAN** (1890), 1 L. R. 13 Mad. 496.—**IND.**

n. —.]—To an action upon a French judgment deft. pleaded that at the commencement of the suit, & thence down to its termination, he was absent from France; & that he was not summoned to appear in, nor had he any notice or knowledge of, any of the proceedings:—*Held*: the defence was bad, as, consistently with its averments, deft. might have been resident in France or might, through an agent, have been served with process.—**MAUBOURQUET v. WYSE** (1867), 1 L. R. 1 C. L. 471.—**IR.**

SUB-SECT. 3.—JUDGMENT MUST BE FINAL AND COMPLETE.

1099. Judgment with stay of execution—To enable defendant to prove counter-demand.]—HALL v. ODBER, No. 1228, *post*.

1100. Order for injunction.]—An injunction granted by Ct. of Ch. in Ireland to restrain proceedings at law in that country, on an interlocutory application, is not of itself a sufficient ground to obtain an injunction in this ct. to restrain proceedings in an action in the K. B. Div. here in respect of same matter.

An interlocutory order of a ct. of competent jurisdiction in Ireland does not bind a ct. of concurrent jurisdiction in England.—BAIL v. STORIE (1823), 1 Sim. & St. 210; 1 L. J. O. S. Ch. 214; 57 E. R. 84.

*Annotations:—*Consd. Milltown v. Stewart (1837), 8 Sim. 371. *Mentd.* Parsons v. Bignold (1843), 7 Jur. 591.

1101. Judgment in nature of nonsuit.]—

(1) Plca stated that pltf. had impleaded deft. in a plea of trespass on the case upon promises in a ct. of judicature in the island of Saint Christopher, for the same causes of action as those mentioned in the declaration, that deft. pleaded *non assumpsit*, upon which issue was joined & the jury found for defts. with one penny costs, that judgment was given for deft. upon that verdict, & that that judgment was afterwards affirmed, first by a ct. of error in the Island, & afterwards by the King in Council:—*Held*: this plea was bad, as it did not appear that the judgment at Saint Christopher's was final & conclusive in the colony itself, so as to bar pltf. from another action there.

(2) For anything that appears there may be a proceeding in the nature of a nonsuit in the practice of St. Christopher, although differing in form from the practice of our cts., & the form of entry here set forth may be only equivalent to a nonsuit (BAYLEY, J.)—PLUMMER v. WOODBURNE (1825), 4 B. & C. 625; 7 Dow. & Ry. K. B. 25; 4 L. J. O. S. K. B. 6; 107 E. R. 1193.

*Annotations:—*As to (1) *Refd.* Smith v. Nicholls (1839), 5 Bing. N. C. 208; General Steam Navigation Co. v. Guillou (1843), 11 M. & W. 877; Bank of Australasia v. Nias (1851), 20 L. J. Q. B. 284; Thompson v. Bell (1854), 23 L. J. Q. B. 159; Frayes v. Worins (1861), 10 C. B. N. S. 149; *Re* Henderson, Nouvion v. Freeman (1887), 57 L. J. Ch. 367; Francis, Times v. Carr (1900), 82 L. T. 698. *Generally, Mentd.* Newall v. Elliot (1863), 1 H. & C. 797.

1102. Order for payment of money into court.]—(1) This ct. will not carry into effect an interlocutory decree of a foreign ct.

In a Scottish transaction a sum of money was deposited in a Scottish bank in the names of A. & B. for specified purposes, but they misapplied it, & each received a portion. By an interlocutory order of the Scottish ct. they were jointly & severally ordered to pay the amount misapplied into the Bank of Scotland. B. came to England, & A. being obliged to pay the whole, obtained an assignment of the order & instituted a suit here to compel B. to pay his share or contribute ratably:—*Held*: the order of the Scottish ct. was not final, & this ct. would not entertain jurisdiction.

PART XIV. SECT. 2, SUB-SECT. 3.

a. General rule.]—An action will not lie upon a decree or judgment of a foreign ct. which is not final in its nature, but merely to do some act, as to save a party, harmless & indemnified.—GAUTHIER v. ROUTH (1842), 6 O. S. 602.—CAN.

p. —.]—An action will not lie upon a foreign judgment unless it be final.—GRAHAM v. HARRISON (1889), 6 Man. L. R. 210.—CAN.

q. —.]—The rule in the case of

judgments sought to be executed in a jurisdiction other than that in which judgment was rendered is, that such judgments must finally determine the points in dispute, & must be adjudications upon the actual merits.—SRENIHUREE BUKSHIEE v. GOPAULCHUNDER SAMUNT (1871), 15 W. R. 500.—IND.

r. —.]—LONDON, BOMBAY & MEDITERRANEAN BANK v. HORMAJI PESTANJI FRAMJI (1871), 8 Bom. O. C. 200.—IND.

(2) *Qu.*: whether the proper mode of enforcing a foreign judgment is not by action at law.—PAUL v. ROY (1852), 15 Beav. 433; 21 L. J. Ch. 361; 19 L. T. O. S. 56; 51 E. R. 605.

*Annotations:—*As to (2) *Refd.* *Re* Henderson, Nouvion v. Freeman (1887), 37 Ch. D. 244. *Generally, Refd.* Dreyfus v. Peruvian Guano Co. (1889), 41 Ch. D. 151.

1103. Order for payment of costs—Part of judgment disposing of matter in dispute.]—An action of *assumpsit* or debt may be maintained against a deft. resident in this country for costs awarded against him after appearance by a decree of the Ct. of Session in Scotland in a suit for divorce.—RUSSELL v. SMYTH (1842), 9 M. & W. 810; 11 L. J. Ex. 303; 152 E. R. 343.

*Annotations:—**Apld.* Schibsky v. Westenholz (1870), L. R. 6 Q. B. 155. *Refd.* Henderson v. Henderson (1844), 6 Q. B. 288; Sheehy v. Professional Life Assee. (1857), 2 C. B. N. S. 211; Rousillon v. Rousillon (1880), 14 Ch. D. 351; *Re* Henderson, Nouvion v. Freeman (1887), 35 Ch. D. 704; Emanuel v. Symon, [1908] 1 K. B. 302; Harris v. Taylor, [1915] 2 K. B. 580. *Mentd.* Martin v. White, [1910] 1 K. B. 665.

1104. — Pending appeal—On undertaking for repayment if appeal successful.]—S. raised an action against P. before the Lords of Session in Scotland, who dismissed the action, & found P. entitled to his expenses. S. appealed to the House of Lords. Pending the appeal, P. petitioned the Lords of Session for decree & interim execution, under 48 Geo. 3, c. 151, s. 17, for the expenses. The Lords of Session allowed the decree, pronouncing an interlocutor & interim decree for payment, upon security to repay in the event of a reversal of the original judgment in the House of Lords, with warrant, in failure of payment after a time named, to poind S.'s goods. Security having been given, & the time having expired, P., in this ct., sued for the amount of the expenses:—*Held*: the action was not maintainable, the decree for payment not being in the nature of a final judgment.—PATRICK v. SHEDDEN (1853), 2 E. & B. 14; 22 L. J. Q. B. 283; 21 L. T. O. S. 89; 17 J. P. 664; 17 Jur. 1154; 1 C. L. R. 841; 118 E. R. 674.

*Annotations:—*Consd. *Re* Henderson, Nouvion v. Freeman (1887), 35 Ch. D. 704. *Apld.* Nouvion v. Freeman (1889), 15 App. Cas. 1. *Mentd.* Marbella Iron Ore Co. v. Allen (1878), 47 L. J. Q. B. 601.

1105. On dismissal of motion to set aside proceedings.]—(1) Defts., a joint-stock co. duly registered in London, carried on business there by B., their agent, & also in Dublin by R., their agent there. After the passing of 13 & 14 Vict. c. 18, a writ of summons, issued out of the Ct. of Q. B. in Ireland against the co., & pursuant to an order of that ct., made according to their practice under the 43 Geo. 3, c. 53, s. 8, & 13 & 14 Vict. c. 18, s. 9, was served by delivering a copy personally to R. together with a copy of the order, & by sending similar copies through the General Post Office directed to B. the London agent. The co. not having entered an appearance, pltf., by leave of the ct., entered one for them, & took other proceedings to judgment:—*Held*: the writ was well served, & the judgment regular & enforceable by action in this country.—SHEEHY v. PROFESSIONAL

s. Where defence struck out.]—Where in a suit in a foreign ct. the defence was struck out & judgment entered for pltf.:—*Held*: the judgment was not one decided on the merits & was not conclusive.—PERURI VISWANADHA REDDI v. KEYMER (1914), 1 L. R. 39 Mad. 95.—IND.

1103 i. Order for payment of costs—Part of judgment disposing of matter in dispute.]—SPLATT v. SPLATT (1889), 10 N. S. W. L. R. 227; 6 N. S. W. W. N. 58.—AUS.

Sect. 2.—Essentials to recognition of foreign judgments: Sub-sects. 3, 4 & 5.]

LIFE ASSURANCE CO. (1857), 3 C. B. N. S. 597 ; 27 L. J. C. P. 233 ; 4 Jur. N. S. 27 ; 6 W. R. 103 ; 140 E. R. 875, Ex. Ch.

Annotations:—*Consd.* Royal Mail Steam Packet Co. v. Braham (1877), 2 App. Cas. 381. *Refd.* Ingate v. Lloyd Austriaco (1858), 4 C. B. N. S. 704. *Mentd.* Thompson v. Parish (1859), 5 Jur. N. S. 986 ; Wildes v. Russell (1866), L. R. 1 C. P. 722 ; Thorburn v. Barnes (1867), L. R. 2 C. P. 384 ; Philpott v. Lehain (1876), 35 L. T. 855.

1106. Judgment subject to appeal—Appeal pending.]—SCOTT v. PILKINGTON, No. 653, *ante*.

1107. —.]—HARROP v. HARROP, No. 1112, *post*.

1108. Judgment in “executive” proceedings—Defendant precluded from contesting validity of contract sued on—Unsuccessful party entitled to take subsequent proceedings in which all defences available—Spanish judgment.]—An action cannot be brought in this country upon a foreign judgment for the recovery of a debt, if the judgment does not finally & conclusively, subject to an appeal to a higher ct., settle the existence of the debt so as to become *res judicata* between the parties.

By Spanish law in certain cases summary or “executive” proceedings could be taken to recover a debt, & pltf. if successful obtained a “remate” judgment for the recovery of a sum of money. Such a judgment was final in those proceedings unless reversed or varied on appeal. In such proceedings deft. could plead certain limited defences, but could not set up any defence affecting the validity of the contract. Either pltf. or deft., if unsuccessful in the “executive” proceedings, might in the same ct. & in respect of the same subject-matter, take ordinary or “plenary” proceedings, in which all defences & the whole merits of the matter might be gone into. In the “plenary” proceedings the “remate” judgment could not be set up as *res judicata* or otherwise. A “remate” judgment could be enforced by pltf. on giving security, although either an appeal or “plenary” proceedings might be pending. A “plenary” judgment rendered the “remate” judgment inoperative & required restoration of any money paid under it:—*Held*: since a “remate” judgment did not finally & conclusively establish the existence of a debt no action could be brought upon it in this country.—NOUVION v. FREEMAN (1880), 15 App. Cas. 1 ; 59 L. J. Ch. 337 ; 62 L. T. 189 ; 38 W. R. 581, H. L.

Annotations:—*Consd.* Bouchet v. Tulledge (1894), 11 T. L. R. 87 ; Jeannot v. Fuerst (1909), 100 L. T. 816. *Apld.* *Re* Macartney, Macfarlane v. Macartney, [1921] 1 Ch. 522. *Refd.* Dreyfus v. Peruvian Guano Co. (1889), 58 L. J. Ch. 471 ; Merrifield, Ziegler v. Liverpool Cotton Asscn. (1911), 105 L. T. 97. *Mentd.* Westmoreland Green & Blue Slate Co. v. Feilden, [1891] 3 Ch. 15 ; Robins v. Robins, [1907] 2 K. B. 13.

1109. Judgment by default—Subject to notice of “opposition”—Defendant entitled to defend as if previous judgment non-existent—French judgment.]—BOUCHET v. SIMMONS (1895), 11 T. L. R. 227, C. A.

1110. — Followed by notification of execution

1106 i. Judgment subject to appeal—Appeal pending.]—An action on a foreign judgment was stayed pending an appeal in the foreign state from the judgment sued on, although no stay of execution upon the original judgment was imposed by the foreign ct.—HUNTINGTON v. ATTRILL (1887), 12 P. R. 36.—CAN.

1106 ii. —.]—The pendency of an appeal against a foreign judgment would be no defence to an action upon it in Man. although the Man. ct. might stay execution on proper terms.—

HOWLAND v. CODD (1894), 9 Man. L. R. 435.—CAN.

1106 iii. —.]—A foreign judgment is conclusive between the parties while it stands, although there is an appeal pending from it not yet decided.—WILCOX v. WILCOX (1914), 27 W. L. R. 359.—CAN.

1106 iv. —.]—CAMPBELL v. MORGAN, [1919] 1 W. W. R. 644.—CAN.

t. Judgment by default.]—A default judgment obtained in a foreign

—French judgment.]—JEANNOT v. FUERST, No. 1076, *ante*.

1111. Judgment or order not enforceable in foreign country unless enforcement order obtained—Arbitration award—German award.]—An assocn. formed to promote & protect the cotton trade in L. made a bye-law rendering a member liable to expulsion for disreputable conduct in dealings with members of associated societies. Pltfs. having sold cotton, the bills of lading of which were forged, to a firm, members of a German assocn., with whom the L. assocn. had agreed that refusal to arbitrate upon questions in dispute should constitute disreputable conduct, refused to submit the questions between themselves & such firm to arbn., & a foreign award was made against pltfs. for payment of a large sum of money. By German law an enforcement order is necessary before an award can be enforced. The L. assocn. having threatened to expel pltfs. under their bye-law:—*Held*: the award was a valid determination upon the matters in dispute *inter partes*, but, although the action must be dismissed, the award was not the existing judgment of a foreign tribunal which an English ct. could enforce.—MERRIFIELD, ZIEGLER & CO. v. LIVERPOOL COTTON ASSCN., LTD. (1911), 105 L. T. 97 ; 55 Sol. Jo. 581.

Annotation:—*Refd.* Harrop v. Harrop, [1920] 3 K. B. 386.

1112. Original judgment liable to be abrogated or varied on application for enforcement order.]—In order that a foreign judgment may be enforceable in an English ct., it must be a final & conclusive judgment of the ct. by which it was pronounced, & it is not a final & conclusive judgment of that ct. if an order has to be obtained in that ct. for its enforcement, or if on application to that ct. for an order to enforce it the original judgment is liable to be abrogated or varied ; but it is not prevented from being a final judgment by reason of the fact that it may be the subject of an appeal to a High Ct.

By the judgment of a Judicial Comr. of Perak dated Dec. 13, 1916, which affirmed, with a variation, & previous order of a magistrate, it was adjudged that deft. should pay to pltf., his wife, as from Aug. 9, 1916, a certain sum per month for the maintenance of pltf. & the child of the marriage. In Oct. 1919, the parties having come to England, pltf. brought an action against deft. claiming five monthly payments alleged to be due under the judgment of the Judicial Comr.:—*Held*: the judgment was not final & conclusive within the doctrine of English law which enabled judgments of foreign cts. to be enforced in England, & pltf. could not recover.—HARROP v. HARROP, [1920] 3 K. B. 386 ; 90 L. J. K. B. 101 ; 123 L. T. 580 ; 36 T. L. R. 635 ; 64 Sol. Jo. 586 ; 84 J. P. Jo. 249.

Annotation:—*Apld.* *Re* Macartney, Macfarlane v. Macartney, [1921] 1 Ch. 522.

1113. Judgment for repayment of sum of money—Amount subject to variation or termination according to circumstances—Maintenance of illegitimate child.]—A valid foreign judgment in

jurisdiction, though liable to be set aside, so long as it stands is “final & conclusive” within the meaning of that expression as applied to foreign judgments, & consequently it may be sued on in this province.—BOYLE v. VICTORIA YUKON TRADING CO. (1902), 9 B. C. R. 213.—CAN.

1113 i. Judgment for payment of sum of money—Amount subject to variation or termination according to circumstances—Support & maintenance of wife.]—By an order of a foreign ct. made in an action in which a wife

personam cannot be enforced in England in (*inter alia*) the following circumstances:—(a) If it is contrary to public policy; *e.g.*, by recognising the right of an illegitimate child to perpetual maintenance against the putative father & his estate. (b) If the cause of action is unknown in England; *e.g.*, the right to a posthumous affiliation order. (c) If the judgment is not final & conclusive as to the amount payable; *e.g.*, if the maintenance can be varied or terminated according to the child's circumstances.—*Re MACARTNEY, MACFARLANE v. MACARTNEY*, [1921] 1 Ch. 522; 90 L. J. Ch. 314; 124 L. T. 658; 65 Sol. Jo. 435.

SUB-SECT. 4.—JUDGMENT MUST BE FOR SUM CERTAIN.

1114. Sum subject to deduction of costs to be taxed—Taxation condition precedent to action.]—*Assumpsit* will not lie on a decree of a foreign ct., whereby deft. is ordered to pay a certain sum of money to pltf., first deducting thereout deft.'s costs to be taxed by the proper officer & where deft.'s costs have not been taxed, either at his own request or upon an *ex parte* proceeding at the instance of pltf.—*SADLER v. ROBINS* (1808), 1 Camp. 253.

Annotations:—*Distd.* Hall v. Odber (1809), 11 East, 118. *Consd.* Henley v. Soper (1828), 8 B. & C. 16; Henderson v. Henderson (1844), 6 Q. B. 288. *Mentd.* Miles v. Bough (1842), 12 L. J. Q. B. 74.

1115. Balance due on taking account—Partnership.]—An action will lie upon the decree of a colonial ct. of equity for the balance of an account between partners. In such action, the ct. will look at the substance, without regarding the form of the proceedings upon which the decree is founded.—*HENLEY v. SOPER* (1828), 8 B. & C. 16; Dan. & Ll. 38; 2 Man. & Ry. K. B. 153; 6 L. J. O. S. K. B. 210; 108 E. R. 949.

Annotations:—*Consd.* Henderson v. Henderson (1844), 6 Q. B. 288. *Mentd.* *Re Fenwick, Ex p. Brown* (1849), 13 L. T. O. S. 468.

1116. — Trust & executorship.]—(1) Declaration in debt charged that deft. was indebted to pltf. in £8,883, by virtue of a decree & sentence of the Supreme Ct. of Newfoundland, in a cause on the equity side of the ct., wherein pltf. & others were pltf.s. & deft. was deft. by which decree it was ordered that deft. should pay pltf. that sum. Plea, that the decree was made in respect of matters of trust & exor.-ship accounts, not cognisable in a ct. of law:—*Held*: bad, debt being maintainable at law on a decree of a colonial court of equity simply ascertaining a balance & ordering payment by deft. to pltf.

(2) Plea that pltf. sued in the Supreme Ct. as widow of H. in right of H. without showing any right of representation to warrant such suit, & that the decree was made on matter of complaint solely in right of H.:—*Held*: bad, because whatever constituted a defence in that ct. ought to have been there relied on; & because this ct. would assume that right had been done there, unless something appeared to have been done repugnant to natural justice. (3) Pleas, showing a set-off for debts from H., or his estate to deft.:—

sued her husband for support & maintenance, the husband was ordered to pay into ct. a specified sum per month for the support & maintenance of his wife, such payments to be made "until further order of the ct." In an action in another jurisdiction by the wife against the executor of her husband for arrears due under the order:—*Held*: the order was not such a "final & conclusive" judgment as to be

enforceable by Irish cts.—*M'DONNELL v. M'DONNELL*, [1921] 2 I. R. 148.—*IR.*

PART XIV. SECT. 2, SUB-SECT. 4.

1115 i. Balance due on taking account.]—Pltf., having obtained a decree in a ct. in M., brought a suit for an account of money due under the decree in a ct. of C.:—*Held*: as the foreign judgment on which the action purported to be brought was not a judgment for

Held: bad; because pltf. sued in her own right in this ct., & the defence, if available at all, was one which ought to have been made in the Supreme Ct.—*HENDERSON v. HENDERSON* (1844), 6 Q. B. 288; 1 New Pract. Cas. 22; 13 L. J. Q. B. 274; 3 L. T. O. S. 178; 8 Jur. 755; 115 E. R. 111.

Annotations:—*As to* (2) *Reid. Re Fenwick, Ex p. Brown* (1849), 13 L. T. O. S. 468; *Sheehy v. Professional Life Assco.* (1857), 2 C. B. N. S. 211; *Barber v. Lamb* (1860), 8 C. B. N. S. 95; *Scott v. Pilkington, Munroe v. Pilkington* (1862), 8 Jur. N. S. 557; *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 341; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *Marbella Iron Ore Co. v. Allen* (1878), 47 L. J. Q. B. 601. *As to* (3) *Reid. Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 341; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228.

SUB-SECT. 5.—JUDGMENT MUST NOT BE CONTRARY TO POLICY OF LAW.

1117. Orders in respect of foreign infant—Resident in England.]—When an infant, a citizen of a foreign country, is sent to England, the Ct. of Ch. in England will carry out in all respects the orders of the cts. of the foreign country in regard to the infant, so far as consistent with the laws of England.—*Re SAVINI, SAVINI v. LOUSADA* (1870), 22 L. T. 61; *sub nom. DI SAVINI v. LOUSADA*, 18 W. R. 425.

1118. Judgment in action of penal nature—General rule.]—By a law of the State of New York penalties were inflicted on debtors for misrepresentation. The penalties were paid to the creditors in satisfaction *pro tanto* of their debt. The New York cts. had decided that actions for these penalties were criminal actions. An action was brought in an Ontario ct. upon a judgment of a New York ct. under this statute:—*Held*: (1) these actions, being by a subject to enforce in his own interest a liability for the protection of his private rights, were remedial & not penal within the rule of international law which prohibits the cts. of one state from executing the penal laws of another state; (2) it was the duty of the Ontario ct. to decide whether the New York statute was remedial or fully penal, & it was not bound by the interpretation of the New York cts.—*HUNTINGTON v. ATTRILL*, [1893] A. C. 150; 62 L. J. P. C. 44; 68 L. T. 326; 57 J. P. 404; 41 W. R. 574; 8 T. L. R. 341, P. C.

Annotation:—*As to* (2) *Consd. Raulin v. Fischer*, [1911] 2 K. B. 93.

What is—Judgment in action by creditor against debtor for penalties for misrepresentation—Under New York law.]—*HUNTINGTON v. ATTRILL*, No. 1118, *ante*.

1120. — Judgment awarding damages to injured party intervening in criminal prosecution—Under French law.]—By the French law, where an offender was prosecuted for a crime, a person who was injured by the crime might intervene in the prosecution & put in a claim for damages, which was tried along with the criminal charge, & upon conviction punishment for the offence & damages for the injury might be awarded by the same judgment:—*Held*: (1) in such a case the judgment

an ascertained sum of money, it constituted no foundation for an action.—*SMITH v. COELHO* (1899), 1 L. R. 22 Mad. 382.—*IND.*

PART XIV. SECT. 2, SUB-SECT. 5.

*u. General rule.]—*A foreign judgment is impeachable in so far as it interferes with the law of the land in which it is sued on.—*TAYLOR v. HOLLARD* (1886), 2 S. A. R. 78.—*S. AF.*

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was severable; (2) the portion of it awarding damages to the injured person was not within the rule of international law which prohibited cts. of justice from executing the penal judgments of a foreign ct., but might be enforced by action in this country.—*RAULIN v. FISCHER*, [1911] 2 K. B. 93; 80 L. J. K. B. 811; 104 L. T. 849; 27 T. L. R. 220.

Compare No. 6, ante.

1121. Judgment for debt against married woman & husband—Not in terms made against separate estate.]—*LEWIS v. LOGAN* (1894), 38 Sol. Jo. 325.

1122. Judgment recognising right of illegitimate child to perpetual maintenance against putative father.]—*Re MACARTNEY, MACFARLANE v. MACARTNEY*, No. 1113, *ante*.

Judgment creating status of penal nature.]—*See Nos. 1289, 1290, post.*

SUB-SECT. 6.—JUDGMENT MUST BE FOUNDED ON RECOGNISABLE CAUSE OF ACTION.

1123. Right to posthumous affiliation order.]—*Re MACARTNEY, MACFARLANE v. MACARTNEY*, No. 1113, *ante*.

SUB-SECT. 7.—JUDGMENT MUST NOT BE OBTAINED BY FRAUD OR MISREPRESENTATION.

1124. Judgment so obtained not recognised—Set aside in equity.]—A judgment of a foreign ct., fraudulently obtained, may be set aside, in effect, by an injunction granted in an English ct.—*BLAKE v. SMITH* (1810), cited in *Donnelly*, 270; 47 E. R. 365.

Annotation:—Consd. Price v. Dewhurst (1837), *Donnelly*, 264.

1125. ———.]—A foreign judgment being equally conclusive against the debtor as an English judgment, may be set aside in equity for fraud.

A bill was brought against a banker by his customer for an account, & for an injunction to restrain an action on a foreign judgment obtained by the banker from the customer in respect of their mutual dealings, & it appeared by specific allegations in the bill, that, notwithstanding the judgment, the balance of accounts was in favour of the customer:—*Held*: the case made by the bill was *prima facie* a case of fraud in the banker, which he was bound to answer, & his demurrer was overruled, without reference to the question whether the bill was sustainable for the account.—*BOWLES v. ORR* (1835), 1 Y. & C. Ex. 404; 160 E. R. 189.

Annotations:—Expld. & Distd. Aberystwith & Welsh Coast Ry. v. Piercy (1864), 2 Hem. & M. 713. *Refd. Aboulloff v. Oppenheimer* (1882), 30 W. R. 429. *Mentd. Padwick v. Hurst* (1854), 18 Beav. 575.

1126. ———.]—*PRICE v. DEWHURST*, No. 383, *ante*.

1127. ———.]—Decree of ct. below for a sum of money due on foreign judgments, reversed on the

ground that those judgments had been improperly obtained.—*FRANKLAND v. M'GUSTY* (1830), 1 Knapp, 274; 12 E. R. 324, P. C.

Annotations:—Mentd. Re Wardley & Hodson, Ex p. Thorpe (1836), 2 Deac. 16; *Leverson v. Lane* (1862), 13 C. B. N. S. 278; *Re Riches & Marshall's Assignment* (1864), 10 L. T. 662.

1128. ———.]—*BANK OF AUSTRALASIA v. NIAS*, No. 1042, *ante*.

1129. ———.]—*REIMERS v. DRUCE*, No. 1028, *ante*.

1130. ———.]—A foreign judgment of a competent ct. is conclusive, & not open to examination by another ct., unless the judgment impeached carries on the face of it manifest error, as if it is shown to have been obtained by fraud, or wanting in the condition of natural justice. Such judgment cannot be applied to persons other than those who were parties to the litigation decided by it, except in cases where the judgment is *in rem*.

A Greek ship having on board a cargo consigned to Malta, the port of destination, having encountered severe weather in her passage down the Black Sea, was obliged, for the preservation of her cargo, to jettison her boats, spars & cables, & being disabled put into Constantinople, where the captain applied to the Greek Consular Ct., & obtained an order for a survey of the ship & cargo, & a sentence of average settlement, with the appointment of a curator, who by virtue of the authority conferred on him, hypothecated the cargo, & caused a bottomry bond to be executed thereon for freight & the necessary expenses of trans-shipping & forwarding the cargo. The cargo, having been trans-shipped, arrived at Malta, where proceedings were taken in the Ct. of Commerce by the consignee to set aside the sentence of average settlement & to annul the bottomry bond. The Ct. of Commerce declared its incompetency to decide regarding the average settlement, but pronounced the bottomry bond null & void. On appeal to the Ct. of Appeal at Malta, that ct. reversed the decree of the Ct. of Commerce so far as regarded its competency to decide the average act & settlement, & ordered, as regarded the decision of the nullity of the bottomry bond, that such decision should be set aside until a definite sentence on the average act & settlement should have been come to by the Ct. of Commerce. The Ct. of Commerce gave a decision on the case thus remitted against the consignee, which was equivalent to a nonsuit. On appeal from this decision, the Appellate Ct. of Malta were of opinion that the captain having taken the legal course before the Consular Tribunal at Constantinople, & that ct. having, on the report of experts, appointed a curator of the cargo, & declared the voyage ended at Constantinople, such curator was the attorney for the owners of the cargo, & had authority to hypothecate same; that where the formalities of a consular authority & verbal process justifying the expenses necessitating the loan were observed, the lender on the bottomry bond was exonerated from justifying the necessity for the loan or making inquiry as to the facts causing such necessity, & decided for the validity of the bond:—*Held*: the Greek Consular Ct. at Constantinople

LARNACH v. ALLEYNE (1862), 1 W. & W. 342.—*AUS.*

1124 ii. ———.]—A foreign judgment, whether *in personam* or *in rem*, may be impeached by extrinsic evidence showing that it was obtained by fraud.—*R. v. WRIGHT* (1877), 1 P. & B. 363.—*CAN.*

1124 iii. ———.]—*MUSU HAJI AHMED v. PURMANUND NURSEY* (1890), 1 L. R. 15 Bom. 216.—*IND.*

PART XIV. SECT. 2, SUB-SECT. 7.

1124 i. Judgment so obtained not recognised—Set aside in equity.]—In a suit in a foreign ct. by infant *cestuis que trust* by their *prochein ami* against their trustees, a decree was made for sale of the trust property & at the sale the property was purchased by A. without the previous sanction of the ct. On a bill by the infants praying that the sale might be declared

fraudulent & void as against them & that A. might account with wilful default for all moneys received for a subsequent sale by him of the property:—*Held*: this ct. had jurisdiction to deal with the parties to the suit as well as the subject matter thereof notwithstanding the decree of the foreign ct.; that even if full value was given & there was no actual fraud the sale was constructively fraudulent & void & decree would be made as prayed.—

being a competent ct., having jurisdiction over a Greek ship & a cargo owned by Greek subjects, the sentence of that ct. was not open to examination by the Ct. of Commerce at Malta, & it must be presumed, in the absence of manifest error or fraud, that the Greek Consular Ct. rightly interpreted & applied the Greek law, by which they had the power they exercised of deciding that Constantinople should be considered the place of the ship's destination, & the average adjusted according to the law in force at that place; & the bottomry bond was necessary & valid.—*MESSINA v. PETROCCHINO* (1872), L. R. 4 P. C. 144; 8 Moo. P. C. C. N. S. 375; 41 L. J. P. C. 27; 26 L. T. 561; 20 W. R. 451; 1 Asp. M. L. C. 298; 17 E. R. 352, P. C.

Annotations:—*Consd.* R. v. L. G. Board, *Ex p. Arlidge*, [1914] 1 K. B. 160. *Refd.* Pemberton v. Hughes, [1899] 1 Ch. 781. *Mentd.* The M. Moxham (1875), 1 P. D. 43.

plea of fraud is a good defence at law to an action on a foreign judgment, & the Ct. of Ch. will not, on the ground that such a judgment was obtained by fraud, interfere with the action at law.—*OCHSENBEIN v. PAPELIER* (1873), 8 Ch. App. 695; 42 L. J. Ch. 861; 28 L. T. 459; 37 J. P. 724; 21 W. R. 516, L. C. & L. J.

Annotations:—*Consd.* London & Provincial Insee. Co. v. Seymour (1873), L. R. 17 Eq. 85. *Refd.* Abouloff v. Oppenheimer (1882), 10 Q. B. D. 295; *Vadala v. Lawes* (1890), 25 Q. B. D. 310; R. v. L. G. Board, *Ex p. Arlidge*, [1914] 1 K. B. 160.

1132. — Defence of fraud available in action on judgment—Although question of fraud investigated in foreign court—& decision that no fraud committed.]—A foreign judgment obtained by the fraud of a party to the suit in the foreign ct. cannot be afterwards enforced by him in an action brought in an English ct., even although the question whether the fraud had been perpetrated was investigated in the foreign ct., & it was there decided that the fraud had not been committed.

To an action claiming the value of certain goods & brought upon a foreign judgment, whereby defts. were ordered to return to pltf. the goods or to pay to her their value, the defence alleged that pltf. obtained the foreign judgment by fraudulently representing to the foreign ct. that the goods were not then in her possession, & by fraudulently concealing from the foreign ct. that the goods then were in her possession & were concealed by her:—*Held*: the defence was good.—*ABOULOFF v. OPPENHEIMER* (1882), 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57, C. A.; *subsequent proceedings* (1883), 52 L. J. Q. B. 309, D. C.

Annotations:—*Consd.* *Vadala v. Lawes* (1890), 25 Q. B. D. 310. *Refd.* *Re Henderson, Nouvion v. Freeman* (1887), 35

1133 i. *Defence of fraud available in action on judgment—Although involving retrial of questions adjudicated on by foreign court.*—*WOODRUFF v. MCLENNAN* (1887), 14 A. R. 242.—CAN.

1133 ii. —.]—To an action on a foreign judgment defts. pleaded that the order for such judgment was obtained upon a false affidavit, & that pltf. obtained the judgment by fraudulently concealing from the ct. the true nature of the transactions between them & defts.:—*Held*: a good defence.—*HOLLENDER v. FROULKES* (1894), 26 O. R. 61.—CAN.

1135 i. —.]—*Motion for summary judgment.*—Pltf. brought an action against the defts. in Quebec, to recover money alleged to be due from them for services rendered. Defts. appeared in the action & defended on the merits, & judgment went against them. Pltf. having brought an action in O. on the judgment, & moved for speedy judgment, defts. opposed the

Ch. D. 704; *Manger etc. v. Cash* (1889), 5 T. L. R. 271. *Mentd.* *Burdett v. Horne* (1911), 27 T. L. R. 402.

1133. — — Although involving retrial of questions adjudicated on by foreign court.]—Where an action is brought in England to enforce a foreign judgment, deft. may raise the defence that the judgment was obtained by the fraud of pltf. even though the fraud alleged is such that it cannot be proved without retrying the questions adjudicated upon by the foreign ct.—*VADALA v. LAWES* (1890), 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594, C. A.

1134. — — Although fraud discovered since judgment.]—*MANGER ETC. (SYNDICS UNDER BANKRUPTCY OF RODRIGUES ET CIE) v. CASH* (1889), 5 T. L. R. 271, D. C.

1135. — — Summary proceedings under R. S. C., Ord. 14.]—Leave should not be given to sign judgment under the above Order unless it is clear that there is no real substantial question to be tried.

In an action on a foreign judgment, deft. made an affidavit that the judgment had been obtained by fraud:—*Held*: pltf. should not be allowed to sign judgment under the above Order.—*CODD v. DELAP* (1905), 92 L. T. 510, H. L.

Whether judgment contrary to natural justice—Evidence of fraud rejected by foreign court.]—*See* No. 1147, *post*.

SUB-SECT. 8.—JUDGMENT MUST NOT BE CONTRARY TO NATURAL JUSTICE.

1136. General rule — Judgment contrary to natural justice not recognised.—In an action brought by the syndics of a French bkpt. upon an arbitral sentence & ordonnance, whereby deft. was adjudged to pay the bkpt. a sum of money:—*Held*: (1) the agreement of reference made in France was sufficiently proved by an examined copy & the evidence of the attesting witness, it appearing that the original was deposited with a notary at Paris for safe custody, & it was the established usage in France not to allow the removal of a document so deposited; (2) the proceedings in foreign cts. might be presumed to be consistent with the foreign law until the contrary was distinctly shown; (3) the principle adopted by a foreign jurisdiction in assessing damages could not be impugned, unless contrary to natural justice or proved to be not conformable to the foreign law; (4) two out of three syndics of a French bkpt. might sue without naming the third, or stating that the Juge Commissaire had authorised

WARRENER (1852), 13 U. C. R. 18.—CAN.

1136 iii. —.]—The declaration charged that deft. was indebted to pltf. by virtue of a judgment recovered in Q. Plea, that the deft. was not personally served with the first process in the suit within the jurisdiction of the ct. where the judgment was obtained, & that deft. was never indebted to pltf. in the claim on which the judgment was obtained. On demurrer:—*Held*: plea, as an allegation that the enforcement of the judgment was contrary to natural justice, was bad, as it did not negative the existence of all facts which, if proved, would render the judgment enforceable.—*SHEARER v. MCLEAN* (1903), 36 N. B. R. 284.—CAN.

1136 iv. —.]—The grounds of a foreign judgment are not examinable, unless such judgment be plainly repugnant to natural justice.—*SIMS v. THOMAS* (1841), 3 I. L. R. 415; 1 Leg. Rep. 81; Long. & T. 19.—IR.

motion upon affidavit that the judgment was recovered by fraud, & deception practised upon the ct. by pltf., & that defts. had a good defence to the action upon the merits:—*Held*: (1) the motion for judgment must be dismissed; (2) in an action founded upon a foreign judgment deft. is at liberty to plead, & prove, if he can, that the judgment was recovered by fraud & deception practised upon the ct.—*JACOBS v. BEAVER SILVER COBALT MINING CO.* (1908), 17 O. L. R. 496; 12 O. W. R. 803.—CAN.

PART XIV. SECT. 2, SUB-SECT. 8.

1136 i. General rule—Whether judgment contrary to natural justice recognised.—In debt on a foreign judgment, deft. pleaded that the judgment was contrary to reason & justice. On demurrer:—*Held*: a bad plea.—*MCPIH v. McMILLAN* (1846), 3 U. C. R. 30.—CAN.

1136 ii.

—.]—*KINGSMILL v.*

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the suit, such appearing to be the rule in France.—*ALIVON v. FURNIVAL* (1834), 1 Cr. M. & R. 277; 4 Tyr. 751; 3 L. J. Ex. 241; 149 E. R. 1084.

Annotations:—As to (1) Rejd. R. v. Douglas (1845), 1 Car. & Kir. 670; *Boyle v. Wiseman* (1855), 10 Exch. 647; *In the Goods of Holl* (1858), 1 Sw. & Tr. 136, n. *As to (2) Rejd. Re Henderson, Nouvion v. Freeman* (1887), 35 Ch. D. 704. *As to (4) Rejd. Ingate v. Austrian Lloyd's Co.* (1858), 6 W. R. 659; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

1137. ———.]—*MESSINA v. PETROCOCCHINO*, No. 1130, *ante*.

1138. ———.]—*WALKER v. MAHON*, No. 1037, *ante*.

1139. ———.]—*PEMBERTON v. HUGHES*, No. 952, *ante*.

1140. What amounts to repugnancy to "natural justice."—*CRAWLEY v. ISAACS*, No. 1096, *ante*.

1141. ——— Court constituted of interested parties.]—*PRICE v. DEWHURST*, No. 383, *ante*.

1142. ——— Comity of nations disregarded—Refusal to recognise title validly acquired by English law.]—A. & B. were mtgees. of an English ship. The ship was attached in a foreign port by the creditors of D., the registered owner, & proceedings were had in the ct. there for the sale of the ship. The agents of A. & B. intervened in these proceedings to protect the rights & assert the claims of A. & B. as mtgees. The ct. there refused to take notice of the claim as mtgees., as by the law of the State a mtge. of chattels was invalid. The ship was ordered to be sold. It finally arrived in a British port. Thereupon pltf. as mtgees. filed their bill to confirm the mtge., & for the usual directions:—*Held*: (1) the judgment of the foreign ct. was not binding on the cts. in England, the *lex loci contractus* being ignored by that ct.; (2) pltf. not having originated proceedings in the foreign ct., but, on the contrary, their title being wholly denied by it, were not estopped from proceeding here.—*LIVERPOOL BANK v. FOGGO* (1860), 2 L. T. 594.

1143. ———.]—*SIMPSON v. FOGO*, No. 382, *ante*.

1144. ———.]—A British ship, mortgaged in England by a British subject to British subjects, was arrested at New Orleans by creditors of the mtgor., also British subjects resident in England, & as the cts. of New Orleans do not recognise such mtges. of ships, the mtgees., in order to protect the ship from sale, gave bonds for the amounts claimed by the creditors. The mtgees. afterwards filed a bill to restrain the creditors from suing on these bonds:—*Held*: though the decisions of the cts. of New Orleans might be open to the reproach of injustice, yet as the creditors owed no duty to the mtgees., & had a right to proceed against the property of their debtor wherever they found it, the bill could not be maintained.—*LIVERPOOL MARINE CREDIT CO. v. HUNTER* (1868), 3 Ch. App. 479; 37 L. J. Ch. 386; 18 L. T. 749; 16 W. R. 1090; 3 Mar. L. C. 128, L. C.

Annotation:—Consd. Re Maudslay, Sons & Field, Maudslay v. Maudslay, Sons & Field, [1900] 1 Ch. 602.

1145. ——— Notice of proceedings given too late for defendant to appear in time.]—*JEANNOT v. FUERST*, No. 1076, *ante*.

1146. ——— Exclusion of evidence—Of parties—Parties not competent witnesses.]—The ct. will not refuse to enforce a judgment obtained in an Italian ct. merely because by Italian law neither party to a litigation can be called as a witness on his own behalf. The exclusion of such evidence cannot be said to be contrary to substantial justice within the

meaning of the rule laid down in *Pemberton v. Hughes*, No. 952, *ante*.—*SCARPETTA v. LOWENFELD* (1911), 27 T. L. R. 509.

Annotation:—Consd. Robinson v. Fenner, [1913] 3 K. B. 835.

1147. ——— Of fraudulent misrepresentation—Defence of fraud.]—In an action upon a foreign judgment the English ct. will not hold the foreign judgment to be contrary to natural justice, where the foreign ct. has jurisdiction over the subject-matter of the suit & the parties thereto, & where the parties have duly & in accordance with English ideas of natural justice been summoned to the foreign ct. so as to have had a hearing or an opportunity of being heard.

A co. in Quebec owed a sum of money to N. He assigned part of this debt to pltf. as security for a loan. He subsequently assigned the whole debt to deft., subject to the rights of pltf. in consideration of an undertaking by deft. to pay to pltf. the amount of the debt due from N. to pltf. Pltf. sued deft. in Canada to recover the amount of the debt. Deft. in that action pleaded that he had been induced to enter into the undertaking by the fraudulent misrepresentation of N. as to the financial position of the co. The Canadian ct. held that evidence of this fraud was inadmissible, & gave judgment for pltf.:—*Held*: the judgment was not contrary to natural justice.—*ROBINSON v. FENNER*, [1913] 3 K. B. 835; 83 L. J. K. B. 81; 106 L. T. 542; *subsequent proceedings*, [1913] 3 K. B. 845, n.

1148. Defence that proceedings contrary to natural justice—How pleaded.]—*COWAN v. BRAIDWOOD*, No. 1083, *ante*.

SUB-SECT. 9.—JUDGMENT MAY BE ANCILLARY TO JUDGMENT IN REM.

1149. Judgment for damages against co-respondent ancillary to decree for divorce—Courts pronouncing & enforcing judgment both courts of same Sovereign—Enforcing court with no jurisdiction to grant divorce in question.]—The cts. of this country will enforce a foreign judgment *in personam* ancillary or accessory to a decree for dissolution of marriage, such as a judgment for damages against a co-resp., regularly pronounced according to the law of the ct. which has given it, where both the ct. pronouncing & the ct. enforcing the judgment are cts. of same Sovereign & where the ct. enforcing it could not grant that relief, because it had no jurisdiction over the marriage to the dissolution of which the judgment for damages was ancillary.

Pltf., who was a British subject domiciled & resident in British India & had been married there, regularly instituted a suit for divorce in India under the India Divorce Act, 1869, making deft. a co-resp. Deft., a domiciled British subject, had then left India & had no property there; he was resident in England & was duly served with the petition by registered post in England, in accordance with the procedure of the Indian ct.; he did not appear or defend the suit. A decree was pronounced dissolving the marriage & awarding damages:—*Held*: pltf. was entitled to recover the damages awarded by the judgment of the ct. in India.—*PHILLIPS v. BATHO*, [1913] 3 K. B. 25; 82 L. J. K. B. 882; 109 L. T. 315; 29 T. L. R. 600.

Annotations:—Apprvd. Gibson v. Gibson, [1913] 3 K. B. 379. *Rejd. Harris v. Taylor*, [1915] 2 K. B. 580.

SECT. 3.—CONCLUSIVENESS OF FOREIGN JUDGMENTS.

SUB-SECT. 1.—JUDGMENTS IN PERSONAM.

A. As to Merits.

1150. *Whether unimpeachable.*—A bill was dismissed judgment having been given against pltf. in the Ct. of Denmark.—*BLUET v. BAMPFIELD* (1674), 1 Cas. in Ch. 237; 22 E. R. 773.

1151. ———. *Until reversed*—By foreign court itself.]—It is against the law of nations not to give credit to the judgments & sentences of foreign countries till they be reversed by the law, & according to the forms, of those countries wherein they were given (LORD NOTTINGHAM, C.).—*COTTINGTON'S CASE* (1678), cited in 2 Swan. 326; 36 E. R. 640.

Annotation :—*Refd.* *Hughes v. Cornelius* (1682), Skin. 59.

By House of Lords—*Scottish judgment.*—Where there is an appeal from the decision of a Scottish ct., acted upon by this ct., the ct., being unable to form any opinion upon that decision, must assume for the purpose of acting upon it that it is right, but cannot assume that such appeal will not be successful.—*LORD v. COLVIN* (1861), 1 Drew. & Sm. 475; 30 L. J. Ch. 787; 9 W. R. 687; 62 E. R. 460.

1153. ———.]—A partner, having retired under an agreement of indemnity against partnership claims, was allowed a sum of money recovered by the sentence of a foreign ct. for customs, without examination of the merits.—*GOLD v. CANHAM* (1679), 1 Cas. in Ch. 311; cited 2 Swan. 325; 22 E. R. 816, L. C.

1154. ———.]—The sentence of a foreign ct. of competent jurisdiction is evidence of *res judicata*, & is not to be called in question in a collateral cause in the cts. of this kingdom.—*HAMILTON v. DUTCH EAST INDIA CO.* (1732), 8 Bro. Parl. Cas. 264; 3 E. R. 573, II. L.

1155. ———. Or merely *primâ facie* evidence of debt.]—*GAGE v. BULKELEY*, No. 1029, *ante*.

1156. ———.]—An action was brought by S. in the Ct. of Session in Scotland, upon a judgment of the Supreme Ct. in Jamaica. The Ct. of Session determined that pltf. was bound to prove before them the ground, nature & extent of the demand on which the judgment in Jamaica had been obtained :—*Held* : the decision of the Ct. below should be reversed, & the judgment of the Supreme Ct. of Jamaica ought to be received as evidence *primâ facie*, of the debt, & it lay upon deft. to impeach the justice thereof, or to show same to have been irregularly or unduly obtained.—*SINCLAIR v. FRASER* (1771), 1 Dougl. 4, n.; cited in 20 State. Tr. 468; 99 E. R. 3, H. L.

Annotations :—*Consd.* *Walker v. Witter* (1778), 1 Dougl. K. B. 1; *Galbraith v. Neville* (1789), 1 Dougl. K. B. 6, n.; *Arnot v. Redfern* (1826), 11 Moore, C. P. 209. *Apld.* *Robertson v. Struth* (1844), 5 Q. B. 941. *Refd.* *Thompson v. Blackhurst* (1833), 1 Nev. & M. K. B. 266; *Don v. Lippmann* (1837), 5 Cl. & Fin. 1.

1157. ———.]—A foreign judgment has never been considered as a record, but it is *primâ facie* evidence of the justice of the demand in an action of *assumpsit*, having no more credit than is given to every species of written agreement, *viz.*, that it shall be considered as good till it is impeached.—*GALBRAITH v. NEVILLE* (1789), 1 Dougl. K. B. 6, n.; 99 E. R. 5.

Annotations :—*Consd.* *Houlditch v. Donegal* (1834), 8 Bli. N. S. 301. *Refd.* *Martin v. Nicolls* (1830), 3 Sim. 458; *Thompson v. Blackhurst* (1833), 1 Nev. & M. K. B. 266.

1158. ———.]—*HALL v. ODBER*, No. 1228, *post*.

1159. ———.]—In an action on a covenant to indemnify pltf. from all debts due from the late partnership of pltf., deft. & D., & from all suits, etc., proof, by a copy of the proceedings, was given of a suit in a foreign ct., instituted against the late partners for the recovery of a partnership debt, in which a decree was passed against them for want of answer, *per quod* a sequestration issued against pltf.'s estate, & he was obliged to pay the debt, etc. :—*Held* : the proceedings in the foreign ct. were conclusive against deft., & he was not at liberty to show that the proceedings were erroneous.—*TARLETON v. TARLETON* (1815), 4 M. & S. 20; 105 E. R. 742.

Annotations :—*Consd.* *Martin v. Nicolls* (1830), 3 Sim. 458. *Apprvd.* *Houlditch v. Donegal* (1834), 8 Bli. N. S. 301.

1160. ———.]—*ARNOTT v. REDFERN*, No. 761, *ante*.

1161. ———. Delay in impeaching judgment.]—A., who was domiciled in America, gave to B., one of his sisters, one-fourth of the residue of his property for her life, subject at her death to be equally divided among her children should she have any. Upon a suit in the proper ct. in America, B. having no children, it was decreed that the fund should be paid to her. This decree was made upon a bill taken *pro confesso* against parties who were out of the jurisdiction, there being two exors. within the jurisdiction upon whom the decree operated. One of the absent defts. having received the funds of B. under a power from her, upon a suit against him for an account, & an objection raised that B. was entitled to no more than a life interest under the will :—*Held* : (1) such a question could only be raised by proceeding in the ct. in America to rehear the cause; (2) a petition ten years afterwards to the Ct. of Session to take further evidence as to the proper construction of the will was rightly rejected.—*GORDON v. BROWN* (1829), 4 Bli. N. S. 569; 3 Hag. Ecc. 455, n.; 5 E. R. 202, II. L.

1162. ———.]—A foreign judgment cannot be questioned in the cts. of this country.

On a bill for a discovery & a commission to examine witnesses abroad, in aid of pltf.'s defence to an action brought in this country on a foreign judgment :—*Held* : the bill was demurrable.—*MARTIN v. NICOLLS* (1830), 3 Sim. 458; 57 E. R. 1070.

Annotations :—*Dctd.* *Houlditch v. Donegal* (1834), 8 Bli. N. S. 301. *Consd.* *Alivon v. Furnival* (1834), 1 Cr. M. & R. 277; *Price v. Dewhurst* (1837), 8 Sim. 279; *Bank of Australasia v. Harding* (1850), 19 L. J. C. P. 345. *Refd.* *Becquet v. MacCarthy* (1831), 2 B. & Ad. 951; *Cowan v. Braidwood* (1840), 10 L. J. C. P. 42; *Smyth v. Griffin* (1843), 12 L. J. Ch. 193. *Henderson v. Henderson* (1844), 6 Q. B. 288; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Austria (Emperor) v. Day* (1861), 2 Giff. 628.

—.]—A bill was filed to set aside the decree & open the mtge. accounts in a suit in the Ct. of Ch. in Jamaica, on the ground of fraud in the conduct of that suit :—*Held* : whatever irregularities or mistakes might have been committed in the course of the foreign suit, the allegations of fraud were not established in evidence, & the Ct. of Ch. in England had no jurisdiction as a

PART XIV. SECT. 3, SUB-SECT. 1.—A.

1155 i. *Whether unimpeachable—Or merely primâ facie evidence of debt.*—A judgment for a specific sum is *primâ facie* evidence against a less sum only being due, & as respects the merits it is conclusive till repelled by proof sufficient to destroy the effect of

a foreign judgment as evidence of a debt.—*PAGE v. PHILAN* (1844), 1 U. C. R. 254.—CAN.

1155 ii. ———.]—In an action on a foreign judgment, if the judgment is not impeached or denied, it is *primâ facie* evidence against deft.—*MANNING v. THOMPSON* (1867), 17 C. P. 606.—

CAN.

w. ———. *Where no estoppel.*—If the proceedings in a foreign ct. do not operate as an estoppel, the domestic ct. may inquire into the grounds of the judgment.—*MOMILLAN v. RITCHIE* (1851), 2 All. 242.—CAN.

Sect. 3.—Conclusiveness of foreign judgments: Subsect. 1, A. & B.]

ct. of appeal to review the decrees of the Ct. of Ch. in Jamaica merely because they had proceeded on ignorance of facts or error of law.—**FULLER v. WILLIS** (1831), 1 My. & K. 292, n.; 39 E. R. 693, L. C. Annotation:—**Mentd.** *Leith v. Irvine* (1833), 1 My. & K. 277.

1164. ———.]—It is the general sense of lawyers in Westminster Hall that the judgment of a foreign ct. in cts. of this country is only *prima facie* evidence, is liable to be averred against & not conclusive (LORD BROUGHAM, C.).—**HOULDTCH v. DONEGALL** (MARQUESS), No. 374, *ante*.

1165. ———.]—**DON v. LIPPMANN**, No. 711, *ante*.

1166. ———.]—**FERGUSON v. MAHON**, No. 1082, *ante*.

1167. ———.]—**Pleas not raised in foreign court—Whether pleadable in action on judgment.**—**HENDERSON v. HENDERSON**, No. 1116, *ante*.

1168. ———.]—**VANQUELIN v. BOUARD**, No. 1044, *ante*.

1169. ———.]—The publisher of a newspaper, in which had appeared an article contemptuously reflecting on the proceedings of the Ct. of Ch. of the Isle of Man, was brought before that ct. & committed for contempt. A., who was then present, avowed himself to be the author of the article, & was also forthwith committed verbally by the ct. After some time a written warrant was drawn up, signed by the Lieutenant-Governor of the island, which, after stating that at a Ct. of Ch. held, etc., A. voluntarily appeared & avowed himself the author of an article headed, etc., & that the writing & publishing the article was a contempt of the ct., ordered that A. should be for such contempt committed a prisoner to the gaol of R., there to remain until further order. It appeared that the Lieutenant-Governor presided in the Ct. of Ch., which was a ct. of record, having jurisdiction over the whole island, & having power to punish for contempt of its authority; & that the ordinary course of proceeding in such cases is by a rule or judgment declaring the party to be in contempt, & awarding such punishment as the ct. might deem proper; that no warrant was granted, but a certified copy of the rule or judgment was a sufficient authority to the officer to imprison; that by the law of the island parties in contempt of any of the cts. were committed to the gaol of R., & no period was in general fixed for their release, which they might obtain by application to the ct., & in case of contemptuous behaviour, by paying the fine imposed, or making such apology or complying with such terms as the ct. might deem satisfactory. On a motion for a *habeas corpus* to discharge A. from custody:—**Held**: (1) it sufficiently appeared that the warrant was a judicial act of the Ct. of Ch.; (2) a ct. of competent

1167 i. ———.]—**Plea not raised in foreign court—Whether pleadable in action on judgment.**—A plea to an action on a foreign judgment, of Stat. Limitations, to the original cause of action, ought not to be struck out as embarrassing; such plea being *lex fori* & one which could not have been pleaded in a foreign country. Nor should a counterclaim be struck out where, at all events, deft. was not bound to raise it in the original action.—**BRITISH LINEN CO. v. McEWAN** (1889), 6 Man. L. R. 292.—**CAN.**

1167 ii. ———.]—Deft. in an action on a foreign judgment may plead on the merits to the action on the judgment, or he may set up any defence which he might have set up

in an action on the original cause of action in the foreign ct., but he cannot plead a defence which he might have set up to the original cause of action, had it been sued upon in the domestic ct., but which could not be raised in the foreign ct.—**BRITISH LINEN CO. v. McEWAN** (1892), 8 Man. L. R. 99.—**CAN.**

1167 iii. ———.]—To a count on a foreign judgment deft. pleaded nine pleas which might have been pleaded in the foreign country to the original cause of action. There was no evidence that they were untrue:—**Held**: these pleas could not be struck out on the ground of embarrassment or delay, & the fact that plffs. might be put to great expense about

authority having decided this to be a contempt, the Ct. of Q. B. could not review its decision; (3) the commitment, being according to the ordinary form adopted by the Ct. of Ch. of the Isle of Man, was valid, though it was not for a time certain.—**Re CRAWFORD** (1849), 13 Q. B. 613; 7 State Tr. N. S. 961; 18 L. J. Q. B. 225; 13 L. T. O. S. 185; 13 J. P. 634; 13 Jur. 955; 116 E. R. 1397.

Annotations:—**As to** (2) **Consd.** *Martin v. Mackonochie* (1879), 4 Q. B. D. 697. **Generally, Mentd.** *Ex p. Anderson* (1860), 3 L. T. 622; *Ex p. Brown* (1864), 5 B. & S. 280.

1170. ———.]—A foreign judgment, though conclusive where it was given, is only *prima facie* evidence of a debt here.

Where deft., a member of a colonial co., in an action brought against him in this country on a contract entered into by the co., pleaded a judgment recovered in the colony against the chairman of the co. as conclusive:—**Held**: the plea was bad.

Here the right to sue on the original causes of action remains, there being in our cts. no merger of those causes of action in a higher remedy (**CRESSWELL, J.**).—**BANK OF AUSTRALASIA v. HARDING** (1850), 9 C. B. 661; 19 L. J. C. P. 345; 14 Jur. 1094; 137 E. R. 1052.

Annotations:—**Apld.** *Kelsall v. Marshall* (1856), 1 C. B. N. S. 241. **Distd.** *Barber v. Lamb* (1860), 8 C. B. N. S. 95. **Consd.** *Copin v. Adamson*, *Copin v. Strachan* (1874), L. R. 9 Exch. 345. **Refd.** *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *Thelwall v. Yelverton* (1864), 16 C. B. N. S. 813; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Re Trufort*, *Trafford v. Blanc* (1887), 36 Ch. D. 600; *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49.

1171. ———.]—**BANK OF AUSTRALASIA v. NIAS**, No. 1042, *ante*.

1172. ———.]—**Mistake of fact apparent on face of judgment.**—**REIMERS v. DRUCE**, No. 1028, *ante*.

1173. ———.]—The judgment of a foreign ct., having jurisdiction over the parties & subject-matter of the suit, cannot be impeached on the ground that it is erroneous upon the merits.—**DE COSSE BRISSAC v. RATHBONE** (1861), 6 H. & N. 301; 30 L. J. Ex. 238; 158 E. R. 123.

Annotations:—**Consd.** *Simpson v. Fogo* (1863), 1 Hem. & M. 195. **Expld.** *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155. **Consd.** *Voinet v. Barrett* (1885), Cab. & El. 554; *Re Trufort*, *Trafford v. Blanc* (1887), 36 Ch. D. 600. **Refd.** *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *Voinet v. Barrett* (1885), 55 L. J. Q. B. 39.

1174. ———.]—Pltf., acting on behalf of the Finance Minister of the Sultan of Turkey, in Nov., 1858, made arrangements with the owners of the British ship, the *Dutchman*, then in the port of London, & about to sail to Constantinople, for the conveyance of certain gold. He thereupon effected with deft.'s co. a policy of insurance upon the gold, dated Nov. 26. On Nov. 27 the owners of the vessel transferred her to a Russian co., & her name was changed to the *Dnieper*. Neither pltf. nor deft. knew until the termination of the voyage that the ship had ceased to be a British vessel. She sailed on Jan. 4, 1859, & whilst proceeding on

procuring evidence in the foreign country to meet, by way of anticipation, what was set up in the pleas, was no ground for striking them out.—**INTERNATIONAL, ETC., CORPN. v. GREAT N. W. CENTRAL RY. CO.** (1893), 9 Man. L. R. 147.—**CAN.**

1167 iv. ———.]—The defences that may be set up in an action in Man. on a foreign judgment are not limited to such as might have been, but were not, pleaded in the original action, but include such as were actually pleaded there, subject to the power of the ct. or a judge to strike them out on the ground of embarrassment or delay.—**HICKEY v. LEGRESLEY** (1905), 15 Man. L. R. 301.—**CAN.**

her voyage was wrecked about 110 miles from Constantinople. The captain sent off the chief officer with the gold to Gallipoli, which was two & a half miles distant. The gold was then deposited with the Russian consul where it remained twelve days, the fees demanded upon delivering it up being 2½ per cent. upon its value. At the time of the gold being sent to the Russian consul, no expenses had been incurred in saving the ship or any part of the cargo; the ship became a total wreck. A ct. was afterwards appointed by the consul-general according to Russian law, & it was determined that this case was one which required a settlement of salvage, & it was adjudged that the gold should contribute the sum of £7149 6s. 1d. towards the expense of saving the cargo. Pltf. paid the amount & brought an action against deft. to recover the sum of £1,108 3s. 3d., his proportion on the policy:—*Held*: the ct. at Constantinople, being a ct. of competent jurisdiction according to Russian law to decide the question of salvage, this ct. could not interfere with such decision, whether given in consonance with maritime law or not.—*DENT v. SMITH* (1869), L. R. 4 Q. B. 414; 10 B. & S. 249; 38 L. J. Q. B. 144; 20 L. T. 868; 17 W. R. 646; 3 Mar. L. C. 251.

Annotations:—*Distd.* *Harris v. Scaramanga* (1872), L. R. 7 C. P. 481. *Folld.* *Messina v. Petrocchino* (1872), L. R. 4 P. C. 144. *Consd.* *R. v. L. G. Board, Ex p. Arlidge*, [1914] 1 K. B. 160.

1175. —.—.]—*HAWKSFORD & RENOUE v. GIFFARD*, No. 1225, *post*.

1176. —.—.]—*CONSONNO v. ERNSTHAUSEN* (1886), 2 T. L. R. 296.

1177. —.—.]—*Re TRUFORT, TRAFFORD v. BLANC*, No. 463, *ante*.

B. As to Mistakes of Law.

1178. Mistake made by Court of Chancery in Jamaica—Whether impeachable by Court of Chancery in England.]—*FULLER v. WILLIS*, No. 1163, *ante*.

1179. Mistake as to law of another country.]—*CASTRIQUE v. IMRIE*, No. 1195, *post*.

1180. —.— English law—English law question of fact.]—(1) It is no bar to an action, on a judgment *in personam* of a foreign ct. having jurisdiction over the parties & cause, that the foreign tribunal has put a construction erroneous, according to English law, on an English contract.

Declaration was made on a judgment of a French ct. having jurisdiction in the matter. A plea set out the judgment, from which it appeared that the suit was for the breach by the shipowner of a charterparty made in England, in which was a clause that the penalty for the non-performance of the agreement should be the estimated amount of freight; & that the ct. had treated this clause, contrary to the English law, as fixing the amount of damages recoverable, & had given judgment accordingly for the amount of freight. The proceedings showed that both parties had appeared & been heard before the judgment was pronounced, but no objection was taken by deft. to the mode of assessing the damages:—*Held*: deft. could not set up as an excuse for not paying money awarded by a judgment of a foreign tribunal having jurisdiction over him & the cause, that the judgment

proceeded on a mistake as to the English law, which was really a question of fact, & it made no difference that the mistake appeared on the face of the proceedings.

(2) The French ct. could only be informed of foreign law by evidence, & deft., having neglected to bring the English law to the knowledge of the French ct., could not impeach the judgment given against him on the ground of error as to that law (*HANNEN, J.*).—*GODARD v. GRAY* (1870), L. R. 6 Q. B. 139; 40 L. J. Q. B. 62; 24 L. T. 89; 19 W. R. 348.

Annotations:—*As to* (1) *Reid*. *Meyer v. Ralli* (1876), 1 C. P. D. 358; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *Voinet v. Barrett* (1885), 55 L. J. Q. B. 39; *Pemberton v. Hughes*, [1899] 1 Ch. 781. *As to* (2) *Consd.* *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600. *Reid*. *Rousillon v. Rousillon* (1880), 42 L. T. 679. *Generally, Consd.* *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155; *Robinson v. Fenner*, [1913] 3 K. B. 835. *Reid*. *Ochsenbein v. Papelier* (1873), 8 Ch. App. 695; *Copin v. Adamson, Copin v. Strachan* (1874), 31 L. T. 242; *Re St. Nazaire Co.* (1877), 36 L. T. 358; *Nouvion v. Freeman* (1889), 15 App. Cas. 1; *Crozot v. Brogden* (1894), 42 W. R. 317; *Kmanuel v. Symon*, [1908] 1 K. B. 302. *Mentd.* *Thorp v. Hibbard* 4 T. L. R. 54; *Wall v. Rederiaktiebolaget Luggude*, [1915] 3 K. B. 66.

1181. —.—.]—*Re TRUFORT, TRAFFORD v. BLANC*, No. 463, *ante*.

1182. Mistake apparent on face of judgment.]—*REIMERS v. DRUCE*, No. 1028, *ante*.

—*GODARD v. GRAY*, No. 1180, *ante*.

1184. Mistake admitted by parties.]—The presumption with regard to the judgment of a foreign ct. is that it is correct according to the law of the country to which it belongs, but when it is admitted by the parties that the law of the foreign tribunal has not been correctly declared by its judgment, such a judgment is not binding on an English ct.

A cargo of rye, shipped on an Austrian ship for carriage from Enos, a Turkish port, to Schiedam, was insured by a policy warranted free of particular average. The ship meeting with stormy weather, a portion of the cargo was damaged, & the ship had to put into the port of La Rochelle. Proceedings were taken, at the instance of the captain, in the Tribunal of Commerce at that port, & in consequence the cargo was landed & warehoused. It was necessary to sell a portion of the cargo immediately, which was accordingly done. On Feb. 21 the ct. on the petition of the captain ordered a sale of the residue, & notice of abandonment was given to defts. as insurers on the ground that, in the opinion of the experts or surveyors, the rye could not be forwarded to its destination. This notice defts. refused to accept, & on Mar. 5 defts., as insurers, summoned the captain before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye. The ct. accordingly ordered the residue of the rye to be surveyed, & the surveyors reported that it could be re-shipped & conveyed to its destination. This report was confirmed by the ct., & notice of it given to the assured, together with notice that any course pursued with the cargo would be for their account & on their responsibility. The rye, however, was not forwarded, & remained until Dec. warehoused at La Rochelle, although the captain might have procured a ship to carry it on. The captain having in the meantime procured advances to meet the expenses caused by the

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y. Mistake as to law.]—A wrong view as to the legal liability of a party or as to onus does not render a foreign judgment one not given on the merits.—*KAMA SHENOI v. HALLANGA* (1918), 1 L. R. 41 Mad. 205.—*IND*.

z. Mistake in proceedings prior to judgment.]—In *assumpsit* on a

foreign judgment, the judgment cannot be impeached for any alleged defect in the proceedings prior to judgment, under the general issue.—*MCPHERSON v. McMILLAN* (1846), 3 U. C. R. 34.—*CAN*.

a. —.—.]—A count of the declaration, on which a foreign judgment was obtained, was framed in

assumpsit, & did not aver pltf.'s readiness to perform his part of the contract, but disclosed a good cause of action for malfeasance:—*Held*: the judgment would not be treated as void, though the objection to the declaration might have been good on general demurrer.—*JACK v. TEASE* (1861), 12 J. Ch. R. 279; 14 Ir. Jur. 9.—*IR*.

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interruption of the voyage, was summoned, by the parties who had made the advances, before the Tribunal of Commerce, & on Sept. 14 the ct. decreed a sale of the ship, & a statement of general & particular average of the ship & cargo to be drawn up, which was accordingly done. On Dec. 21 the Tribunal of Commerce decreed the sale of the rest of the cargo, on the ground that the weather was unfavourable for its preservation. On Jan. 25 the Tribunal of Commerce decreed that the full amount of the freight due upon the whole voyage was chargeable upon the proceeds of such sale, & an amended average statement, which proceeded on this footing, was confirmed by the ct. If the proportion of freight so payable was to be added to the extra expenses incurred in respect of the residue of the cargo so sold by reason of the interruption of the voyage, including the extra freight in respect of forwarding to the port of destination, the amount would exceed the value of the rye at the port of destination. It was admitted that neither the law of France nor of Austria was in accordance with the decree of Jan. 25, & if the proper proportion of freight had been charged to the residue of cargo sold, the value at the port of destination would have exceeded the expenses:—*Held*: (1) there was no constructive total loss of the cargo, inasmuch as the decree for the sale of the residue of the cargo was not due to the perils insured against, but was made for the purpose of paying advances incurred through the captain's breach of duty in not forwarding such rye to its destination; (2) the insurers were not concluded by the judgment of the French ct. from denying that there was no total loss, because it was admitted that such judgment was erroneous according to the law which it professed to administer.—*MEYER v. RALLI* (1876), 1 C. P. D. 358; 45 L. J. Q. B. 741; 35 L. T. 838; 24 W. R. 963; 3 Asp. M. L. C. 324.

C. Other Cases.

1185. *Parties different.*—*MESSINA v. PETROCCHINO*, No. 1130, *ante*.

1186. —.]—*RIO TINTO COPPER CO. v SOCIÉTÉ DES MÉTAUX* (1890), 6 T. L. R. 408.

1187. —.]—An American co. incorporated with the object of buying & selling land in Mexico, having acquired over seventeen million acres in the territory of Lower California in that country, borrowed under its powers a very large sum on debentures. A trust deed was executed between the co. of the first part, a trustee for the debenture holders of the second part, & an advisory committee of three persons of the third part. By the deed, which contained a covenant by the American co. that the land in Lower California should be charged with the payment of the principal money & interest payable on the debentures, the committee were empowered to call meetings of the debenture holders, to be conducted like meetings of shareholders, & a meeting was to have power to sanction any modification or compromise of the rights of debenture holders against the co. or against its property, whether such rights should arise under the debentures or under those presents, & a special resolution was to be binding on all the debenture holders. In 1889 an English co. was formed with power to buy & sell land, & other very wide powers, & on May 4 of that year the American co., being in difficulties, transferred its assets, business & liabilities to such English co., subject, as to the lands in Lower California, to the

debentures & the deed of trust. The English co., being desirous that the debenture holders should exchange their debentures for fully paid preference shares in the English co., the committee called a meeting of the debenture holders, at which a special resolution to accept such preference shares in lieu of their debentures was passed by the necessary majority. Certain debenture holders who did not attend the meeting dissented from the arrangement, & brought an action against the American co. to recover interest on their debentures, which was ultimately decided in favour of the dissenting debenture holders by the Ct. of Appeal on the ground that a power to compromise rights presupposed some dispute about, or difficulty in, enforcing them, & there being no evidence of any such dispute or difficulty, there was nothing to bring the power to compromise into play. The dissenting debenture holders now brought an action against the trustee of their deed, the advisory committee, & the English co. for an account of their interest in arrear & unpaid; a declaration that by the trust deed the debenture holders were entitled to a first charge on the property comprised in the deed, & to have all necessary acts done to make such charge effectual; a declaration that the committee & the trustee of the deed had been guilty of wilful neglect & default in failing to procure & register a certain hypothecation of the land, & to put in force the powers of the deed; & for other relief. Defts. contended (*inter alia*) that plffs. were bound by the special resolution passed at the meeting of the debenture holders, but it was urged on behalf of plffs. that the judgment in the action against the American co. estopped the English co. in the present action from saying that plffs. were bound by the special resolution. The judge found upon the evidence that there were difficulties, not brought before the ct. in the former action, of such a substantial character in the way of the debenture holders enforcing their rights, that the majority of them might have *bond fide* considered it desirable to compromise those rights against the American co. & its property by passing the special resolution, & that there was no reason to doubt that the resolution was in fact honestly arrived at, & passed *bond fide* at the meeting by the necessary majority acting solely in what they believed to be the interests of the debenture holders:—*Held*: (1) the English co., not having been parties to the action against the American co., were *prima facie* not bound by the judgment, & although the English co., by reason of the covenant of indemnity given by them to the American co., were interested in assisting the latter co., & did assist them in the action brought against them, yet this did not put them in the position of defts. to that action, or estop them in the present action from contending that plffs. were bound by the special resolution; (2) with reference to the contention that the English co. were estopped by the judgment because they were privies in estate of the American co., that judgment could not have bound the land, & moreover, a prior purchaser of land could be estopped, as being privy in estate, by a judgment obtained in an action against the vendor commenced after the purchase; (3) although the English co. would be estopped under their covenant of indemnity from disputing the judgment as against the American co. suing them on that express covenant, there were no grounds in a totally different action like the present, to which the American co. were not even parties, for holding that the English co. were so estopped; (4) evidence being accordingly admissible as to the question whether the dissenting

minority were bound by the special resolution, plffs. were bound by the special resolution, & the action must accordingly be dismissed with costs.—**MERCANTILE INVESTMENT & GENERAL TRUST CO. v. RIVER PLATE TRUST, LOAN & AGENCY CO.**, [1894] 1 Ch. 578; 63 L. J. Ch. 366; 70 L. T. 131; 42 W. R. 365; 10 T. L. R. 186; 8 R. 791.

1188. Effect of judgment not clear.—Deft. having applied to rescind an order for service out of the jurisdiction on the ground that the claim had been determined by a foreign judgment, & that the matter was *res judicata*:—**Held**: as there was sufficient doubt as to the effect of the foreign judgment, & as there was a question of law which might be reasonably argued, the service of the writ must be allowed.—**CALL v. OPPENHEIM** (1885), 1 T. L. R. 622, C. A.

Annotation:—**Consd. Société Générale de Paris v. Dreyfus** (1887), 37 Ch. D. 215.

Judgment of court without jurisdiction.—**See** Sect. 2, sub-sect. 2, *ante*.

Judgment not final nor for sum certain.—**See** Sect. 2, sub-sects. 3, 4, *ante*.

Judgment contrary to policy of law or to natural justice.—**See** Sect. 2, sub-sects. 5, 6, 8, *ante*.

Judgment obtained by fraud.—**See** Sect. 2, sub-sect. 7, *ante*.

SUB-SECT. 2.—JUDGMENTS IN REM.

A. In General.

Conclusiveness & effect of foreign judgments in personam.—**See** Sub-sect. 1, *ante*.

1189. What is foreign judgment in rem—Judgment in proceedings to enforce maritime lien—Recognised as such by foreign codes founded on civil law—Though not by English law.—**CASTRIQUE v. IMRIE**, No. 1195, *post*.

1190. ——— Not where object of suit personal remedy.—All civilised nations recognise the validity of maritime lien, & will enforce it when it has been declared by a foreign ct., but it is essential that it should appear from the proceedings of the foreign ct. that the object of the suit was the sale of the ship, & not a personal remedy against the captain or owners.

Plffs. brought an action & obtained judgment in the Tribunal of Commerce at Lisbon against the captain & owners of a British ship for damages for injury caused by a collision with plffs.' ship. The Portuguese cts. recognised no distinction between actions *in personam* & actions *in rem*. Defts.' ship having come into a British port, plffs. commenced an action *in rem* against the ship, claiming to enforce the judgment of the Portuguese ct. against it, & arrested the ship:—**Held**: the action in the Portuguese ct. was a personal action, & the writ in the present action & all proceedings under it must be set aside, the ct. having no jurisdiction to enforce a judgment in a personal action by proceedings *in rem*.—**THE CITY OF MECCA** (1881), 6 P. D. 106; 50 L. J. P. 53; 44 L. T. 750; 4 Asp. M. L. C. 412, C. A.

Annotation:—**Reid. The Nautik**, [1895] P. 121.

See, also, No. 1376, *post*.

1191. ——— Divorce decree affecting status of parties.—**BATER v. BATER**, No. 935, *ante*.

Recognition in England of foreign decrees of divorce generally.—**See** Part X., Sect. 2, *ante*.

1192. Conclusive in England—Founded on recognised law—& pronounced by competent tribunal.—

(1) If personal chattels are sold in a manner binding according to the law of the country in which they are disposed of, that disposition is binding in this country.

A cargo of deals was shipped on board a Prussian vessel by Russian merchants at Onega for an English firm carrying on business at Hull. The vessel struck on the rocks on the coast of Norway, but the cargo was landed safely. A survey was held, when the surveyors recommended, as best for all parties, that the ship & cargo should be sold, & the cargo was sold accordingly. It appeared that by the law of Norway, though the captain might not under such circumstances be able to justify the sale as between himself & the owners of the cargo, an innocent purchaser would have a good title to the property bought at such sale:—**Held**: the sale in Norway bound the property, & the goods having afterwards come to this country, the owner claiming under such sale had a good title to them as against the underwriters to whom the cargo had been abandoned.

(2) We are by no means prepared to agree with the Exch. Ct. in thinking the judgment of the Diocesan Ct. in Norway conclusive as a judgment *in rem*, nor are we satisfied that defts. in the present action were estopped by the judgment of that ct. or what was relied on as a judicial proceeding at the auction (**CROMPTON, J.**).

I admit, if there be a judgment *in rem* founded on a recognised law, & pronounced by a competent tribunal of the country where a movable chattel then is, that that judgment determines & changes the property everywhere & between all persons, as in the cases of a condemnation of goods in the Exch., or of a ship in a lawful Prize Ct. (**BYLES, J.**).—**CAMMELL v. SEWELL** (1860), 5 H. & N. 728; 29 L. J. Ex. 350; 2 L. T. 799; 6 Jur. N. S. 918; 8 W. R. 639; 157 E. R. 1371, Ex. Ch.

Annotations:—**As to** (1) **Consd. Liverpool Bank v. Foggo** (1860), 2 L. T. 594; **Castrique v. Imrie** (1870), L. R. 4 H. L. 414. **Reid. Simpson v. Foggo** (1860), 1 John. & H. 18; **Castrique v. Behrens** (1861), 30 L. J. Q. B. 163; **Lloyd v. Guibert** (1865), L. R. 1 Q. B. 115; **Meyer v. Ralli** (1876), 45 L. J. Q. B. 741; **Alcock v. Smith**, [1892] 1 Ch. 238; **Dulaney v. Merry**, [1901] 1 K. B. 536. **Generally, Reid. The Empire of Peace** (1869), 39 L. J. Adm. 12; **Vadala v. Lawes** (1890), 25 Q. B. D. 310. **Mentd. The Justyn** (1862), 6 L. T. 553; **Eglinton v. Norman** (1877), 46 L. J. Q. B. 557.

1193. Though obtained improperly—Not impeachable by person not party to foreign litigation.—Declaration that the captain of an English ship, while on a voyage, drew a bill of exchange on the then owners for the necessary disbursements of the ship, & the bill was dishonoured at maturity; that plff. had in the meantime become mtgee. of the ship; that by the French law the *bond fide* holder for value of such a bill, if a French subject, could take proceedings *in rem* in the French cts. & attach & sell the ship in a French port in order to pay the bill; that defts., being English subjects & holders of the bill, after it had been dishonoured conspired with T, a French subject, that they should indorse the bill to him without value, & that he should take proceedings in the French cts., & falsely represent that he was a *bond fide* holder for value; that this was accordingly done, & orders were thereby obtained from the French cts. that the ship should be attached & sold in a French port; & plff. was thus deprived of his property in her:—**Held**: the declaration was bad, as an action could not be maintained while the judgment *in rem*, though in a foreign ct. & obtained as alleged, remained unreversed.—**CASTRIQUE v. BEHRENS** (1861), 3 E. & E. 709; 30 L. J. Q. B. 163; 4 L. T.

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52; 7 Jur. N. S. 1028; 1 Mar. L. C. 45; 121 E. R. 608.

Annotations:—Consd. *Bater v. Bater*, [1906] P. 209. **Mentd.** *Basóbbé v. Matthews* (1867), L. R. 2 C. P. 684; *Bynoe v. Bank of England*, [1902] 1 K. B. 467; *Turley v. Daw* (1906), 94 L. T. 216.

— — — — —.]—**BATER v. BATER**, No.

935, *ante*.

1195. — — **Foreign court honestly exercising jurisdiction—Not impeachable by party with preferential title by English law.]—**(1) An adjudication of a foreign ct., acting within the jurisdiction conferred upon it by the State within whose lawful control the subject-matter adjudicated upon is found, is conclusive against all the world, even though it professes to proceed on an assumption of the law of another country, & that assumption is erroneous.

(2) Where a foreign ct., having competent jurisdiction in the matter, & honestly exercising it, delivers in a proceeding *in rem* a judgment, by which the sale of a chattel is ordered, the sale cannot afterwards be impeached in this country in an action against the purchaser, even though the person seeking to impeach it would by the law of this country have a preferential title to the chattel here.

A ship was, while in the port of an English colony, repaired & furnished with necessaries for the voyage. The captain drew on his owner for the amount due. The bill was never accepted. The ship sailed on its prescribed voyage, & before reaching England entered a French port. The bill was indorsed to a French subject, who sued the captain on it, & obtained in the Tribunal de Commerce a judgment against him, but the judgment freed him from personal arrest & declared the debt privileged on the ship, having priority over others. The ship was taken possession of by the French authorities under this judgment. While the ship was on its voyage, & before its arrival in the French port, the owner had executed a mtge. of the ship to a creditor. Neither the original owner nor the mtgee. was in any way personally cited in the action. The ship could not be actually sold till the Civil Tribunal of the district had confirmed the original judgment. It was confirmed, after the original owner & his assignee, he having in the meantime become bkpt., had been cited before the Civil Tribunal, & that ct. disregarded the opinion of an English lawyer as to what would be the relative rights of the holder of a bill of exchange & the holder of a bill of sale of the ship. The assignee of the mtge. afterwards instituted before the Civil Tribunal a process in the nature of a replevy of the ship, but failed in the process, & the ship was sold:—**Held:** there had been a judgment *in rem* in the French ct., & the title of the purchaser of the ship, an Englishman, could not afterwards be disturbed in this country.

(3) A proceeding in a foreign ct. to enforce a maritime lien, which by the law of that foreign country & of all foreign codes founded on the civil law, though not so recognised by the law of this country, is a proceeding *in rem*, must be so treated here (**LORD CHELMSFORD**).—**CASTRIQUE v. IMRIE** (1870), L. R. 4 H. L. 414; 39 L. J. C. P. 350; 23 L. T. 48; 19 W. R. 1; 3 Mar. L. C. 454, H. L.

Annotations:—As to (1) **Reid.** *Meyer v. Ralli* (1876), 1 C. P. D. 358; *De Mora v. Concha* (1885), 29 Ch. D. 268; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Re Queensland Mercantile & Agency Co., Ex p. Australasian Investment Co., Ex p. Union Bank of Australia* (1891),

61 L. J. Ch. 145. As to (2) **Consd.** *Messina v. Petrocovichino* (1872), L. R. 4 P. C. 144; *The City of Mecca* (1879), 5 P. D. 28; *Minna Craig S.S. Co. v. Chartered Mercantile Bank of India, London & China*, [1897] 1 Q. B. 55. **Reid.** *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Alcock v. Smith*, [1892] 1 Ch. 238. As to (3) **Consd.** *Pemberton v. Hughes*, [1899] 1 Ch. 781. **Reid.** *Liverpool Bank v. Foggo* (1860), 2 L. T. 594; *Simpson v. Foggo* (1863), 1 Hem. & M. 195; *Frails, Times v. Carr* (1900), 82 L. T. 698; *Caine v. Palace S.S. Co.*, [1907] 1 K. B. 670. **Generally, Reid.** *Do Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *Taylor v. Ford* (1873), 22 W. R. 47. **Mentd.** *The Justyn* (1862), 6 L. T. 553; *The Dictator*, [1892] P. 304; *The Nautik*, [1895] P. 121; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455; *Yates v. Kyffw, Taylor & Wark*, [1899] W. N. 141; *In the Estate of Crippen*, [1911] P. 108.

1196. **Though based on mistake as to English law through complainant's default—and whole of facts not before court.]—***Re TRUFORT, TRAFFORD v. BLANC*, No. 463, *ante*.

1197. — — **Judgment ordering sale of ship to satisfy lien—Right to retain proceeds against liquidator.]—***MINNA CRAIG S.S. CO. v. CHARTERED MERCANTILE BANK OF INDIA, LONDON & CHINA*, No. 1198, *post*.

1198. — — — — —.]—Where a foreign ct. having competent jurisdiction in the matter & honestly exercising it, delivers in a proceeding *in rem* a judgment by which a chattel within its jurisdiction is ordered to be sold & the proceeds to be divided among persons claiming interests in or liens upon the chattel, according to a certain order of priority, a person in England receiving a share of the proceeds under such a judgment cannot be declared by an English ct. a trustee of such share for another person, whether the latter was a party to the proceedings in the foreign ct. or not, even though he have a preferential title to the chattel in question according to English law of which title the person receiving the share of the proceeds had notice when he made his claim in the foreign ct.

Pltf. co. was the owner & pltf., L., was the first mtgee. of a ship, the M., when such ship was shipping cargo at B. While shipping cargo at B. the master of the M. was induced by fraud to sign bills of lading for goods which in fact were never put on board. The M. sailed for Hamburg. During the voyage a petition to wind up pltf. co. was presented, & a winding-up order was made on the same day as that on which the M. reached Hamburg. Meanwhile the false bills of lading were indorsed over to defts. for value without notice of the fraud. By German law the signing of a bill of lading by the master gives a lien for the value of the goods in it on the ship & freight, which takes precedence of all other liens & charges, save charges for wages & necessaries during the voyage. Defts. on the M.'s arrival at Hamburg had her together with her freight arrested. An action was commenced in the German cts., to which pltf., L., was, & pltf. co. was not, a party. In the result the German ct. ordered the M. to be sold, & the proceeds & her freight distributed according to a certain order of priority under which defts. received a share, & neither of pltf.s. received anything. Pltf.s. brought an action to recover the money paid to defts. as money received by defts. on their behalf:—**Held:** the judgment, under which defts. had received the money, being a judgment *in rem*, settled finally & as against everyone the interests subsisting in the ship, & it could not be reviewed in an English ct., & practically set aside by making defts. trustees of what they had received under it for pltf.s.—*MINNA CRAIG S.S. CO. v. CHARTERED MERCANTILE BANK OF INDIA, LONDON & CHINA*, [1897] 1 Q. B. 460; 66 L. J. Q. B. 339; 76 L. T. 310; 45 W. R. 338;

13 T. L. R. 241 ; 41 Sol. Jo. 310 ; 8 Asp. M. L. C. 241 ; 2 Com. Cas. 110, C. A.

1199. Not conclusive in England—When based on perverse disregard of English law—When English law applicable by comity of nations.]—SIMPSON v. FOGO, No. 382, *ante*.

1200. — When judgment merely by default.]—THE DELTA, THE ERMINIA FOSCOLO, No. 1375, *post*.

1201. Effect of—As distinguished from judgments in personam.]—MESSINA v. PETROCCHINO, No. 1130, *ante*.

B. Of Admiralty and Prize Courts.

1202. General rule.]—Although the Ct. of K. B. cannot execute sentences of a foreign ct., inasmuch as a different law prevails, the Ct. of Admty. can execute the sentence of a foreign admty. ct. when final & not interlocutory, & it is accustomed so to do because all admty. cts. in Europe proceed on the same law, *viz.*, the civil law.—JURADO v. GREGORY (1670), 2 Keb. 511, 610 ; 1 Lev. 267 ; 1 Sid. 418 ; 1 Vent. 32 ; 82 E. R. 1191.

*Annotations :—*Consd. The City of Mecca (1879), 5 P. D. 28. *Mentd.* Johnson v. Shippin (1703), 1 Salk. 35.

1203. Whether conclusive in England.]—Sentence of a foreign ct. of admty. is conclusive till reversed.—LUMLY v. QUARRY (1702), 7 Mod. Rep. 9 ; Holt, K. B. 88 ; 2 Ld. Raym. 767 ; 87 E. R. 1061.

1204. — Foreign court sitting under commission from belligerent Power—In neutral country.]—The sentence of a ct. of admty., sitting under a commission from a belligerent Power, in a neutral country, will not be recognised in our cts. ; & that is to be considered a neutral country for this purpose, in which the forms of an independent neutral govt. are preserved, although the belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority.—DONALDSON v. THOMPSON (1808), 1 Camp. 429, N. P.

*Annotations :—*Refd. Cremidi v. Powell, The Gerasimo (1857), 11 Moo. P. C. C. 88 ; Hobbs v. Henning (1865), 5 New Rep. 406.

1205. — Foreign prize court—Condemnation of neutral vessel taken as prize of war or for breach of blockade.]—DOBREE v. NAPIER, No. 798, *ante*.

1206. Requisites of conclusiveness—Grounds of condemnation must be apparent on face of sentence —& free from doubt & ambiguity.]—The sentence of a foreign ct. of admty., condemning a vessel for attempting to violate a blockade, is not conclusive, unless the fact upon which the condemnation proceeded appears, upon the face of the sentence, free from doubt & ambiguity ; it cannot be collected by mere inference, nor can it be left in uncertainty whether the vessel was condemned upon one ground, which would be a just ground of condemnation by the law of nations, or on another ground, which would only amount to a breach of the municipal regulations of the condemning country.

A ship was destined to a port which was notified to be under blockade :—*Held* : the voyage was not illegal in its inception, as the vessel might have sailed for the purpose of inquiring whether the blockade existed.—DALGLEISH v. HODGSON (1831),

7 Bing. 495 ; 5 Moo. & P. 407 ; 9 L. J. O. S. C. P. 138 ; 131 E. R. 192.

*Annotations :—*Consd. Hobbs v. Henning (1865), 17 C. B. N. S. 791. *Distd.* Castrique v. Imrie (1870), L. R. 4 H. L. 414. *Refd.* Simpson v. Fogo (1863), 1 New Rep. 422 ; De Mora v. Concha (1885), 29 Ch. D. 268 ; Fracis, Times v. Carr (1900), 82 L. T. 698.

1207. — — — — & that defendant was within jurisdiction of foreign court.]—To support an action in England for damages awarded by an admty. ct. abroad, the transcript of the proceedings in the admty. ct. should show expressly, & not by mere inference, the sentence of the admty. ct., & that deft. was within its jurisdiction.—OBICINI v. BLIGH (1832), 8 Bing. 335 ; 1 Moo. & S. 477 ; 1 L. J. C. P. 99 ; 131 E. R. 423.

*Annotation :—*Refd. Robertson v. Struth (1844), 5 Q. B. 941.

1208. — — — — .]—The sentence of a foreign ct. of admty., condemning a ship or goods as lawful prize, is not conclusive in the cts. of this country as to the ground of condemnation, unless stated upon the face of it without ambiguity. It is competent to our cts. to examine the sentence carefully to see whether it proceeds on that which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country.—HOBBS v. HENNING (1865), 17 C. B. N. S. 791 ; 5 New Rep. 406 ; 34 L. J. C. P. 117 ; 12 L. T. 205 ; 11 Jur. N. S. 223 ; 13 W. R. 431 ; 2 Mar. L. C. 183 ; 144 E. R. 317.

*Annotations :—*Refd. De Mora v. Concha (1885), 29 Ch. D. 268. *Mentd.* Seymour v. London & Provincial Marine Insee. (1872), 41 L. J. C. P. 193.

1209. — Jurisdiction of foreign court — Tribunal summoned by foreign consular court.]—(1) The ct. has jurisdiction over an action brought by a British subject against a foreign ship for a collision in foreign waters.

(2) A deft., relying on the judgment of a tribunal, summoned by a foreign consular ct., as a bar to pltf. proceeding here, is bound to prove that the tribunal had jurisdiction by treaty, usage or voluntary submission.—THE GRIEFSWALD (1859), Sw. 430.

*Annotation :—*As to (2) Refd. The Mall Ivo (1869), L. R. 2 A. & E. 356.

1210. Extent of conclusiveness in England—As to neutrality of ship—Not unless condemnation based on that ground.]—In an action on a policy of insurance a condemnation by a foreign ct. of admty. is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went upon that ground.—BERNARDI v. MOTTEUX (1781), 2 Doug. K. B. 575 ; 99 E. R. 364.

*Annotations :—*Distd. Saloucci v. Woodmass (1784), 3 Doug. K. B. 345. *Consd.* Lothian v. Henderson (1803), 3 Bos. & P. 499 ; Hobbs v. Henning (1865), 17 C. B. N. S. 791. *Refd.* Pollard v. Bell (1800), 8 Term Rep. 434 ; Baring v. Clagett (1802), 3 Bos. & P. 201.

1211. — — — Captured as enemy property—Conclusive evidence against warranty of neutrality.]—In an action upon a policy of insurance upon a ship warranted American, it appeared that the ship had been captured by the French & condemned by a French ct. of admty. as enemy property. The ship was in fact American :—*Held* : (1) the judgment of the French ct., being a judgment *in rem*, was conclusive evidence that the

condemnation & sale in the admiralty ct. there for claims, which by U.S.A. law formed a lien upon her. In an interpleader issue between pltf., claiming under that sale, & deft. :—*Held* : pltf.'s title under the sale made upon the judgment *in rem* must prevail.—VANEVRY v. GRANT (1862), 21 U. C. R. 542.—CAN.

PART XIV. SECT. 3, SUB-SECT. 2.—B.

1203 i. Whether conclusive in other courts—Foreign prize court.]—A sentence was pronounced by a French Commissary of Marine & Commerce resident in Holland :—*Held* : sufficient for condemning a British vessel carried into a Dutch port by a French privateer.—WAKE v. HILLARY, BAUER-

MAN & SON (1801), Mor. Dict. "Prize," App. No. 1.—SCOT.

b. *Extent of conclusiveness—As to ownership of vessel condemned & sold.]—*A steamboat said to belong to M., in Canada, against whom deft. had obtained an execution, was sold in U.S.A. while the writ was in the sheriff's hands, under a judgment of

Sect. 3.—Conclusiveness of foreign judgments: Sub-sect. 2, B., C. & D. Sect. 4: Sub-sects. 1, 2, 3, 4 & 5. Sect. 5.]

warranty of neutrality had been broken; (2) it was immaterial that an English ct. would have decided differently; (3) pltf. was not entitled to recover.—*GEYER v. AGUILAR* (1798), 7 Term Rep. 681; 101 E. R. 1196.

Annotations:—As to (1) *Consd.* *Lothian v. Henderson* (1803), 3 Bos. & P. 499. *Refd.* *Baring v. Clagett* (1802), 3 Bos. & P. 201; *Hobbs v. Henning* (1865), 17 C. B. N. S. 791; *De Mora v. Concha* (1885), 29 Ch. D. 268.

1212. — — — — — —.]—If it can be discerned on the face of the sentence of a foreign ct. of prize that the ct. condemned on the ground that the property was enemy's property, the sentence is conclusive evidence in the cts. here that the property was not neutral, although it appears on the face of the sentence that the prize ct. attained that conclusion through the medium of rules of evidence and rules of presumption established only by the particular ordinances of their own country, & not admissible on general principles.—*BOLTON v. GLADSTONE* (1809), 2 Taunt. 85; 127 E. R. 1008, Ex. Ch.

Annotations:—*Distd.* *Von Tungen v. Dubois* (1809), 2 Camp. 151. *Consd.* *De Mora v. Concha* (1885), 29 Ch. D. 268.

1213. — Only as to express ground of sentence —Not as to premises leading to adjudication.]—A sentence of a foreign ct. of admty. is only conclusive here in an action on a policy of assurance as to the express ground of the sentence but not as to any of the premises, noticed in the consideration part of the sentence, that led to the adjudication.—*CHRISTIE v. SECRETAN* (1799), 8 Term Rep. 192; 101 E. R. 1340.

Annotations:—*Refd.* *Garrels v. Kensington* (1799), 8 Term Rep. 230; *Lothian v. Henderson* (1803), 3 Bos. & P. 499; *Bell v. Carstairs* (1811), 14 East, 374; *Hobbs v. Henning* (1865), 17 C. B. N. S. 791. *Mentd.* *Gibson v. Small* (1853), 4 H. L. Cas. 353; *Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471; *Burges v. Wickham* (1863), 3 B. & S. 669.

1214. — Only as to positive affirmation in adjudicative part—Not in inferential matter.]—The sentence of a foreign ct. of admty. is evidence only of what it positively & specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference.—*FISHER v. OGLE* (1808), 1 Camp. 418.

Annotations:—*Consd.* *Dalglish v. Hodgson* (1831), 7 Bing. 495. *Refd.* *Hobbs v. Henning* (1865), 17 C. B. N. S. 791.

C. Of Probate Courts.

See Part VI., Sect. 2, sub-sect. 1, B., sub-sect. 4, A., (b), *ante*.

D. Of Decrees of Divorce.

See Part X., Sect. 2, *ante*.

SECT 4.—FOREIGN JUDGMENTS AS CAUSES OF ACTION.

SUB-SECT. 1.—NATURE OF CAUSE OF ACTION.

1215. Judgment creates debt—Simple contract debt.]—If a man recovers a judgment or sentence

in France for money due to him, the debt must be considered here only as a debt on simple contract, & Stat. Limitations will run upon it in six years.—*DUPLEIX v. DE ROVEN* (1705), 2 Vern. 540; 23 E. R. 950.

1216. — — — — — —.]—An action cannot be brought on a foreign judgment as judgment, but an action of debt may be brought, & the judgment given as evidence.—*ANON.* (1773), Lofft, 150; 98 E. R. 582.

1217. — Consideration for implied promise.]—On demurrer pltf. assigned cause that *assumpsit* did not lie here on a judgment recovered in Calcutta because they are governed by different laws of which notice could not be taken in English cts.:—*Held*: the *assumpsit* must be admitted.

I have often known *assumpsit* brought on judgments in foreign cts.; the judgment is a sufficient consideration to support the implied promise (*ASHHURST, J.*).—*CRAWFORD v. WHITTAL* (1773), 1 Doug. K. B. 4, n.; Lofft, 154; 99 E. R. 2.

1218. — — — — — —.]—An action of debt will lie on a foreign judgment, & pltf. need not show the ground of the judgment.—*WALKER v. WITTER* (1778), 1 Doug. K. B. 1; 99 E. R. 1.

Annotations:—*Consd.* *Galbraith v. Neville* (1789), 1 Doug. K. B. 6, n.; *Martin v. Nicholls* (1830), 3 Sim. 458; *Houlditch v. Donegal* (1834), 8 Bl. N. S. 301. *Refd.* *Herries v. Jamieson* (1794), 5 Term. Rep. 553; *Thompson v. Blackhurst* (1833), 1 Nev. & M. K. B. 266; *Robertson v. Struth* (1844), 5 Q. B. 941. *Mentd.* *Wigley v. Jones* (1804), 5 East, 440; *Gadd v. Bennett* (1818), 5 Price, 540; *Cousens v. Paddon* (1835), 5 Tyr. 535.

1219. — — — — — —.]—*HOULDITCH v. DONEGALL* (MARQUESE), No. 374, *ante*.

1220. — — — — — —.]—Whenever a ct. of competent jurisdiction adjudges a sum of money to be paid, a contract in law & an obligation in law to pay arises from that adjudication, upon which an action of debt may be supported. This rule applies to foreign cts., & also to inferior courts in this country, whether of record or not.—*WILLIAMS v. JONES* (1845), 13 M. & W. 628; 2 Dow. & L. 680; 1 New Pract. Cas. 227; 14 L. J. Ex. 145; 4 L. T. O. S. 318; 153 E. R. 262.

Annotations:—*Apld.* *Godard v. Gray* (1870), L. R. 6 Q. B. 139. *Consd.* *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155; *Nouvion v. Freeman* (1889), 15 App. Cas. 1. *Refd.* *London Corp. v. Cox* (1867), L. R. 2 H. L. 239; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *Robins v. Robins*, [1907] 2 K. B. 13; *Emanuel v. Symon*, [1908] 1 K. B. 302; *Harris v. Taylor*, [1915] 2 K. B. 580. *Mentd.* *East & West India Docks & Birmingham Junction Ry. v. Gattke* (1851), 3 Mac. & G. 155; *South Staffordshire Ry. v. Hall* (1851), 17 L. T. O. S. 2; *Berkeley v. Elderkin* (1853), 22 L. J. Q. B. 281; *R. v. L. & N. W. Ry.* (1854), 3 K. & B. 443.

1221. — Judgment debt—R. S. C., Ord. 3, r. 6.]—Judgment obtained in a foreign ct. constitutes a judgment debt, & as such, may be summarily sued for under the above Ord. & Ord. 14.—*GRANT v. EASTON* (1883), 13 Q. B. D. 302; 53 L. J. Q. B. 68; 49 L. T. 645; 32 W. R. 239, C. A.

Annotations:—*Refd.* *Balley v. Balley* (1884), 13 Q. B. D. 855. *Mentd.* *Savill v. Dalton*, [1915] 3 K. B. 174.

No merger of original cause of action.]—See Nos. 1042, 1170, *ante*, Nos. 1228, 1229, 1232, *post*.

PART XIV. SECT. 4, SUB-SECT. 1.

1215i. Judgment creates debt—Simple contract debt.]—*MARTEL v. DUBORD* (1885), 3 Man. L. R. 598.—CAN.

1215 ii. — — — — — —.]—*Re McMILLAN v. FORTIER* (1901), 2 O. L. R. 231; 21 C. L. T. 501.—CAN.

1215 iii. — — — — — —.]—*SLOMAN v. BRENTON* (1916), 33 W. L. R. 818; 9 W. W. R. 1466.—CAN.

1217 i. — Consideration for implied promise.]—*CLERGUE v. HUMPHREY* (1900), 31 S. C. R. 66.—CAN.

c. Not debt of record—Evidence of debt.]—A foreign judgment is not a debt of record, but only evidence of a debt.—*FERGUS v. WARDLAW* (1848), 3 Kerr, 665.—CAN.

d. No merger of original cause of action.]—A foreign judgment is not a merger of the simple contract on which it is founded.—*FERGUS v. WARDLAW* (1848), 3 Kerr, 665.—CAN.

e. — — — — — —.]—A foreign judgment is not a merger of the original cause of action, which may, notwithstanding

such judgment, be sued on.—*TREVELYAN v. MYERS* (1895), 26 O. R. 430.—CAN.

f. — — — — — —.]—Pltf. suing in Ont. on a foreign judgment may sue on the foreign judgment or on the original cause of action, or may combine them both in the same action.—*Re McMILLAN v. FORTIER* (1901), 2 O. L. R. 231; 21 C. L. T. 501.—CAN.

g. — — — — — —.]—*STATE BANK BUTLER v. BENZANSON* (1914), 21 W. L. R. 812.—CAN.

SUB-SECT. 2.—FORM OF ACTION.

By action of debt.]—See Sub-sect. 1, *ante*.

1222. By action in rem.]—THE CITY OF MECCA, No. 1190, *ante*.

1223. By specially indorsed writ—R. S. C., Ord. 3, r. 6; Ord. 14.]—GRANT v. EASTON, No. 1221, *ante*.

SUB-SECT. 3.—PARTIES.

1224. Who entitled to sue—In own name without taking out administration—Donee of universality of succession of deceased husband—After recovery of judgment against acceptor of bills on which husband liable as indorser.]—VANQUELIN v. BOUARD, No. 1044, *ante*.

See, also, No. 1283, *post*, &, generally, EXECUTORS & ADMINISTRATORS.

1225. Who liable to be sued—Debtor's trustees as co-defendants.]—A judgment creditor suing in Jersey to enforce a judgment of an English ct., joined as co-defts. the attorney of his judgment debtor & the attorney of the trustees of the debtor's property:—*Held*: (1) the Jersey ct. was wrong in decreeing payment personally against the trustees; (2) the foreign judgment being no more than evidence of a debt, it was incompetent for pltf. to sue other persons jointly with the debtor, on the allegation that they held as trustees property of which the debtor was beneficial owner; (3) as regards interest on the English judgment, it should not be altered by the Jersey ct., except from the date of the Jersey judgment, & the costs occasioned by joining the trustees should not be given.—HAWKSFORD & RENOUE v. GIFFARD (1880), 12 App. Cas. 122; 56 L. J. P. C. 10; 56 L. T. 32, P. C.

SUB-SECT. 4.—DEFENCES AVAILABLE.

Judgment not judgment of proper court or of court of competent jurisdiction.]—See Sect. 2, sub-sects. 1, 2, *ante*.

Judgment not final & complete nor for sum certain.]—See Sect. 2, sub-sects. 3, 4, *ante*.

Judgment contrary to policy of the law or to natural justice.]—See Sect. 2, sub-sects. 5, 6, 8, *ante*.

Judgment obtained by fraud.]—See Sect. 2, sub-sect. 7, *ante*.

SUB-SECT. 5.—DELAY IN BRINGING PROCEEDINGS.

1226. Effect of—Delay of thirteen years—Death of defendant.]—REIMERS v. DRUCE, No. 1028, *ante*.

Statutes of Limitation—Defences under.]—See Part XVI., Sect. 6, *post*.

SECT. 5.—FOREIGN JUDGMENTS AS DEFENCES TO ACTIONS.

1227. Distinction between enforcing & setting up foreign judgment as bar.]—REIMERS v. DRUCE, No. 1028, *ante*.

PART XIV. SECT. 4, SUB-SECT. 2.

1223 i. By specially indorsed writ.]—A debt due upon a foreign judgment may be the subject of a special indorsement of the writ of summons.—ROBERTSON v. ROBERTSON (1908), 18 O. L. R. 170; 11 O. W. R. 715, 875.—CAN.

PART XIV. SECT. 4, SUB-SECT. 4.

h. Plea of nul tiel record.]—The

plea of nul tiel record is not applicable to a declaration upon a foreign judgment.—HILL v. ROWE (1885), 3 Man. L. R. 247.—CAN.

J. —.]—CHAPMAN v. SHERRIE (1870), 1 R. 5 C. L. 36.—IR.

PART XIV. SECT. 5.

1228 i. Whether foreign judgment bar to action—Begun before judgment obtained.]—Unless prevented by rules

1228. Whether foreign judgment bar to action—For same cause of action.]—Evidence of an account stated, whereby deft. admitted a certain balance due to pltf., is not done away, but confirmed in support of an *assumpsit*, by evidence of a foreign judgment recovered by pltf. for same sum, with a stay of execution for six months to enable deft. to prove a counter-demand, if he had any, & if pltf. does not declare till after that period, it is no objection that the writ was sued out & deft. arrested before.—HALL v. ODBER (1809), 11 East, 118; 103 E. R. 949.

Annotations:—Consd. Smith v. Nicholls (1839), 1 Arn. 474. Refd. *Re* Henderson, Nouvion v. Freeman (1887), 35 Ch. D. 704.

1229. —.]—Pltf., who has recovered judgment against deft. in a foreign ct., has an option to sue in this country either upon the foreign judgment or on the original cause of action.—SMITH v. NICOLLS (1839), 5 Bing. N. C. 208; 1 Arn. 474; 7 Dowl. 282; 7 Scott, 147; 8 L. J. C. P. 92; 132 E. R. 1084.

Annotations:—Refd. Henderson v. Henderson (1844), 6 Q. B. 288; Bank of Australasia v. Harding (1850), 9 C. B. 661; Thelwall v. Yelverton (1864), 16 C. B. N. S. 813; *Re* Henderson, Nouvion v. Freeman (1887), 35 Ch. D. 704; *Re* King & Beesley, *Ex p.* King & Beesley, [1895] 1 Q. B. 189. Mentd. Cowan v. Braldwood (1840), Drinkwater, 40; Garcias v. Ricardo (1844), 8 Jur. 1037; Spence v. Chadwick (1847), 16 L. J. Q. B. 313; Brine v. G. W. Ry. (1862), 2 B. & S. 402.

1230. —.]—BANK OF AUSTRALASIA v. HARDING, No. 1170, *ante*.

1231. —.]—BANK OF AUSTRALASIA v. NIAS, No. 1042, *ante*.

1232. —.]—By an Act passed in India a banking co. at Calcutta were to be sued in the name of their secretary & a judgment against him was to have the like effect against the property of the bank, as if recovered against all the members thereof as parties on the record, provided that, if an execution issued against the property of the bank were ineffectual, execution should issue against the members successively, & if that were ineffectual, then against any person who was a member at the time the contract sued upon was entered into; but no execution was to be issued against any other person than the actual party to the suit without leave first granted in open ct. & notice to the person sought to be charged. Pltf., having recovered judgment in India against the secretary for a breach of contract entered into by the co. there, took no further proceedings in India, but sued deft. who was a member of the co. at the time the contract was entered into & judgment recovered, in this country on the judgment & on the contract:—*Held*: pltf. was entitled to recover on both causes of action.—KELSALL v. MARSHALL (1858), 1 C. B. N. S. 241; 26 L. J. C. P. 19; 2 Jur. N. S. 1142; 5 W. R. 114; 140 E. R. 100.

1233. — Foreign judgment satisfied.]—A plea of judgment recovered in an action brought in the consular ct. at Constantinople, established under Foreign Jurisdiction Act, 1843 (c. 94), & payment by deft. of the amount:—*Held*: a good bar to an action brought here for same cause.—BARBER v. LAMB (1860), 8 C. B. N. S. 95; 29

of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained.—LAW v. HANSEN (1895), 25 S. C. R. 69.—CAN.

1233 i. — For same cause of action—Foreign judgment satisfied.]—Where the judgment of an English ct. has received execution by imprisonment of deft. on a writ of *ca. sa.*, such execution is a good defence to an action in Scotland

k. — Injunction by foreign court—No bar to action for specific performance.]—To an action claiming specific performance of an agreement, or in the alternative, damages, the defence was pleaded that after the making of the contract an injunction was granted by a foreign ct. enjoining deft. from transferring property of any description during the pendency of an action brought against him in such foreign ct.:—*Held*: there was no defence to the action.—DE VENNE v. WARREN** (1910), 45 N. S. R. 8; 8 E. L. R. 453.—**CAN.****

trespass under the process of a foreign ct. it seems that the plea should be formed in analogy to similar justifications under the process of our inferior cts., but at any rate a plea which only states that the ct. abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such ct., having competent jurisdiction in that behalf, *et taliter processum*, etc., that deft. was ordered by the ct., having competent authority in that behalf, to seize the property, is bad, as being too general, & not giving pltf. notice whether deft. justified as an officer of the ct., or party to the cause, or of what nature the charge was, or by whom instituted, or what the order of seizure was, whether absolute or *quousque*, etc.—**COLLETT v. KEITH (LORD) (1802)**, 2 East, 260; 102 E. R. 368.

Annotation :—**Mentd.** *Pipon v. Cope* (1808), 1 Camp. 434.

1239. — Foreign law need not be set out.—*Assumpsit* on a policy of insurance by the assignees of P., a bkpt. Plea to £78 parcel, etc., that the policy was made in Scotland, & that the sum was duly fenced & arrested, according to the law of Scotland at the suit of G. for a debt due to him, until sufficient caution should be found in the books of council & session; that same should be forthcoming to G.; that thereupon the sum became & was, according to the law of Scotland, in custody of the law, & subject to the order of the Ct. of Session; that such proceedings were afterwards had; that G. obtained final judgment; that the proceedings were regularly conducted; & that the judgment was final & conclusive against pltf.; & that, according to the law of Scotland, pltf. were precluded from suing for the sum, & were by reason of the premises wholly barred :—**Held**: the plea was sufficient, without setting out the Scottish law.—**M'LEOD v. SCHULTZE (1844)**, 1 Dow. & L. 614; 13 L. J. Ex. 321.

Annotation :—**Refd.** *Benham v. Mornington* (1846), 3 C. B. 133.

1240. Proceedings & judgment need not be set out.—Judgment was given by competent tribunals in France against G. in an action brought by him against persons with whom he had been connected in a loan transaction, for the purpose of obtaining from them an account & payment of his share of the profits in the loan. He afterwards filed a bill in the Ct. of Ch. against some of same persons, & for same purposes, charging that the proceedings & judgment of the French tribunals were contrary to justice & were not final & conclusive, & also that subsequently to the date of the judgment further profits accrued to defts. from the loan, & he claimed a right to a share of them :—**Held**: a plea of the foreign proceedings & judgment, set forth in substance & effect, filed by defts. to the bill, supported by averments that the matters in issue in the foreign tribunals were the same as the matters put in issue by the bill, covered the whole of the matters comprised in the bill, & was a sufficient answer thereto, & it was not necessary

to set forth the proceedings & judgment at length.—**RICARDO v. GARCIA** (1845), 12 Cl. & Fin. 368; 9 Jur. 1019; 8 E. R. 1450, H. L.; *revsq.* S. C. *sub nom.* **GARCIA v. RICARDO** (1844), 14 Sim. 265.

Annotations :—**Consd.** *Reimers v. Druce* (1857), 23 Beav. 145. **Refd.** *Ostell v. Lepage* (1851), 5 De G. & Sm. 95; *Boyse v. Colclough*, *Boyse v. Rossborough* (1854), 1 K. & J. 124; *Cammell v. Sewell* (1860), 5 H. & N. 728; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *Scott v. Pilkington* (1862), 2 B. & S. 11; *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Re Henderson, Nouvion v. Freeman* (1887), 35 Ch. D. 704; *Mutrie v. Binney* (1887), 35 Ch. D. 614.

SECT. 6.—ENFORCEMENT OF FOREIGN JUDGMENTS.

1241. Effect of judgment to be considered by enforcing court.—When the judgment of a foreign tribunal comes to be enforced in another country, its effect must be judged of by the cts. of that country with regard to all the circumstances of the case.—**ASHBURY v. ELLIS**, [1893] A. C. 339; 62 L. J. P. C. 107; 69 L. T. 159; 9 T. L. R. 517; 1 R. 388, P. C.

Annotations :—**Refd.** *Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist*, [1910] 1 P. 271; *Gibson v. Gibson*, [1913] 3 K. B. 379; *Phillips v. Baths*, [1913] 3 K. B. 25.

Essentials to enforcement.—See Sects. 2, 3, *ante*.

Mode of enforcing—By action.—See Sect. 4, *ante*.

— **By extension of judgments of United Kingdom & Dominions.**—See Sect. 7, *post*.

SECT. 7.—EXTENSION OF JUDGMENTS.

SUB-SECT. 1.—OF ENGLISH, IRISH AND SCOTTISH SUPERIOR COURTS.

A. Under Judgments Extension Act, 1868 (c. 54).

1242. To what judgments Act applicable—Judgment for debt, damages or expenses—Not Scottish decree of sequestration.—There is no authority under which an order of a Scottish ct., not being a judgment for debt, damages or expenses, within Judgments Extension Act, 1868, s. 3, or otherwise expressly provided for by statute, can be enrolled in the High Ct. in England. The enrolment of an *interim* act & decree of the Scottish Ct. of Session sequestrating the estate & effects of a Scottish railway co., which had been enrolled as of course in the High Ct., was therefore vacated, & proceedings in the High Ct. founded on such enrolment were set aside.—**Re DUNDEE & SUBURBAN RY. CO. (1888)**, 58 L. J. Ch. 5; 59 L. T. 720; 37 W. R. 50; 5 T. L. R. 39.

1243. — Not order in winding up.—A domiciled Frenchman resident in Scotland brought an action against a co. in England, but all proceedings in the action were stayed in consequence of the co. being ordered to be wound up, & the Frenchman carried in his claim to prove in the winding up of the co. An order was then made in

PART XIV. SECT. 7, SUB-SECT. 1.—A.

1. To what judgments Act applicable—Judgment of Liverpool district registry of High Court.—**Held**:—a certificate of a judgment of the High Ct. of Justice, Q.B. Div., Liverpool District Registry, could be registered in the Books of Council & Session in terms of Sect. 2 of above Act.—**ENGLISH'S COASTING & SHIPPING CO., LTD. v. BRITISH FINANCE CO., LTD. (1886)**, 14 R. (Ct. of Sess.) 220; 24 Sc. L. R. 167.—**SCOT.**

m. — When certificate of English court defective in form.—A judgment obtained in an inferior ct. of record in England was removed into Q.B. there, & a certificate, purporting to be under above Act, but omitting the material allegation that the judgment was obtained "after appearance" or "after service," was signed by Q.B. master & was registered by Master of C.P. at Dublin. The ct., acting under s. 4 of above Act, set aside the registration, & all subsequent proceedings founded upon it.—**PART v. SCANNELL**

(1875), 1 R. 9 C. L. 426.—**IR.**

n. Effect of registration of judgment.—A certificate of an English judgment had been entered in C.P. in Ireland pursuant to above Act. On motion to set aside the judgment entered in C.P., on the ground that the English judgment, on which the certificate was founded, was irregularly entered up as a final judgment, while demurrers to some of the pleas were still undecided: **Held**: (1) there was no judgment of the Irish ct., but merely an

Sect. 7.—Extension of judgments: Sub-sect. 1, A. &

chambers that he should give security for the costs of his claim. On a motion to discharge the order made in chambers:—*Held*: although he would not have been required to give security for the costs of his action, because the judgment in an action in any division of the High Ct. could be enforced in the Scottish cts. by virtue of Judgments Extension Act, 1868, yet, as an order made in a claim in winding-up proceedings was not a judgment enforceable in Scotland under that Act, he must give security for the costs of his claim in the winding up.—*Re HOWE MACHINE CO., FONTAINE'S CASE* (1889), 41 Ch. D. 118; 61 L. T. 170; 37 W. R. 680, C. A.

Annotation:—*Reid. Re Queensland Mercantile Agency Co.* (1891), 61 L. J. Ch. 48.

1244. Effect of enrolment—New cause of action.]

—An action having been commenced in Scotland against an administratrix to recover a debt which was barred by Stat. of Limitations in England, an action for the administration of the intestate's estate was commenced in England, & an order for administration made. Judgment for pltf. by default was afterwards given in the Scottish action. The Scottish creditor then sought to prove his debt in the administration action, but the chief clerk disallowed the claim, as being barred by Stat. of Limitations. The administratrix afterwards obtained an order from the Scottish ct. recalling the judgment by default, & giving her leave to defend. The action was then heard, & judgment given against her, which was then registered in England under Judgments Extension Act, 1868:—*Held*: (1) the Scottish creditor was entitled to prove in the administration action as a creditor for the amount of the judgment & costs; (2) it was not necessary that the chief clerk's certificate should be varied, as the Scottish judgment when registered under the Act created a new cause of action which had not been adjudicated upon.—*Re LOW, BLAND v. LOW*, [1894] 1 Ch. 147; 63 L. J. Ch. 60; 70 L. T. 57; 10 T. L. R. 106; 38 Sol. Jo. 78; 7 R. 346, C. A.

Annotation:—*Consd. Re Bankruptcy Notice*, [1898] 1 Q. B. 383.

1245. Mode of enforcing judgments registered—Not procedure by judgment summons.]—The procedure by judgment summons under Debtors Act, 1869 (c. 62), is not execution of the judgment debt within Judgments Extension Act, 1868, s. 4, & consequently an English ct. has no juris-

entry of record of the certificate of an English judgment; (2) the certificate of the proper officer in England was conclusive on such motion that there was such final judgment; (3) a subsequent order of the officer in England, staying all proceedings on the English judgment while the demurrers remained undisposed of, had no application to the registry of the certificate in Ireland, which had been regularly done at the date of the order.—*BAILEY v. WELPLY* (1869), 1 R. 4 C. L. 243.—IR.

o. — Under Judgments Extension Act, 1860.]—In a suspension of a charge upon a decree of Q.B. in Ireland, obtained against parties domiciled in Scotland, & registered in terms of above Act:—*Held*: (1) the ct. could not competently entertain any question on the merits of the case; (2) it was competent to sist process for the purpose of enabling complainers to present an appln. to the Irish ct. in arrest of judgment.—*WOTHERSPOON v. CONNOLLY* (1871), 9 Macph. (Ct. of Sess.) 510.—SCOT.

p. Mode of enforcing judgments registered—By garnishee order.]—A garnishee order can be made on foot of a judgment obtained in England & subsequently extended to Ireland under Judgments Extension Act, 1868.—*JOHNSTONE v. BUCKNALL*, [1898] 2 I. R. 499.—IR.

q. — Registration as mortgage.]—An English judgment extended to Ireland under above Act can be registered as a judgment mtge., & the omission from the affidavit of judgment, made for the purpose of such registration, of the costs of obtaining & registering in Ireland the certificate of the entry of the judgment does not invalidate the registration of the judgment mtge.—*Re CLELAND'S ESTATE*, [1909] 1 I. R. 1, 19; 42 I. L. T. 43 I. L. T. 26.—IR.

r. — Execution.]—In a case in which debts were a limited co. who had their registered office in England, & who carried on business in Ireland, pltf. obtained a judgment in England which they extended to Ireland, & the ct., upon an *ex p.*

diction to issue a judgment summons for the purpose of enforcing a registered Irish judgment.—*Re WATSON, Ex p. JOHNSTON, JOHNSTON v. WATSON*, [1893] 1 Q. B. 21; 62 L. J. Q. B. 85; 67 L. T. 519; 41 W. R. 34; 37 Sol. Jo. 8; 4 R. 90, C. A.

Annotations:—*Folld. Re Bankruptcy Notice*, [1898] 1 Q. B. 383. *Consd. Thompson v. Gill*, [1903] 1 K. B. 760.

1246. — Appointment of receiver—By way of equitable execution.]—An appointment of a receiver by way of equitable execution may be made upon the certificate of a decree of the Ct. of Session in Scotland registered in the High Ct. under Judgments Extension Act, 1868.—*THOMPSON v. GILL*, [1903] 1 K. B. 760; 72 L. J. K. B. 411; 88 L. T. 714; 51 W. R. 484; 19 T. L. R. 366; 47 Sol. Jo. 418, C. A.

Judgment obtained in respect of statute-barred debt.]—See Part XVI., Sect. 6, *post*.

B. English and Irish Chancery Decrees.

1247. Sufficiency of enrolment.]—*PENNEFATHER v. SHORT*, [1866] W. N. 126.

Annotations:—*Consd. Newell v. Newell* (1896), 41 Sol. Jo. 66; *Re Synge* (1901), 84 L. T. 756.

1248. How enforced—Attachment or committal.]—*PENNEFATHER v. SHORT*, No. 1247, *ante*.

1249. — —.]—*HAZLETON v. BRIGHT*, [1873] W. N. 3.

Annotations:—*Consd. Newell v. Newell* (1896), 41 Sol. Jo. 66; *Re Synge* (1901), 84 L. T. 756.

1250. — —.]—Motion by pltf. in an action brought in the Ch. Div. of the High Ct. in Ireland that pltf. might be at liberty to issue a writ of attachment against deft., N., for his contempt in not having obeyed an order made by that ct. on May 7, 1896. By an order of the L. C., dated Aug. 10, it was ordered that the order of the Irish ct., which had been exemplified to the English ct., should be enrolled in the English High Ct., & this was done on Aug. 28. Deft. was in England:—*Held*: (1) the ct. had under Crown Debts Act, 1801 (c. 90), s. 16, power to make the order asked for; (2) time was given to deft., who appeared in person, to apply to the Irish ct. to discharge the order of May 7, which he alleged to have been irregularly obtained.—*NEWELL v. NEWELL* (1896), 41 Sol. Jo. 66.

Annotation:—*As to* (1) *Reid. Re Synge* (1901), 84 L. T. 756.

1251. — — Not when order served out of Ireland—Without leave.]—On Mar. 27, 1899, an order was made by one of the judges of the Ch. Div. of the High Ct. in Ireland upon S. to lodge in ct. on oath all deeds & documents in his custody,

appln. by pltf., gave leave to issue & serve upon defts. out of the jurisdiction a summons under Courts (Emergency Powers) Act, 1914, for leave to proceed to execution in Ireland upon the extended judgment.—*RUANE v. WEST OF IRELAND FISHERIES, LTD.* (1915), 49 I. L. T. 136.—IR.

PART XIV. SECT. 7, SUB-SECT. 1.—B.

1248 i. How enforced—Attachment—Defendant a peer.]—An order to account was made against deft., an Irish peer, by the Ch. Div. in England, & an exemplification of it enrolled in Ireland pursuant to 41 Geo. 3, c. 80, s. 5. An appln. was made for leave to appoint a sequestrator over the estates of deft. in Ireland:—*Held*: the order could only be enforced by process of attachment prescribed by the statute, & although that remedy was not available against deft. by reason of his being a peer, there was no jurisdiction to issue a sequestration to enforce obedience to the order.—*KILWORTH v. MOUNTCASHELL* (1892), 31 L. Ir. 81.—IR.

power or procurement relating to certain property in Ireland, ordered to be sold, or account for same on oath, within ten days after service of the order upon him. On April 24, 1899, a copy of the order of Mar. 27, 1899, was personally served on S. at his address in London. By an order dated Mar. 26, 1901, & made under Crown Debts Act, 1801 (c. 90), & Landed Estates Ct. Act. 1857 (c. 72), the order of Mar. 27, 1899, was ordered to be enrolled in the Ch. Div. of the High Ct. in England. On Apr. 11, 1901, a copy of the order of Mar. 26, 1901, was personally served on S. at his address in London. A motion was subsequently made for leave to issue a writ of attachment against S. for contempt of ct. in not obeying the order of Mar. 27, 1899:—*Held*: as the order of Mar. 27, 1899, had not been served upon S. in Ireland, & no leave had been obtained to serve that order upon him out of the jurisdiction, there had been no disobedience thereof, & the motion for leave to issue a writ of attachment must be refused.—*Re* SYNGE (1901), 85 L. T. 736; 17 T. L. R. 759, C. A.

1252. Impeachment of Irish decree—Defendant granted time to apply to Irish court—To discharge order.]—NEWELL *v.* NEWELL, No. 1250, *ante*.

SUB-SECT. 2.—OF SUPERIOR COURTS OF UNITED KINGDOM AND DOMINIONS.

See cases infra & Administration of Justice Act, 1920 (c. 81), ss. 9–14.

PART XIV. SECT. 7, SUB-SECT. 2.

a. By filing memorial of judgment obtained in Australasian Colony.]—When a memorial of a judgment obtained in supreme ct. of any Australasian Colonies has been filed in the office of the supreme ct. of Queensland, it becomes to all intents & purposes a record in such ct., & pltf. may have recourse to any remedy of which he might have availed himself if the judgment had been originally recovered there.—*MORROW v. BELLAMY* (1873), 3 Q. S. C. R. 190.—AUS.

t. — Sufficiency of memorial.]—If the "addition" of the debt. is not stated in the memorial, the ct. cannot allow execution to issue on a foreign judgment.—*BERRY v. SHEAD* (1886), 7 N. S. W. L. R. 39; 2 N. S. W. W. N. 54.—AUS.

u. By entering judgment of other province with registrar—Winding Up Act.]—*Re* SOVEREIGN BANK (1915), 43 N. B. R. 519.—CAN.

PART XIV. SECT. 8.

w. Exemplification.]—Deft. in an action on a judgment obtained in U.S.A., pleaded denying the recovery of the judgment. Upon a motion for judgment upon the pleadings, verified by affidavit, & the production of an exemplification of the judgment:—*Held*: judgment could not be ordered on these materials, deft. having put the judgment distinctly in issue.—*HENEERY v. TURNER* (1883), 2 O. R. —CAN.

1253 i. — By seal of court.]—An exemplification of judgment under the seal of the ct. in which the judgment was pronounced is equivalent to the original judgment exemplified, & notice under Evidence Act of intention to produce it in evidence is unnecessary.—*BOYLE v. VICTORIA YUKON TRADING CO.* (1902), 9 B. C. R. 213; 22 O. L. T. 377.—CAN.

1253 ii. — Under hand of master—Seal of court—Notarially certified—

*Admissible.]—*WHITEHEAD *v.* THOMPSON (1861), 23 Dunl. (Ct. of Sess.) 772; 33 Sc. Jur. 401.—SCOT.

y. Parol evidence of seal—Admissible.]—Evidence of a witness that he had seen the seal of a foreign ct., & believed the seal affixed to the document produced to be the seal of the ct., & of another witness, that he had been to the office of the foreign ct., & compared the seal, which was shown him by an officer of the ct., with that produced in evidence:—*Held*: sufficient *prima facie* evidence of the judgment.—*HALL v. ARMOUR* (1836), 5 O. S. 3.—CAN.

1255 i. Certificate of clerk of court—Not admissible.]—A foreign judgment cannot be proved by a certificate from the clerk of the foreign ct. that judgment has been entered for a sum in favour of pltf.—*NORTON v. POST* (1836), 5 O. S. 137.—CAN.

1255 ii. — Though verified under hand of judge & seal of court.]—The judgment of a foreign ct. is not sufficiently authenticated by a copy certified to be correct by the clerk, although the clerk's signature & authority are verified by a certificate annexed thereto under the hand of the judge & the seal of the ct.: the copy of the judgment itself should be authenticated under seal of the Ct.—*POOL v. HILL* (1843), 2 Kerr, 184.—CAN.

1255 iii. —]—To prove a judgment of the supreme ct. of the state of N.Y., a copy of the roll was produced, certified by the ct. clerk under the seal of the ct.:—*Held*: insufficient.—*WOODRUFF v. WALLING* (1855), 12 U. C. R. 501.—CAN.

1255 iv. Certified copy & seal of clerk of court—Admissible.]—Pltf. sued on a judgment of a ct.; deft. objected to pltf.'s proof of judgment by a certified copy alleged to be under the seal of the clerk of the ct. & not the seal of the ct. & that it did not comply with the provisions of Canada Evidence Act, 1893, s. 10:—*Held*: the certified copy complied with the provisions of the Act, as it purported to be signed by an

SECT. 8.—PROOF OF FOREIGN JUDGMENTS.

See, generally, EVIDENCE.

1253. Authentication by seal of court.]—The sentence of a foreign ct. of admty. cannot be given in evidence except under the seal of the ct.—*STENNIL v. BROWN* (1712), 10 Mod. Rep. 108; 88 E. R. 649.

1254. — Or signature of judge.]—In an action on a foreign judgment the judgment produced at the trial must be authenticated by the seal of the foreign ct., or evidence must be given that the ct. has no seal, & then the judgment may be established by proving the signature of the judge.—*ALVES v. BUNBURY* (1814), 4 Camp. 28, N. P.

1255. Copy by chief clerk—Not admissible in England—Though admissible where pronounced.]—A copy of a judgment in the Supreme Ct. of Jamaica, made by the chief clerk of the ct., is not receivable in evidence here, although it appears that such copies are usually received as evidence in the island of Jamaica.—*APPLETON v. BRAYBROOK (LORD)* (1817), 6 M. & S. 34; 2 Stark. 6; 105 E. R. 1155.

*Annotations:—*Consd. *Mackenzie v. Hudson* (1822), 1 Dow. & Ry. K. B. 159; *Brown v. Thornton* (1837), 6 Ad. & El. 185.

1256. S. P. BLACK v. BRAYBROOK (LORD) (1817), 6 M. & S. 39; 2 Stark. 7; 105 E. R. 1157.

*Annotation:—*Consd. *Brown v. Thornton* (1837), 6 Ad. & El. 185.

officer who would ordinarily have the seal in his custody & the effect of this was not taken away because the legend of the seal had engraved upon it, that it was the seal of the clerk of the ct.—*BEEBE v. TANNER* (1903), 6 Terr. L. R. 13.—CAN.

1255 v. — Without notice.]—*STEVENS v. OLSON* (1904), 6 Terr. L. R. 106.—CAN.

z. Certificate of prothonotary—That judgment of non pros. "marked."]—In an action on a N.S. judgment signed Mar. 7, 1855, in pursuance of a judge's order setting aside deft.'s plea as frivolous, deft. produced a certificate from the prothonotary of the ct. entitled in the same cause, stating that judgment of *non pros.* for want of a replication was marked on Dec. 11, 1854:—*Held*: in the absence of any record of such judgment, or of any evidence to show that "marking" was equivalent to "signing," there was not sufficient evidence of a judgment of *non pros.* to affect the validity of pltf.'s judgment.—*DENNISON v. TAYLOR* (1856), 3 All. 313.—CAN.

a. Certified copy under hand of master.]—Pltf. produced as evidence of a judgment against deft. in ct. of Exch. of Pleas in England, a certified copy thereof under the hand of one of the masters of that ct.:—*Held*: insufficient; pltf. should at least have produced an exemplification under seal of the ct.—*HESKETH v. WARD* (1866), 17 C. P. 190.—CAN.

b. Whole record should be produced.]—The whole of the proceedings in a suit in a foreign ct. should be produced to prove the judgment.—*McMILLAN v. RITCHIE* (1851), 2 All. 242.—CAN.

c. Vesting order of Court of Chancery—Proves itself.]—A vesting order of the Ct. of Ch. of England, which proves itself on production, properly received in evidence.—*CAHUA v. SCOTT, CAHUA v. ERLE* (1872), 22 C. P. 551.—CAN.

SECT. 9.—INTEREST ON FOREIGN JUDGMENTS.

1257. *Whether recoverable.*]—Pltf. is not entitled to interest in an action on a foreign judgment.—*ATKINSON v. BRAYBROOKE* (LORD) (1816), 4 Camp. 380 ; 1 Stark. 219, N. P.

1258. — Judgment for entire sum—Counts for goods sold & money paid.]—In an action of debt on a foreign judgment for an entire sum recovered on counts for the balance of a merchant's account for goods sold ; money advanced & paid ; money due on bills of exchange ; & for interest, this ct. will not give interest on affirmance of the judgment of the court below. Where interest is given, the debt must appear on the record to be one which carries interest.—*DORAN v. O'REILLY* (1817), 5 Dow, 133 ; 3 E. R. 1278, L. C.
Annotation :—*Mentd.* *Butler v. Stoveld* (1823), 1 Bing. 368.

1259. — Question for jury.]—In an action on an Irish judgment, the question whether any & what interest is recoverable, is a question for the jury under all the circumstances of the case. In deciding this question they will have to consider

whether pltf. has taken proper steps to find his debtor & follow up his judgment by an execution, or whether he has been guilty of laches.—*BANN v. DALZELL* (1828), 3 C. & P. 376 ; Mood. & M. 228, N. P.

Annotation :—*Mentd.* *Ibbotson v. Fenton* (1837), 6 Ad. & El. 772.

1260. At what rate payable—Question for jury.]—*BANN v. DALZELL*, No. 1259, *ante*.

1261. — Judgment payable in sterling.]—*NOEL v. ROCHFORD*, No. 756, *ante*.

1262. —.]—*HAWKSFORD & RENOUE v. GIFFARD*, No. 1225, *ante*.

Interest on contracts generally.]—*See* Part VII., Sect. 3, *ante*.

Interest where charges on immovables.]—*See* Part IV., Sect. 6, *ante*.

SECT. 10.—LIS ALIBI PENDENS.

See Part XVI., Sect. 5, *post*.

Part XV.—Foreign War Legislation.

1263. Not recognised in England—Acts of attainder & confiscation—Right of attainted person to sue on bond—Liability of attainted person to be sued on bond.]—*FOLLIOTT v. OGDEN*, No. 1280, *post*.

1264. — Ordinance sequestrating debts due to British subjects—& ordering payment of debts to parties other than creditors—Right of British subject to sue for debt.]—*WOLFF v. OXHOLM*, No. 420, *ante*.

1265. Ordinance postponing fulfilment of contracts—& prohibiting payment of interest during postponement—Right of British subject to interest.]—*Re FRIED KRUPP ACT.*, No. 762, *ante*.

Foreign penal laws.]—*See, generally*, Nos. 1118, 1120, *ante*.

English war legislation.]—*See* CONSTITUTIONAL LAW, pp. 545-555,

Part XVI.—Practice and Procedure.

SECT. 1.—IN GENERAL.

1266. What are matters of procedure—Disability to sue—Contract sued on not in writing—Statute of Frauds, s. 4.]—*LEROUX v. BROWN*, No. 672, *ante*.

1267. — Civil action suspended until criminal conviction.]—*SCOTT v. SEYMOUR*, No. 782, *ante*.

1268. — Action against parties suspended until judgment recovered against firm.]—*BULLOCK v. CAIRD*, No. 1295, *post*.

1269. — Absence of circumstances in which plaintiff entitled to sue.]—*HANSEN v. DIXON*, No. 661, *ante*.

1270. — Set-off.]—*MEYER v. DRESSER*, No. 1306, *post*.

1271. — Appeal.]—*LOPEZ v. BURSLEM*, No. 1408, *post*.

1272. — Garnishee proceedings.]—*MARTIN v. NADEL*, No. 1307, *post*.

1273. *Lex fori* applies.]—A person suing in this country must take the law as he finds it ; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here (LORD TENTERDEN, C.J.).—*DE LA VEGA v. VIANNA* (1830), 1 B. & Ad. 284 ; 8 L. J. O. S. K. B. 388 ; 109 E. R. 792.

Annotations :—*Consd.* *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479 ; *Re Kloebe, Kannreuther v. Geiselbrecht* (1884), 28 Ch. D. 175. *Refd.* *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151 ; *Don v. Lippmann* (1837), 5 Cl. & Fin. 1 ; *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877 ; *Re Melbourne, Ex p. Melbourne* (1870), 6 Ch. App. 64. *Mentd.* *Breadalbane v. Chandos* (1836), 4 Cl. & Fin. 43 ; *Castrique v. Imrie* (1860), 8 C. B. N. S. 1.

1274. —.]—The law on this point is well

PART XIV. SECT. 9.

1257 i. *Whether recoverable.*]—Interest on the sum awarded by a judgment obtained in supreme ct. of N.Z., although allowed by rules of that ct., cannot be recovered in proceedings in Victoria by way of execution on the judgment.—*CATHIE v. BOYD* (1920), V. L. R. 398.—AUS.

1257 ii. —.]—After proper proof made of a foreign judgment, & the cause of action on which it is founded, interest will be allowed from the date of such foreign judgment.—*CHAPMAN v. LOGAN* (1864), 8 L. C. J. 196.—CAN.

1257 iii. —.]—In a suit based on a foreign judgment, pltf. cannot recover

more than appears on the face of the judgment ; & when such judgment is silent as to interest, he cannot make deft. liable for interest on the amount of an English judgment, English statutes as to judgments carrying interest not applying to India.—*MOAZIM HOSSEIN v. ROBINSON* (1901), 5 C. W. N. 741 ; I. L. R. 28 Cal. 641.—IND.

1260 i. At what rate payable.]—Where the ct. has power to grant judgment for the amount of an unsatisfied foreign judgment, interest on such amount will only be granted according to the rate established by *lex loci* where such unsatisfied judgment was obtained.—*MAXWELL & EARP v. BENJAMIN* (1897), 4 O. R. 365.—S. AF.

PART XVI. SECT. 1.

1273 i. *Lex fori* applies—To all questions of proof & modes of proof.]—Pltf. sued defts. for damages as compensation for the loss of her husband who had been killed by an explosion in a mine belonging to defts. Pltf. had been married to deceased abroad & defts. contended that pltf. had not established that she was the wife of deceased or that the children were deceased's children :—*Held* : (1) the fact that the marriage was a foreign one did not affect the question of proof, as the *lex fori* governs all questions of proof ; (2) the marriage might be proved by parol testimony.—*DAYE v. MCNEILL* (H. W.) Co. (1904), 6 Terr. L. R. 23.—CAN.

settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made (LORD BROUGHAM).—DON *v.* LIPPMANN, No. 711, *ante*.

1275. — To form of remedies & modes of proceeding.]—For it is well established that the forms of remedies & modes of proceeding are regulated solely by the law of the place where the action is instituted, the *lex fori* (PARKE, B.).—GENERAL STEAM NAVIGATION CO. *v.* GUILLOU, No. 1039, *ante*.

1276. — —.]—The principle which governs all these questions of jurisdiction & remedies is admirably stated by Story, J., Conflict of Laws, c. 14. In regard to the rights & merits involved in actions, the law of the place where they originated is to be followed; but the forms of remedies & the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right or the country of the act (DR. LUSHINGTON).—THE ZOLLVEREIN (1856), Sw. 96; 27 L. T. O. S. 160; 4 W. R. 555; *sub nom.* THE ZOLVEREIN, 2 Jur. N. S. 429.

*Annotations:—*Consd. Cope *v.* Doherty (1858), 4 K. & J. 367; The Halley (1867), L. R. 2 A. & E. 3; The Scotia (1869), 20 L. T. 375. Refd. The Johannes (1860), Lush. 182; R. *v.* Keyn (1876), 2 Ex. D. 63; The Leon (1881), 6 P. D. 148; Davidsson *v.* Hill, [1901] 2 K. B. 606. Mentd. General Iron Screw Collier Co. *v.* Schurmanns (1860), 1 John. & H. 180; The Wild Ranger (1862), Lush. 553; The Amalia (1863), Brown. & Lush. 151; Adam *v.* British & Foreign S.S. Co., [1898] 2 Q. B. 430; Poll *v.* Dambe, [1901] 2 K. B. 579.

1277. — — Not to matters affecting substance of remedy.]—The rules of the *lex fori*, where a question is raised between or by or against foreigners, are not to be applied to matters affecting the substance of the remedy, but only to matters affecting the form.

A foreign ship, owned partly by foreigners & partly by British subjects, was run down by another foreign ship, owned wholly by foreigners. The owners of the lost ship recovered a judgment for the full value of the lost ship, which exceeded the value of the wrongdoer:—*Held*: this ct. had no jurisdiction in such a case under Merchant Shipping Act, 1854 (c. 104), s. 504, to restrict the liability of the wrongdoer to the value of the ship committing the damage.—COPE *v.* DOHERTY (1858), 4 K. & J. 367; 27 L. J. Ch. 600; 31 L. T. O. S. 173; 4 Jur. N. S. 451; 6 W. R. 537; 70 E. R. 154; *affd.* 2 De G. & J. 614, L. J.J.

*Annotations:—*Expld. General Iron Screw Collier Co. *v.* Schurmanns (1860), 1 John. & H. 180. Consd. The Wild Ranger (1862), Lush. 553; The Scotia (1869), 20 L. T. 375. Refd. The Victor (1860), Lush. 72; R. *v.* Keyn (1876), 2 Ex. D. 63; Davidsson *v.* Hill, [1901] 2 K. B. 606. Mentd. Burns *v.* Chapman (1858), 5 C. B. N. S. 481; The Johannes (1860), Lush. 182; The Annapolis, The Johanna Stoll (1861), Lush. 295; The Amalia, Cail *v.* Papayanni (1863), 1 Moo. P. C. C. N. S. 471; Pole *v.* Dambe, [1901] 2 K. B. 579; Varesick *v.* British Columbia Copper Co. (1906), 1 B. W. C. C. 446.

1278. Personal action—In what court triable—Whether in court of country in which defendant resident—Or in court in which cause of action arose.]—GURDYAL SINGH (SIRDAR) *v.* FARIDKOTE (RAJAH), No. 3, *ante*.

1279. — — Action in Scottish court against defendant domiciled in England—Property in Scotland subject to attachment.]—An English corpn., or any person domiciled in England is liable to be sued in a Scottish ct. in most personal actions, not

involving questions of personal status, provided only there is some money due to such person by some one resident in Scotland, or provided there is some property, however trifling, of such person found within Scotland, which may be attached, the attachment being held to confer such jurisdiction on the Scottish ct.—LONDON & NORTH WESTERN RY. CO. *v.* LINDSAY (1858), 30 L. T. O. S. 357; 4 Jur. N. S. 313; 6 W. R. 396; 3 Macq. 99, H. L.

*Annotations:—*Consd. London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239. Refd. Schibsky *v.* Westenholz (1870), L. R. 6 Q. B. 155; Voinet *v.* Barrett (1885), 55 L. J. Q. B. 39. Mentd. Emanuel *v.* Symon, [1908] 1 K. B. 302.

Foreign corporations—Right to sue & liability to be sued.]—See CORPORATIONS.

SECT. 2.—PARTIES.

SUB-SECT. 1.—PLAINTIFFS.

1280. Plaintiff suing in own right—Obligee of bond—Obligee attainted & bond confiscated by foreign State.]—A. & B., being inhabitants of the United States of America, while those States were colonies of Great Britain, & before the war broke out between the two countries, B. executed a bond to A. During the war, after the declaration of independence by the Congress, both parties were attainted, their property confiscated & vested in the respective States, of which they were inhabitants, by the legislative Acts of those States, & a fund was provided for payment of the debts of B.:—*Held*: (1) A. might maintain an action on the bond against B. in England; (2) the several Acts of Attainder & Confiscation, passed by sovereign independent States, did not disable A. from suing, nor exempt B. from being sued in England; (3) it was not a good plea in bar of an action at law, that an ample fund was provided out of the effects of B. for the payment of his debts, to which A. might & ought to have resorted, & been paid, though it might be a ground for relief in equity.

(4) If the penal laws of a foreign country do not in themselves import a personal disability to sue in this, neither do they by divesting the property of a person in that country, take away his right of action in England. The subject-matter of this action being a bond, it could only be sued for according to the laws of England relating to bonds; supposing therefore the right of pltf. to be gone, that could not be set up in bar of the action, which must be brought in the name of the present pltf., whoever might be in possession of the bond, since a chose in action, is not assignable at law, & debt. could not plead that the obligee had assigned it. I would even go further & say, a right to recover any other specific property, such as plate or jewels, in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, & affect nothing more than they can reach & can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations & the like; & cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend (LORD LOUGHBOROUGH).—FOLLIOTT *v.* OGDEN (1789), 1 Hy. Bl. 123; 126 E. R. 75; *affd. sub nom.* OGDEN *v.*

PART XVI. SECT. 2, SUB-SECT. 1.

d. Foreign firm—Right to sue.]

A firm doing business in a foreign country has the same right to sue in Nova Scotia in the firm name as a

firm doing business there would have.—KNAUTH-NACHOD *v.* STERNE (1897), 30 N. S. R. 251.—CAN.

Sect. 2.—Parties: Sub-sects. 1 & 2. Sect. 3: Sub-sects. 1

FOLLIOTT (1790), 3 Term Rep. 726; (1792), 4 Bro. Parl. Cas. 111, H. L.

Annotations:—As to (1) Refd. Phillips v. Eyre (1870), L. R. 6 Q. B. 1. As to (2) & (4) Refd. Barolay v. Russell (1797), 3 Ves. 424; Wolff v. Oxholm (1817), 6 M. & S. 92; Hullett v. Spain (King) (1828), 2 Bl. N. S. 31; Phillips v. Eyre (1870), L. R. 6 Q. B. 1; Huntington v. Attrill, [1893] A. C. 150. Generally, Mentd. Cottin v. Blane (1795), 2 Anst. 544; Wright v. Simpson (1802), 6 Ves. 714.

1281. — Husband & wife suing as partners—In partnership abroad.]—Semble: although by the laws of a foreign country, husband & wife, natives of that country, & resident there, may be partners in trade, they cannot maintain a joint action against persons resident here for a balance due to the partnership account.—COSIO & PINEYRO v. DE BERNALES (1824), 1 C. & P. 266; Ry. & M. 102, N. P.

1282. — Solicitor practising in Ireland—Necessity for delivery of signed bill.]—To an action brought in England by an attorney, practising in Ireland, against defts. domiciled in England for business done in the Irish cts., it is no plea that the pltf. did not deliver a signed bill one month before action brought, as neither the Solicitors Act, 1843 (c. 73), s. 37, nor the Solicitors (Ireland) Act, 1849 (c. 53), s. 2, applies to such a case.—KERNEGHAN v. WADESON (1855), 24 L. T. O. S. 253; 3 C. L. R. 764.

1283. — Authorised by foreign court to sue in England on foreign judgment—Effect of foreign order.]—Where an American ct. had made an order authorising a person who had recovered judgment in that ct. against an American co. to bring actions against an English co. in any & all proper cts., in his own name, or in the name of the American co.:—Held: the jurisdiction of the American ct. was limited to the exact scope of the Californian Code conferring it, & in an action brought by the person in an English ct., he was not properly authorised to sue, & could not sue, in the name of the American co.—BARBER v. MEXICAN LAND & COLONIZATION CO., LTD. (1899), 48 W. R. 235; 16 T. L. R. 127; 44 Sol. Jo. 145.

1284. Plaintiff suing in representative capacity—Liquidator of estate—Appointed by law of France—What plaintiff must show.]—An affidavit of debt, stating that deft. was indebted to pltf. as liquidator of an estate, duly appointed by the law of France, is defective, not showing that pltf., as liquidator, is by the law of France entitled to sue.—TENON v. MARS (1828), 8 B. & C. 638; 3 Man. & Ry. K. B. 38; 7 L. J. O. S. K. B. 89; 108 E. R. 1179.

1285. — Syndics of foreign bankrupt—Two out of three suing.]—ALIVON v. FURNIVAL, No. 1136, ante.

1286. — Donee of universality of succession to deceased person—Whether necessary to take out letters of administration.]—VANQUELIN v. BOUARD, No. 1044, ante.

1287. Plaintiff on whom disability imposed—By foreign law—Action for damages for assault suspended until defendant criminally condemned.]—SCOTT v. SEYMOUR (LORD), No. 782, ante.

1288. — — — Absence of circumstances in which plaintiff entitled to sue.]—HANSEN v. DIXON, No. 661, ante.

1289. — By foreign judgment—"Prodigal."]—The cts. of this country will not recognise a state of disability not known to the law of this country. A French subject adjudicated a prodigal by a

French ct., though by French law unable to sue without his *conseil judiciaire*, can sue in the cts. of this country independently.—WORMS v. DE VALDOR (1880), 49 L. J. Ch. 261; 41 L. T. 791 28 W. R. 346.

Annotation:—Folld. Re Selot's Trust, [1902] 1 Ch. 488.

1290. — — —.]—By the Code Napoléon a French subject of full age, who is of extravagant habits, when adjudged by a French ct. of competent jurisdiction to be a prodigal is restrained from dealing with, disposing of, alienating, receiving or giving a receipt for his movable property without the consent of a *conseil judiciaire*. But although this judgment modifies & affects the status of the prodigal, it is a disqualification unknown to English law, & will be disregarded by English cts.

Where a French subject of full age, who had been adjudged a prodigal, & placed under the control of a *conseil judiciaire* by the judgment of a French ct. of competent jurisdiction, became entitled to a fund in ct. in England:—**Held:** he was entitled to payment out of the fund to himself on his sole receipt, notwithstanding the opposition of his *conseil judiciaire*.—*Re SELOT'S TRUST, [1902] 1 Ch. 488; 71 L. J. Ch. 192; 46 Sol. Jo. 280.*

Annotation:—Distd. Bank of Africa v. Cohen, [1909] 2 Ch. 129.

Recognition of foreign judgments generally.]—See Part XIV., Sect. 2, ante.

SUB-SECT. 2.—DEFENDANTS.

1291. Debtor attainted under foreign law—Fund available under foreign law for creditors—Whether defence in law to action in England.]—It was a good ground of relief in equity that an ample fund was provided out of the effects of the attainted debtor in America for the payment of his debts, to which the creditor might have resorted, & out of which he might have been paid, & an injunction would be granted by the Ct. of Ch. to prevent execution from being taken out on a judgment obtained in an action at law by such a creditor.—WRIGHT v. NUTT & PINBURY (1788), Dick. 691; 1 Cox, Eq. Cas. 424; 1 Hy. Bl. 136; 21 E. R. 440, L. C.

Annotations:—Consd. Wright v. Simpson (1802), 6 Ves. 714. Refd. Cottin v. Blane (1795), 2 Anst. 544. Mentd. Solomon v. Graham (1855), 5 E. & B. 309.

1292. — — —.]—FOLLIOTT v. OGDEN, No. 1280, ante.

1293. Shareholders in foreign company—Company alone liable by foreign law—Whether plea available in England.]—GENERAL STEAM NAVIGATION CO. v. GUILLOU, No. 1039, ante.

1294. — Action in England on judgment recovered against secretary of company—Special provisions in foreign law as to execution—Whether applicable in England.]—KELSALL v. MARSHALL, No. 1232, ante.

1295. Partner in foreign firm—Judgment against firm necessary by foreign law—Liability of partner in England.]—To a declaration in an action for breach of an agreement by deft. to build a ship for pltf., deft. pleaded that the agreement was made in Scotland by pltf. with a trading partnership or firm domiciled & carrying on business there, & was to be performed wholly in Scotland; that by the law of Scotland the firm was a separate & distinct person from any or the whole of the individual members thereof, of whom deft. was one, & that by the law of Scotland the firm had

PART XVI. SECT. 2, SUB-SECT. 2.

e. Members of foreign firm—Liability to be sued in firm name.]—

The members of a foreign firm cannot be sued in Nova Scotia in the firm name, for by suing a firm, the members of which are resident out of the

jurisdiction, the ct. might be improperly subjecting foreigners to its jurisdiction.—KNAUTH-NACHOD v. STERNE (1897), 30 N. S. R. 251.—CAN.

the capacity of suing & being sued as such separate firm, & the alleged agreement was made by the firm as such separate person, & not jointly & severally by the individual members thereof; that the firm consisted of, etc., who at the time of making the agreement were domiciled & carrying on business in Scotland; that by the law of Scotland debt. became & was, as a partner of the firm, liable to pltf. for the satisfaction of any judgment which might be obtained against the firm, or the whole of the individual partners thereof jointly, & save as aforesaid, no liability by the law of Scotland attached to debt. in respect of the agreement; that by the law of Scotland it was a condition precedent to any individual liability attaching to debt. in respect of the agreement that the firm, as such person as aforesaid or the whole individual partners thereof, jointly, should first have been sued:—*Held*: the plea was bad, as it merely stated the form of proceeding in Scotland, while the remedy & mode of proceeding were regulated by the law of England.—*BULLOCK v. CAIRD* (1875), L. R. 10 Q. B. 276; 44 L. J. Q. B. 124; 32 L. T. 814; 23 W. R. 827.

Annotations:—*Folld.* West Norfolk Farmers' Manure Co. v. Cross & Donaldson (1885), 1 T. L. R. 281; *Re* Doetsch, Matheson v. Ludwig, [1896] 2 Ch. 836.

SECT. 3.—REMEDIES.

SUB-SECT. 1.—RIGHT OF ARREST.

1296. Right of arrest by English law—No right of arrest by foreign law.—Injunction against securities obtained by one French emigrant against another by arresting him, when about to sail on the expedition against France, & under an obligation entered into in France as surety which according to the laws of France could not affect the person.—*TALLEYRAND v. BOULANGER* (1797), 3 Ves. 447; 30 E. R. 1099, L. C.

Annotations:—*Consd.* Flack v. Holm (1820), 1 Jac. & W. 405; Liverpool Marine Credit Co. v. Hunter (1868), 3 Ch. App. 479. *Refd.* Breadalbane v. Chandos (1836), 4 Cl. Fin. 43; Don v. Lippmann (1837), 5 Cl. & Fin. 1.

1297. ——— Writ of ne exeat regno.—Writ of *ne exeat regno* granted at the suit of an English subject against a native of Russia generally resident & carrying on business in partnership at St. Petersburg, & in this country only for a temporary purpose, upon a balance of account in respect of goods consigned to him & his partner. The writ will issue on a balance of account sworn by the deponent to be due to the best of his belief, but, if the mode of computing the account be mentioned, & it appears to comprise unascertained

sums, it will not be granted. The ct. will always hear a debt. moving to discharge the writ; but it will only enquire, whether there is reasonable ground to suppose that pltf. will succeed in the suit. Exemption from arrest for a debt of same nature by the laws of Russia is not a sufficient ground for discharging the writ, where one of the parties is an Englishman & was resident in this country.

Qu.: whether the writ will be granted where the debt has been contracted while pltf. & debt. resided in a foreign country by the laws of which arrest for debt is not permitted.—*FLACK v. HOLM* (1820), 1 Jac. & W. 405; 37 E. R. 430, L. C.

Annotations:—*Consd.* Anon. (1865), 5 New Rep. 358; *Thompson v. Smith* (1865), 34 L. J. Ch. 412.

1298. ———.]—A writ of *ne exeat regno* will be granted in respect of a debt which was contracted in Jamaica between persons resident there, though, in Jamaica, debt. could not have been arrested for the demand.—*GRANT v. GRANT* (1827), 3 Russ. 598; 38 E. R. 699, L. C.; *subsequent proceedings* (1828), 5 Russ. 189, L. C.

Annotations:—*Mentd.* Brown v. Newall (1837), 2 My. & Cr. 558; *Re* Sparke & Bridges, *Ex p.* Day (1863), 9 L. T. 350.

1299. ——— Receipt by creditor of portion of debt in proceedings in foreign country.—The ct. refused to discharge a foreigner on the ground that the debt for which he had been arrested was the balance of a demand upon which pltf. had received a dividend under proceedings in the country where the debt was contracted similar to our proceedings in bkptcy.; though it was sworn by a competent person that the law of the foreign country did not warrant an arrest of the person under such circumstances.—*BRETTILLOT v. SANDOS* (1837), 4 Scott, 201; 1 Jur. 182.

1300. No right of arrest by English law—Right of arrest by foreign law—Arrears of fee farm rent in Scotland.—A party cannot be held to bail for arrears of a fee farm rent issuing out of premises situate in Scotland.—*M'KENZIE v. JOHNSON* (1835), 1 Scott, 594.

SUB-SECT. 2.—DISCOVERY.

Sec. generally, DISCOVERY, INSPECTION & INTERROGATORIES.

1301. In aid of proceedings in foreign court.—*BENT v. YOUNG* (1838), 9 Sim. 180; 7 L. J. Ch. 151; 2 Jur. 202; 59 E. R. 327.

Annotations:—*Distd.* Transatlantic Co. v. Pietroni (1860), John. 604. *Folld.* Dreyfus v. Peruvian Guano Co. (1889), 41 Ch. D. 151.

1302. ———.]—The ct. will not entertain an

change of residence.—Wherever a person be domiciled, or to whatever country he be bound by allegiance, if he come to Ont., & reside there, & contract debts, & is about to quit the country with intent to defraud his creditors, he is subject to arrest as it prevails in Ont. A debt. cannot rely on a change of residence to a foreign country so as to avoid the law of arrest, to which he was subject in Ont. at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest.—*KERSTERMAN v. McLELLAN* (1883), 10 P. R. 122.—CAN.

k. ——— Foreign cause of action—Alien passing through jurisdiction.—An alien passing through the jurisdiction may be arrested on a *capias ad respondendum* upon a cause of action arising in a foreign country.—*MACAULAY v. O'BRIEN* (1897), 5 B. C. R. 510.—CAN.

PART XVI. SECT. 3, SUB-SECT. 1.

1. Right of arrest by Canadian law—Debt contracted abroad—Debtor absconding from own country without intention of returning.—The general rule that it is against the policy of the law to permit one foreigner to follow another into Ont., & arrest him for a debt contracted abroad, is limited to cases in which the debtor is here on temporary business, & is about to return to his own country. Where the debtor has absconded from his own country to Ont., & does not intend returning, or intends to go to some other country, the creditor may follow & arrest him in Ont.—*BUTLER v. ROSENFELDT, SWEETZER v. ROSENFELDT* (1879), 8 P. R. 175.—CAN.

g. ——— Debtor in act of returning to country where debt contracted.—A., having contracted a debt in the U.S.A., his ordinary place of abode, & in the act of returning there after a visit to his parents in

Canada, cannot be arrested on a charge of leaving Ont. with intent to defraud his creditors.—*SMITH v. SMITH* (1883), 9 P. R. 511.—CAN.

h. ——— Aliens resident within jurisdiction—No right of arrest by foreign law.—In the absence of an agreement *ad hoc* with his obligee, a party is liable at the latter's suit on a good cause of action to all the remedies, including arrest & imprisonment, allowed by law, & it is immaterial that the parties are aliens, or that the particular remedy sought is not allowed in the foreign jurisdiction. The ct. has jurisdiction by reason of the residence of the parties within the jurisdiction, though the contract & breach arose outside the jurisdiction, & the parties are aliens.—*BAXTER v. JACOBS, MOSS* (1889), 1 B. C. R. 373.—CAN.

i. ——— Debt contracted in Canada—Debtor about to quit country with intent to defraud creditors—Fraudulent

Sect. 3.—Remedies: Sub-sects. 2, 3, 4, 5, 6, 7 & 8.
Sects. 4 & 5: Sub-sect. 1, A. & B.]

action for discovery only in aid of proceedings in a foreign ct.—**DREYFUS v. PERUVIAN GUANO CO.** (1889), 41 Ch. D. 151; 58 L. J. Ch. 471; 60 L. T. 216; 5 T. L. R. 323.

SUB-SECT. 3.—PAYMENT INTO COURT.

1303. In action in England—Suit pending in foreign court against same fund—Possibility of foreign court ordering payment into court also.]—An assurance co. having its principal office in Edinburgh, & a branch office in London, issued a policy on which was indorsed a memorandum that the money to become payable thereunder should be payable to the exors., administrators or assigns of the assured at the office of the co. in London. On the death of the assured the policy money being claimed by the exor., who had proved the will in Scotland, & by pltf. as equitable mtgees. of the policy, the co. commenced an action in Scotland, in order to have the conflicting claims adjudicated upon, & subsequently pltf. filed the bill in this suit against the co. & the exor. of the assured. On a summons taken out by pltf. that the co. might pay the policy money into ct.:—**Held:** the co. having admitted they had no interest in the money, must pay it into ct. without being indemnified by pltf. from having to pay it into ct. in Scotland, although the practice of the Scottish cts. might be to require this to be done, notwithstanding the payment of same sum into an English ct.—**COOK v. SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY** (1872), 26 L. T. 571.

SUB-SECT. 4.—INJUNCTION.

1304. To restrain removal of foreign ship from England—Sold abroad to Englishman.]—HART v. HERWIG, No. 709, *ante*.

SUB-SECT. 5.—SPECIFIC PERFORMANCE.

1305. Contract made abroad with foreigner for sale of foreign ship—Ship within jurisdiction of English court.]—HART v. HERWIG, No. 709, *ante*.

SUB-SECT. 6.—LIEN.

Precedence of liens.]—See No. 1308, post.

SUB-SECT. 7.—SET-OFF.

1306. In action in England—For freight—Right under foreign law to set off value of cargo not

delivered.]—A consignee of goods, or an indorsee of a bill of lading, has no right to have the value of missing goods deducted from the freight payable in respect of the goods delivered. This being the general law, it cannot be altered by a universal practice of merchants, which is not confined to any particular place or trade, to have the value of such goods deducted from the freight.

The law of a foreign country, entitling the consignee to reduce the claim against him for freight by the value of goods put on board & lost, but which amounts to an allowance by way of set-off, & not to an extinguishment of the claim for freight, is matter of procedure only, & does not apply to an action for freight brought in this country against the consignee.—**MEYER v. DRESSER** (1864), 16 C. B. N. S. 646; 33 L. J. C. P. 289; 10 L. T. 612; 2 Mar. L. C. 27; 143 E. R. 1280; *sub nom.* **MAYER v. DRESSER**, 12 W. R. 983.

Annotations:—Consd. Maspons y Hermano v. Mildred (1882), 9 Q. B. D. 530. **Reid. The Norway** (1864), Brown. & Lush. 377. **Mentd. Grissell v. Bristowe** (1868), L. R. 3 C. P. 112; **Produce Brokers Co. v. Olympia Oil & Cake Co.**, [1916] 1 A. C. 314.

SUB-SECT. 8.—EXECUTION.

1307. Governed by lex fori—Garnishee proceedings—Not recognised by law of nations.]—A garnishee order should not be made to attach a debt due from the garnishee to the judgment debtor where payment under the order will not be a valid discharge to the garnishee as against the judgment debtor of the amount paid under the order.

Where a foreign corpn. having its head office abroad & a branch office in London owed a debt contracted abroad to a foreign resident abroad who became a debtor on a judgment recovered against him in England:—**Held:** a garnishee order should not be made to attach the debt due from the foreign corpn. to the judgment debtor, because that debt would still remain due & payable abroad notwithstanding payment in England under a garnishee order, on the ground that garnishee proceedings are a process of execution & part of the *lex fori* & as such not recognised by the law of nations.—**MARTIN v. NADEL**, [1906] 2 K. B. 26; 75 L. J. K. B. 620; 95 L. T. 16; 54 W. R. 525; 22 T. L. R. 561, C. A.

SECT. 4.—PRIORITIES OF CREDITORS.

1308. Governed by lex fori—Bond on ship—Wages of foreign seamen.]—(1) Questions of the precedence of liens upon ships are to be determined by the *lex fori*.

(2) Seamen's wages earned before the giving of a bond are to be preferred to the bond.

PART XVI. SECT. 3, SUB-SECT. 7.

1. In action in United Provinces—Debt barred by limitation in United Provinces—Not barred by local law.]—In a suit filed against him in the U.P., deft. claimed to set off a debt, which, though it would have been barred by limitation in the U.P., was not barred according to the local law applicable thereto:—**Held:** the set-off was admissible.—**BACHCHAN LAL v. BANARSI DAS** (1913), I. L. R. 35 All. 238.—**IND.**

PART XVI. SECT. 3, SUB-SECT. 8.

m. Application of lex loci contractus.]—A contract was made in Vermont between persons domiciled in that state:—**Held:** (1) the conse-

quences attached to the contract by the laws of Vermont must be applied by Canadian cts.; (2) one of the consequences of the contract being that the right of execution & sale of property should cease on the appointment of receivers, a judgment creditor could not be allowed to proceed to execute his judgment against such property, merely because it had passed from the territorial jurisdiction of the ct. of Vermont, into that of the cts. of Quebec.—**BARKER v. CENTRAL VERMONT RY. CO.** (1898), Q. R. 13 S. C. 2.—**CAN.**

n. Right to arrest property of foreigner—Jurisdiction founded by arrest.]—An *incola* is entitled to an arrest of property found within the Transvaal & belonging to a *peregrinus* for the purpose of founding jurisdic-

tion in an action to be instituted for the performance of a contract entered into with such *peregrinus* beyond the Transvaal, & which had to be performed outside that country.—**MIDDELVEI SYNDICATE v. TUCKER** (1897), 4 O. R. 10.—**S. AF.**

o. ———.]—An *incola* of the Transvaal is entitled to attach *ad fundandam jurisdictionem* the property of a *peregrinus* locally situated, & where an applicant shows a *prima facie* cause of action the ct. cannot refuse an order for such attachment. The arrest itself, under such circumstances, founds jurisdiction, & no further *ratio jurisdictionis* need be present.—**LECOMTE v. W. & B. SYNDICATE OF MADAGASCAR**, [1905] T. S. 696.—**S. AF.**

Bond was given on ship, freight & cargo, ship & freight being insufficient to pay same, & suit was brought by seamen against ship & freight for wages. The owners of the cargo were allowed to appear & defend:—*Held*: seamen entitled as their claim was superior to that of bondholder, & therefore to that of owners of cargo deriving through him.—*THE UNION* (1860), 1 Lush. 128; 30 L. J. P. M. & A. 17; 3 L. T. 280.

Annotations:—*As to* (2) *Consd.* *The Hope* (1873), 28 L. T. 287. *Refd.* *The Daring* (1868), L. R. 2 A. & R. 260.

Jurisdiction of Admlty. Ct. over foreign seamen generally, see *ADMIRALTY*, Vol. I., pp. 137–139.

1309. — Administration of debtor's assets in England—Right of creditor having obtained priority abroad by registration.]—Where a debt is contracted by an Englishman in a foreign country the provisions of the *lex loci contractus* do not avail to entitle the creditor to payment of his debt out of equitable assets administered in this country in priority to other creditors.

An Englishman residing in Venezuela executed an instrument to secure repayment to G. of £1,600, & G. afterwards registered the instrument in the form prescribed by the law of Venezuela, & by virtue of such registration became entitled, according to that law, to be paid his debt out of the general assets of the debtor in priority to other creditors:—*Held*: a fund in this country constituting equitable assets of the debtor must be divided among the creditors without regard to any such priority.—*PARDO v. BINGHAM* (1868), L. R. 6 Eq. 485; *subsequent proceedings* (1869), 4 Ch. App. 735.

Annotations:—*Refd.* *In the Goods of Ewing* (1881), 6 P. D. 19. *Mentd.* *O'Grady v. Wilmot*, [1916] 2 A. C. 231.

5. STAY OF PROCEEDINGS—LIS ALIBI PENDENS.

SUB-SECT. 1.—STAY OF PROCEEDINGS.

A. Where no foreign Suit instituted.

1310. Stayed if vexatious & oppressive—Cause of action arising abroad—Parties domiciled abroad—Action of transitory nature in England.]—The ct. will stay an action of a transitory nature, brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to pltf., & that deft. would be subject to such injustice in defending the action as would amount to vexation & oppression, to which he would not be subjected if an action were brought, in another & accessible ct., where the cause of action arose.—*LOGAN v. BANK OF SCOTLAND* (No. 2), [1906] 1 K. B. 141; 75 L. J. K. B. 218; 94 L. T. 153; 54 W. R. 270; 22 T. L. R. 187, C. A.

Annotations:—*Appld.* *Egbert v. Short*, [1907] 2 Ch. 205. *Consd.* *Re Norton's Settlement*, *Norton v. Norton*, [1908] 1 Ch. 471. *Refd.* *The Cap Blanco*, [1913] P. 130; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

1311. — Liability to be determined according to foreign law.]—In 1902 a deed of separation was executed in India between pltf. & her husband, of which deft. was the trustee. Pltf. was the wife of an American domiciled in India, & deft. then & still was a solr. practising at Madras. The husband made default in paying the allowance which by the deed he had covenanted to pay, & the complaint of pltf. against deft. was that he had wilfully or negligently delayed taking proceedings, & had so wilfully or negligently conducted proceedings against her husband that she had been unable to recover the moneys due to her in respect of the allowance. In Oct. 1906, deft. happened to

be in England on a holiday, & on the day before he left for India he was served with the writ in the action. At the date of the issue of the writ pltf. was temporarily in England, but left shortly afterwards for America, where she still remained. Pltf. knew of her alleged cause of action when she was resident in India. On an application by deft. to dismiss or stay the action on the ground that it was an abuse of the process of the ct.:—*Held*: (1) inasmuch as the alleged cause of action arose in India, & the liability, if any, of deft. would have to be determined according to the law of India, & upon the evidence of Indian witnesses, the proper place for the action to be brought was India; (2) that the action was not brought *bond fide* in England; (3) the injustice to deft. in bringing the action in this country was so great that the ct. would not allow the action to proceed; (4) the fact that pltf. happened to be in England at the date of the issue of the writ was not in itself sufficient to preclude the ct. from dismissing the action.—*EGBERT v. SHORT*, [1907] 2 Ch. 205; 76 L. J. Ch. 520; 97 L. T. 90; 23 T. L. R. 558; 51 Sol. Jo. 499. *Annotation*:—*As to* (3) *Apprvd.* *Re Norton's Settlement*, *Norton v. Norton*, [1908] 1 Ch. 471.

1312. — Defendants domiciled in England but ordinarily resident abroad—Action brought to obtain undue advantage.]—An action was commenced in England, in which pltf., a married woman, claimed an account under a settlement made in India on the occasion of her marriage in 1897, & she further alleged a wilful default by defts., one of whom, pltf.'s husband, had been appointed a trustee of the settlement by a subsequent deed, the other two being the original trustees of the settlement. Defts. were all domiciled in England, but were ordinarily resident in India, pltf.'s husband being a barrister practising in Calcutta, & the other defts. holding appointments in the Indian Civil Service. The property comprised in the settlement was in India. From 1902 down to the commencement of the action pltf. was living in France apart from her husband. She then came to England, where, as she alleged, she intended thenceforth to reside permanently. The husband & another of defts. were served with the writ during their temporary presence in England. They applied to stay all proceedings in the action on the ground that it was an abuse of the process of the ct.:—*Held*: pltf. had in fact brought the action in England instead of in India, not for any *bond fide* purpose, but in order to obtain an undue advantage over defts., & the continuance of the proceedings in England would necessarily be productive of injustice to defts., & the action ought to be stayed.—*Re NORTON'S SETTLEMENT*, *NORTON v. NORTON*, [1908] 1 Ch. 471; 77 L. J. Ch. 312; 99 L. T. 257, C. A.

Annotations:—*Refd.* *Cohen v. Rothfield*, [1919] 1 K. B. 410; *Keyes v. Keyes & Gray*, [1921] P. 204.

Stay where agreement between parties to refer disputes to foreign court.]—See *ARBITRATION*, Vol. II., p. 364, Nos. 329–331.

B. During Pendency of foreign Suit.

1313. General rule.]—Where two or more actions are pending between same parties in respect of same subject-matter, the ct. has jurisdiction to stay proceedings in all but one of them on the ground that the concurrent litigation is vexatious, even where one of the actions is in a foreign ct., & judgment has not been obtained in any of the actions. But where one action is in a foreign ct., the party applying for a stay of proceedings must make out a special case for relief, whereas, where all the litigation is in England, or, *semble*, in the

**Sect. 5.—Stay of proceedings—*lis alibi pendens*:
Sub-sect. 1, B.]**

King's cts. anywhere, the concurrent proceedings are *prima facie* vexatious.—McHENRY v. LEWIS (1882), 22 Ch. D. 397; 52 L. J. Ch. 325; 47 L. T. 549; 31 W. R. 305, C. A.

Annotations:—Consd. & Expld. Peruvian Guano Co. v. Bockwoldt (1883), 23 Ch. D. 225. Apld. Hyman v. Helm (1883), 24 Ch. D. 531; The Christiansborg (1885), 10 P. D. 141. Consd. Mutrie v. Binney (1887), 35 Ch. D. 614; Logan v. Bank of Scotland, [1906] 1 K. B. 141; Cohen v. Rothfield, [1919] 1 K. B. 410. Refd. The Reinbeck (1889), 60 L. T. 209; Egbert v. Short, [1907] 2 Ch. 205; Re Norton's Settlement, Norton v. Norton, [1908] 1 Ch. 471; Carter v. Hungerford (1915), 59 Sol. Jo. 428.

1314. — Suits relating to land in colonies.]—

This litigation is very unfortunate, & in my view it raises questions of wider importance than those affecting merely pltf. & defts. It raises a question as to the mode in which a ct. in this country ought to have regard to proceedings dealing with same subject-matter in a ct. in a British colony possessing an appeal to the Privy Council in this country. Before dealing with the facts of this case, I desire to say that I think every English ct. ought to be extremely careful not to infringe upon the jurisdiction of a colonial ct. in a proceeding commenced before any proceedings were commenced in England relating to land in the colony (COZENS-HARDY, M.R.).—JOPSON v. JAMES, No. 1320, *post*.

1315. — Burden of proof.]—(1) Two parties having cross-claims arising out of same transactions for substantially same relief, one commenced an action in England & the other an action in Scotland:—*Held*: the ct. will not restrain pltf. in either action from proceeding with his action unless it is satisfied that the continued prosecution thereof would be oppressive or vexatious.

(2) It is incumbent on the party seeking to restrain the other to show that the proceeding he complains of is oppressive or vexatious, & that the party instituting it can gain no advantage therefrom.—COHEN v. ROTHFIELD, [1919] 1 K. B. 410; 88 L. J. K. B. 468; 120 L. T. 434; 63 Sol. Jo. 192, C. A.

1316. Similar relief claimed—In Irish court.]—Plea of a suit depending in the Ct. of Ch. in Ireland for the same matter overruled.—DILLON (LORD) v. ALVARES (1798), 4 Ves. 357; 31 E. R. 182, L. C.

Annotations:—Distd. Ostell v. Lepage (1851), 16 Jur. 404. Dbtd. McHenry v. Lewis (1882), 22 Ch. D. 397. Refd. Mutrie v. Binney (1887), 35 Ch. D. 614.

PART XVI. SECT. 5, SUB-SECT. 1.—B.

1320 i. Similar relief claimed—In English court—Acquiescence in English proceedings—Jurisdiction of Scottish courts.]—A Scottish co. having agents & offices in England brought an action in Scotland against the representatives of a former agent in England to recover a debt claimed by them & to obtain a security upon the estate of the deceased in Scotland. A decree for the administration of the testator's estate having been made in England, the English Ct. of Ch. granted an injunction to restrain the co. from continuing the action in Scotland, but upon appeal the order was discharged. The co. then brought another action in Scotland, & another suit having been instituted against the co. in England, in which they appeared, pursuers in that action alleging that the co. had acquiesced in the English proceedings, asked for an injunction to restrain the action in Scotland, but it was refused:—*Held*: there was no sufficient reason for sisting proceedings in order that the question might be tried in the Ct. of Ch. in England as the more proper & convenient forum.—CARRON Co. v. STANTON (1857), 19 Dunl. (Ct. of Sess.) 318; 29 So. Jur. 150.—SCOT.

p. — No answer to application for commission to examine witnesses in London.]—BARTLETT v. LEWIS (1862), 13 L. C. L. R. App. 39.—IR.

q. — In Quebec—No bar to suit in Ontario.]—HUGHES v. REES (1884), 5 O. R. 654.—CAN.

1319 i. — In foreign court—Submission to jurisdiction.]—It was objected in an action in Hong Kong that proceedings having been instituted at Canton in respect of the question raised in the action, the present pltf. who had appeared therein as deft. had thereby submitted to the jurisdiction of the Canton ct. & was therefore precluded from maintaining the present proceedings:—*Held*: deft. in a suit in one country may legitimately become pltf. in another country, in respect of the same cause of action.—LAN MAN CHO v. HONG KONG & SHANGHAI BANKING CORPN. (1908), 4 Hong Kong L. R. 20.—HONG KONG.

1321 i. Different relief claimed—Scottish action for legitim under marriage contract—English action for variation of marriage contract—Scottish action stayed.]—CHANDOS v. BREADALBANE (1836), 15 Sh. (Ct. of Sess.) 48; 12

Fac. Coll. 56.—SCOT.
[.]—An action was commenced in this ct. for same cause as that for which proceedings were pending between same parties in one of the superior cts. of Ireland:—*Held*: pltf. must elect in which he would proceed, & for that purpose the rule was made absolute until a further order of the ct. or a judge.—ALEXANDER v. ADAMS (1867), 16 L. T. 384; 15 W. R. 791.

In Scottish court—Suit relating to real estate.]—ELLIOTT v. MINTO (LORD), No. 391, *ante*.

1319. — In foreign court.]—It is no ground for staying proceedings in an action here that proceedings are pending between the parties for same cause of action in the United States.—COX v. MITCHELL (1859), 7 C. B. N. S. 55; 29 L. J. C. P. 33; 1 L. T. 8; 6 Jur. N. S. 225; 8 W. R. 45; 141 E. R. 734.

Annotations:—Distd. Alexander v. Adams (1867), 16 L. T. 384. Consd. The Mali Ivo (1869), L. R. 2 A. & E. 356. Consd. & Expld. McHenry v. Lewis (1882), 22 Ch. D. 397. Distd. Peruvian Guano Co. v. Bockwoldt (1883), 23 Ch. D. 225. Refd. Scott v. Seymour (1862), 1 H. & C. 219; The Christiansborg (1885), 10 P. D. 141; Mutrie v. Binney (1887), 35 Ch. D. 614.

1320. — In colonial court—Land situate in colony.]—The principles which ought to guide a ct. of justice in England where concurrent proceedings for similar relief are pending in an English & colonial ct. stated. (No. 1314, *ante*.)

Where a partnership action of earlier date had been brought in the Supreme Ct. in Nova Scotia, where the partnership mining property was situate, & prosecuted to a decree:—*Held*: further proceedings in an action of later date brought in the Palatine Ct. in England, where three out of four partners resided, for similar relief, must be stayed & an order made restraining pltf. in the Nova Scotian action from prosecuting proceedings in that action must be discharged.—JOPSON v. JAMES (1908), 77 L. J. Ch. 824, C. A.

Annotation:—Consd. Cohen v. Rothfield, [1919] 1 K. B. 410.

1321. Different relief claimed—English suit for restitution of conjugal rights—Suit in foreign country for divorce.]—The wife of an officer in the Indian army stationed at Bombay went over to England with his approbation, & within two months he commenced proceedings in the Bombay ct. for dissolution of the marriage on the ground of adultery alleged to have been committed by her in India. The petition was served on her in England, & two days afterwards she commenced

Fac. Coll. 56.—SCOT.

s. — Scottish suit to obtain diligence—English action for debt—Scottish suit not stayed.]—During pendency of a suit in England for a debt against parties domiciled in England but having estates in Scotland, an action was raised in Scotland, by the same person who was pltf. in the English proceedings against the same parties & for the same debt:—*Held*: the action was competent, pursuer judicially stating that it was only intended to insist in it for the purpose of obtaining diligence on the dependence against the property in Scotland & not to have the merits of the claim discussed.—HAWKINS v. WEDDERBURN (1842), 4 Dunl. (Ct. of Sess.) 924; 14 So. Jur. 336.—SCOT.

t. — English suit to set aside previous orders & proceedings—Scottish suit not stayed.]—A party, heir of entail of Scottish estates & beneficiary under an English will, had instituted a suit in England with the view of setting aside certain previous proceedings & orders. The subject matter of the suit consisted partly of landed estate situate in Scotland in which the trust funds had

a suit for restitution of conjugal rights against her husband, who was then in England on short leave, & was to start for Bombay within a fortnight:—*Held*: the proceedings in the wife's suit ought not to be stayed till after the determination of the proceedings in the husband's suit at Bombay.—*THORNTON v. THORNTON* (1886), 11 P. D. 176; 55 L. J. P. 40; 54 L. T. 774; 34 W. R. 509, C. A.

Annotations:—*Consd. & Expld. Re Norton's Settlmt., Norton v. Norton*, [1908] 1 Ch. 471. *Consd. Cohen v. Rothfield*, [1919] 1 K. B. 410. *Reid. Armytage v. Armytage*, [1898] P. 178; *Keyes v. Keyes & Gray*, [1921] P. 204. *Mentd. Rayment v. Rayment & Stuart, Chapman v. Chapman & Buist*, [1910] P. 271.

1322. — English suit for judicial separation—*Suit in foreign country for divorce.*—*VON ECKHARDSTEIN (BARONESS) v. VON ECKHARDSTEIN (BARON)*, No. 920, *ante*.

1323. — English action for account of agency dealings between two firms—*Action in foreign country for partnership accounts.*—*B.*, of London, & *M. & C.*, of Honduras, carried on business in partnership at Honduras as *G. & Co.* *B. & N.* carried on business in partnership in London under same name. The Honduras firm employed the London firm as their agents under an agreement by which *B.*'s share in the profits of the Honduras firm was to be brought into account as between the two firms to the credit of the English firm. The Honduras partnership was dissolved, & *B.* obtained a decree in Honduras for taking the partnership accounts. Before those accounts had been fully taken, *M. & C.* brought this action in England against the London firm for an account of the dealings between the two firms, alleging debts to have made improper profits in their agency. Defts. denied having made improper profits, & by counterclaim asked to have the accounts of the Honduras firm taken:—*Held*: though, if *M. & C.* had not brought this action, *B.* would not, after obtaining a decree in Honduras, have been allowed to carry on another action here for same purpose, still as the two actions were so closely connected that neither of them could be finally wound up independently of the other, *B.* ought not to be prevented from proceeding with his counterclaim so as to be in a position to ask at the trial of this action for such a decree as might be right, having regard to the then position of the Honduras action.—*MUTRIE v. BINNEY* (1887), 35 Ch. D. 614; 56 L. T. 455; 36 W. R. 131; 3 T. L. R. 534, C. A.

1324. Different parties—English action by agent against insurers on policies—*Action abroad against agent for account.*—Pltfs. had effected policies on ships by defts., their agents, & had instituted a suit at Genoa against defts., for an account of these policies. This suit was proceeding there, but before final decree, defts. brought actions here against the insurers, on the policies where losses had resulted:—*Held*: pltfs. could file their bill to restrain these actions, & to have a receiver appointed to get in the policy money, pending the litigation in the foreign ct.—*TRANSATLANTIC CO.*

been invested; before the English suit had made material progress the same party brought an action of reduction in Scotland against debt. in the English suit, formally to have the English proceedings reduced, but really for the purpose of using diligence on the dependence in reference to the Scottish landed estate:—*Held*: no objection lay to the action being proceeded with to the effect of diligence being used against the Scottish landed estate.—*FORDYCE v. BRIDGES* (1842), 4 Dunl. (Ct. of Sess.) 1334; 14 Sc. Jur. 447.—*SCOT.*

u. — Scottish action for security

& account—English action for account—*Scottish suit stayed as to account.*—*MUNRO v. GRAHAM* (1839), 1 Dunl. (Ct. of Sess.) 1151; 35 Fac. Coll. 1168.—*SCOT.*

w. — Scottish suit for accounting for certain assets—*General English action for account pending—Scottish action not stayed.*—*RANKEN v. STEWART* (1840), 2 Dunl. (Ct. of Sess.) 717; 36 Fac. Coll. 745.—*SCOT.*

y. Action on foreign judgment—*Proceedings pending in foreign court to set aside judgment.*—Pltf. sought to enforce in Man. two judgments obtained in Ont. against defts., one of which

v. PIETRONI (1860), John. 604; 2 L. T. 726; 6 Jur. N. S. 532; 70 E. R. 561.

Annotation:—*Reid. Dreyfus v. Peruvian Guano Co.* (1889), 41 Ch. D. 151.

1325. — Plaintiff in England not plaintiff abroad—*Action abroad to have will pronounced against.*—*In the Goods of BRYAN, BOARD OF EDUCATION v. REUBELL, HAND INTERVENING* (1904), 20 T. L. R. 290.

1326. Different questions of law—As to domicile of testator—*Probate actions.*—*A.*, a native of France, having lived in England for many years, died, leaving a will executed according to the English law, in which he appointed *B.* sole extrix. She propounded the will, & *C.*, the brother of testator, entered a caveat & filed pleas in which he treated the will as that of a domiciled Englishman. He afterwards filed a bill in Ch. to restrain pltf. from intermeddling in the affairs of deceased, in which he showed that he was aware of the facts on which he now relied, as showing testator to be a domiciled Frenchman. He afterwards instituted a suit in France to set aside the will, on the ground that testator was a domiciled Frenchman, & eight months after the Ch. proceedings, moved the ct. here to stay proceedings, on the ground that the questions were the same in both cts., & if the ct. would not stay proceedings, then he moved to amend his pleas by adding one to the effect that testator was a domiciled Frenchman:—*Held*: the questions were not the same in both cts., for in England the assumption was that testator was a domiciled Englishman, & in France that he was a domiciled Frenchman.—*DUPREZ v. VERET* (1868), L. R. 1 P. & D. 583; 38 L. J. P. & M. 5; 19 L. T. 525; 33 J. P. 118; 17 W. R. 157.

1327. Differences in procedure—*Defendants bound to answer interrogatories in English suit.*—*A.*, an Englishman domiciled in France, entered into a contract in France with *B.*, a Frenchman, for carrying out jointly certain mercantile undertakings. In the course of the transactions large sums of money came into the hands of *C. & D.*, foreign merchants in business in London. *A.* filed a bill against *B.*, *C. & D.*, alleging that, under the contract with *B.* he was entitled to participate in the profits of the undertaking, & praying for an account from *C. & D.* of the money in their hands, & that they might be restrained from handing it over to *B.* Defts. moved to stay all further proceedings in the suit pending certain proceedings in the French cts. instituted by *A.* against *B.*, in which a construction would be put upon the French contract:—*Held*: there being portions of the relief sought as to which defts. were bound to answer, the motion, could not be sustained & must be refused with costs.—*WILSON v. FERRAND* (1871), L. R. 13 Eq. 362; 26 L. T. 387.

Annotation:—*Reid. McHenry v. Lewis* (1882), 21 Ch. D. 202.

1328. Different subject-matter—*Action for delivery of two cargoes—Of different amounts.*—An action was brought in this ct. by an English co.

had been entered by consent. Defts. at the same time were proceeding in Ont. to set aside the judgment. Defts. were acting in good faith in their proceedings, their expenses would be very great, & would be duplicated if the action in Man. proceeded. Defts. applied for a stay of proceedings until determination of the litigation in Ont.:—*Held*: the proceedings should be stayed upon terms, securing as far as possible pltf.'s claim, & upon defts. agreeing to abide by the result of the Ont. litigation.—*CHARLEBOIS v. G. N. W. C. RY. CO.* (1893), 9 Man. L. R. 286.—*CAN.*

Sect. 5. Stay of proceedings—lis alibi pendens:
1, B. & C.; sub-sect. 2, A.

against a firm of French merchants for the delivery of the cargoes of certain ships, or in the alternative for damages, & for an injunction & receiver. At the commencement of the action the ships were in British waters, but they had since been removed by the direction of defts. to ports in France, & the cargoes had been taken possession of by defts. Proceedings had been instituted by plffs. in a French ct. for recovery of the cargoes. The English action comprised a claim for the cargo of one ship which was not claimed in the French action. Defts. moved that plffs. might be ordered to elect whether they would proceed with the English action or with the French proceedings:—*Held*: the motion must be refused.—*PERUVIAN GUANO CO. v. BOCKWOLDT* (1883), 23 Ch. D. 225; 52 L. J. Ch. 714; 48 L. T. 7; 31 W. R. 851; 5 Asp. M. L. C. 29, C. A.

Annotations:—*Appld.* *Hyma v. Helm* (1883), 24 Ch. D. 531; *The Christiansborg* (1885), 10 P. D. 141. *Consd.* *Mutrie v. Binney* (1887), 35 Ch. D. 614; *Armstrong v. Armstrong*, [1892] P. 98; *Logan v. Bank of Scotland*, [1906] 1 K. B. 141; *The Hagen*, [1908] P. 189.

1329. Order by English court without knowledge of order already made by colonial court—Power to set aside—Or stay execution under.]—*NAVAL, MILITARY, & CIVIL SERVICE CO-OPERATIVE SOCIETY OF SOUTH AFRICA, LTD. v. SERVICES, LTD.* (1906), 51 Sol. Jo. 13.

C. Where Decree or Judgment obtained in foreign Suit.

Foreign judgments generally.]—See Part XIV., ante.

1330. Decree or judgment must do justice to suit—& cover whole subject.]—Before this ct. interposes upon an interlocutory application to stay proceedings, in a suit by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice & covers the whole subject of the suit.—*OSTELL v. LE PAGE* (1852), 2 De G. M. & G. 892; 42 E. R. 1121, L. J.

Annotations:—*Consd.* *Wilson v. Ferrand* (1871), L. R. 13 Eq. 362. *Refd.* *Re Henderson, Nouvion v. Freeman* (1887), 35 Ch. D. 704; *Mutrie v. Binney* (1887), 35 Ch. D. 614.

SUB-SECT. 2.—RESTRAINT OF FOREIGN PROCEEDINGS.

A. Where no Suit instituted.

1331. Jurisdiction of court to restrain.]—*LOVE v. BAKER* (1665), 1 Cas. in Ch. 67; Nels. 103; 22 E. R. 698; *sub nom.* *LOWE v. BAKER*, *Freem. Ch.* 125, L. C.

Annotation:—*Consd.* & *N.F.* *Portarlington v. Soulby* (1834), 3 My. & K. 104.

1332. — Action on bill given for gaming debt—In Ireland.]—Plff. accepted a bill of exchange payable to A., by whom it was indorsed & passed

away to B. & by him to defts. The bill was given for a gambling debt:—*Held*: an injunction should be granted to restrain defts. from suing upon it in Ireland.—*PORTARLINGTON (LORD) v. SOULBY* (1834), 3 My. & K. 104; 40 E. R. 40, L. C.

Annotations:—*Consd.* *Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416; *Pena Copper Mines v. Rio Tinto Co.* (1911), 105 L. T. 846. *Refd.* *MacLaren v. Stainton, MacLaren v. Carron Co.* (1855), 26 L. J. Ch. 332.

1333. Grounds for restraint—Not that rights of third party disregarded by foreign law.]—*LIVERPOOL MARINE CREDIT CO. v. HUNTER*, No. 1144, *ante*.

1334. — Not mere hardship & inconvenience.]—The cts. in England will not, unless there is equity to justify them in so doing, interfere to restrain, by injunction, proceedings taken in a foreign ct. Mere hardship or inconvenience is not sufficient to justify such interference.—*FLETCHER v. RODGERS* (1878), 27 W. R. 97, C. A.

B. During Pendency of Suit.

1335. General rule—Discretion of court in exercising jurisdiction.]—The House of Lords had dissolved an injunction, granted by the Master of the Rolls, to restrain a Scottish co., having agents & property within the jurisdiction, from proceeding in the Ct. of Session in Scotland to recover a debt against the estate of a testator, who had died, domiciled in England, but leaving assets in England & Scotland, which were being administered in a suit in this country, to which the co. was not made a party. The exors. afterwards instituted another suit in this country, against the co., for an account of all dealings between the co. & testator, & then applied for a similar injunction in both suits:—*Held*: an injunction must be refused, with costs, on the ground that the question was concluded by the judgment of the House of Lords.

Semble: there must be a very strong case to induce the ct. to restrain a foreigner, domiciled in another country, from proceeding to obtain payment of debts according to the law of the country in which he is domiciled.—*MACLAREN v. STANTON, MACLAREN v. CARRON CO.* (1855), 26 L. J. Ch. 332; 26 L. T. O. S. 191; 2 Jur. N. S. 49, L. C. & L. J. J.; *affg.* *S. C. sub nom.* *STANTON v. CARRON CO.*, 21 Beav. 152.

1336. — Balance of convenience.]—When a foreigner has appeared to an action in an English ct., he gives jurisdiction to the English ct. to restrain him from proceeding to litigate the same subject matter in the cts. of his own country, but it is a matter of discretion, & the ct. ought only to exercise this jurisdiction to prevent double vexation.

The validity of a will made in Italy, in 1872, by an Englishwoman who had married an Italian, & was domiciled in Italy at the time of her death, was in question. An action was pending in England between deceased's brother, who, as plff., sought to prove a will made in England in 1865, & her husband, who, as deft., sought to establish

PART XVI. SECT. 5, SUB-SECT. 1.—C.

z. Receivers appointed by foreign court—Company incorporated & carrying on business abroad—Attachment of property in Nova Scotia.]—Deft. co. was incorporated in New Jersey & never carried on business in Nova Scotia by itself or any agent. Proceedings were taken by plffs. at Halifax against defts. as absent or absconding debtors to recover for goods supplied in Halifax, & certain property was attached as the property of the co. The day before these proceedings were commenced, an order was made by the Ch. Ct. of New Jersey against deft. co.,

in a suit brought in that ct., appointing receivers of deft. co. with full power to take possession of all the property of the co.:—*Held*: setting aside the attachment & return, that by the proceedings in that ct. of New Jersey all the property of the co. had become vested in the receivers, & could not thereafter be attached as the property of the co.—*PICKFORD v. ATLANTIC TRANSPORTATION CO.* (1889), 40 N. S. R. 237.—*CAN.*

a. — Contract made in England—Property passing from foreign jurisdiction to Quebec—Not attachable in Quebec.]—*BARKER v. CENTRAL VERMONT RY.*

Co. (1898), Q. R. 13 S. C. 2.—*CAN.*

PART XVI. SECT. 5, SUB-SECT. 2.—B.

b. General rule—One provincial court in Canada not empowered to restrain proceedings in another.]—*HALIFAX BANKING CO. v. DOMINION SALVAGE & WRECKING CO.* (1885), 6 R. & G. 364; 6 C. L. T. 490.—*CAN.*

c. Different relief claimed—Scottish suit for declaration of Canadian domicile of testator & right to succession according to Canadian law—Canadian suit to realise estate in Canada—Canadian suit restrained.]—*YOUNG v. BARCLAY* (1846), 8 Dunl. (Ct. of Sess.) 774; 18 Sc. Jur. 427.—*SCOT.*

the will made in 1872. The husband then commenced litigation in the Italian cts. to obtain a declaration as to the validity of the will of 1872. All the witnesses as to the validity of the will were in Italy; but the property to be affected by it was all in England:—*Held*: the ct., in the exercise of its discretion, would not restrain deft. from proceeding with his litigation in Italy.—*DAWKINS v. SIMONETTI* (1880), 50 L. J. P. 30; 44 L. T. 266; 29 W. R. 228, C. A.

1837. — Bonâ fide action in court of concurrent jurisdiction not restrained—Scottish Court of Session.—The Ct. of Ch., though it has jurisdiction, will not of necessity grant an injunction to restrain proceedings in the Ct. of Session in Scotland, a ct. of competent jurisdiction.—*KENNEDY v. CASSILLIS (EARL)* (1818), 2 Swan. 313; 36 E. R. 635, L. C.

Annotations:—*Consd.* *Carron Iron Co. v. Maclaren* (1855), 5 H. L. Cas. 416; *Bute v. Stuart* (1861), 2 Giff. 582. *Refd.* *Martin v. Nicolls* (1830), 3 Sim. 458.

1838. — — — — —.—Whether a ct. having ample authority to decide the matter brought before it, should await the expected adjudication of another tribunal having only similar authority, is merely a question for the exercise of judicial discretion. If there be any want of power in the ct. it may be well that the proceedings should be stayed in order that some other ct. which has the requisite power may adjudicate.

I am far from saying that there might not be cases in which a proceeding in a foreign ct. might be regarded as a satisfactory way of ascertaining the legal rights of parties; & the Scottish cts. might very properly desire to ascertain the result of the foreign proceeding before determining the claim brought before themselves. But I can hardly conceive a greater miscarriage of justice than it would be, after a suit had been fought out to the end, if your Lordships were now to turn round upon a point of discretion & say the Ct. of Session must take into consideration what has been done in the English suit. There was no lack of materials in Scotland for the necessary purposes of justice (LORD SELBORNE).—*PHOSPHATE SEWAGE CO. v. MOLLESON* (1876), 1 App. Cas. 780, H. L.; *subsequent proceedings* (1879), 4 App. Cas. 801, H. L.

Annotation:—*Distd.* *Re Low, Bland v. Low*, [1894] 1 Ch. 147.

1839. — Restrained if conducive to justice—Full justice unable to be done in foreign court.—Pltf., A., a domiciled Scotsman, through his stock-brokers in England, had various transactions for the feigned purchase & sale of shares & stock in railway & other cos., it was never intended that they should be completed by delivery of the stock, being merely time-bargains, a gambling for differences between the prices at which the shares or stock were nominally purchased & sold. The brokers obtained from A. a deposit of certain shares as security for any balance which might be due to them, & also stipulated for a bond or judge's order both in England & Scotland as a further security. Defts. rendered an account, & then sold the deposited shares, but as the proceeds did not discharge the balance due to them, they brought an action against pltf. in the Sheriff's Ct. in Scotland for the balance, & arrested his goods there, & a commission was issued for the purpose of taking evidence in England. A. then filed his bill in England, asking discovery & for an account, & an injunction to restrain defts. from proceeding with the action in Scotland, at the same time offering to pay what was due, & submitting all his property in Scotland, subject to the arrestments, to the jurisdiction of this ct.:—*Held*: (1) the

illegality of the transaction could not be then considered, & it was no ground for stopping the proceedings in a foreign ct.; (2) from the allegation that evidence of the transactions could not, by the law of Scotland, be received in the Sheriff's Ct. from pltf. & defts., there was ground to suppose that complete justice could not be done there.—*AINSLIE v. SIMS* (1854), 23 L. J. Ch. 161; 21 L. T. O. S. 163.

1840. — — — — —.—If the circumstances of a case are such as would make it the duty of one ct. in this country to restrain a party from instituting proceedings in another ct. here, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign ct. The fact of a foreigner having property in this country, enables the ct. here to make effectual an injunction issued to him; but, especially in the case of a foreigner who seeks no assistance from the cts. here, the issuing of such injunction ought clearly to be shown to be required as conducive to justice. Where there is a plain equity in favour of an injunction, & the representatives of the real & personal property, who seek it are in this country, the ct. will grant it, & restrain proceedings in the cts. of a foreign country. In such a case the ct. will decide upon the consideration of all the circumstances, & require parties here to take or omit such steps in a foreign ct. as the ends of justice may require. The particular provisions of the foreign law applicable to a transaction, proceedings as to which in a foreign ct. are thus restrained, must not be disregarded.

A co. was chartered in Scotland for the manufacture of iron. Its manufactory & chief office of management were there; it had agents for the sale of the goods in different parts of Scotland & England, & it possessed real estate in both countries. A., a large shareholder in the co., & possessed of real & personal property in England & Scotland, was the co.'s agent for the sale of goods in London & was domiciled here. When he died, he left a will in English form, & appointed as his exors. persons who were resident in both countries; his heir was one of the persons, & was also the person who succeeded him in the London agency for the co. Probate of the will was taken out in England, & such of the exors. as thought fit to apply to the Scottish ct. were according to the Scottish law confirmed in the execution of the will. An administration suit was instituted in the Ct. of Ch., & the usual order for a general account of the debts & assets made. After this order the co. took proceedings in the Scottish cts. against the real & personal estate of testator in Scotland. Notice of an injunction at the suit of the exors. was served on the co.'s agent in London, & on the co.'s manager in Scotland; the co. did not appear, & the injunction was issued. The co. then moved to dissolve the injunction. No order was made:—*Held*: the injunction could not be maintained.—*CARRON IRON CO. v. MACLAREN* (1855), 5 H. L. Cas. 416; 24 L. J. Ch. 620; 26 L. T. O. S. 42; 3 W. R. 597; 10 E. R. 961, H. L.; *revsq.* *S. C. sub nom. MACLAREN v. STANTON* (1852), 16 Beav. 279.

Annotations:—*Consd.* *Pennell v. Roy* (1853), 22 L. J. Ch. 409. *Distd.* *Venning v. Loyd* (1859), 1 De G. F. & J. 193. *Consd.* *Newby v. Colt's Patent Firearms Co.* (1872), L. R. 7 Q. B. 293. *Fold.* *Re Boyse, Crofton v. Crofton* (1880), 15 Ch. D. 591. *Consd.* *McHenry v. Lewis* (1882), 22 Ch. D. 397; *Pena Copper Mines v. Rio Tinto Co.* (1911), 105 L. T. 846. *Refd.* *Ewing v. Orr Ewing* (1885), 10 App. Cas. 460, n. *Mentd.* *Walker v. Brooks* (1856), 4 W. R. 347; *Mauder v. Lloyd* (1862), 2 John. & H. 718; *Hyman v. Holm* (1883), 24 Ch. D. 531; *Nutter v. Messageries Maritimes de France* (1885), 54 L. J. Q. B. 527; *Haggin v. Comptoir D'Escompte de Paris, Mason & Barry v. Comptoir D'Escompte de Paris* (1889), 23 Q. B. D. 519; *La Bourgogne*, [1899] P. 1; *De Beers Consolidated Mines v.*

**Sect. 5.—Stay of proceedings—*lis alibi pendens*:
Sub-sect. 2, B. & C.]**

Howe, [1905] 2 K. B. 612; Saccharin Corp'n. v. Chemische Fabrik von Heyden Akt., [1911] 2 K. B. 516; Okura v. Forsbacka Jernverks Akt., [1914] 1 K. B. 715.

1841. — Not restrained on ground of illegality.]

—**AINSLIE v. SIMS**, No. 1339, *ante*.

1842. — Not restrained unless action vexatious—Burden of proof.]—B., resident in San Francisco, brought an action against C. in England alleging that C. had been B.'s agent to purchase for him goods in England, that B. had recently discovered that C. had, in the accounts rendered, charged more for the goods than he had paid for them, & asking for an account against C. as agent. C., by his defence denied agency, alleged that he had as principal sold the goods to B., insisted on the accounts rendered as settled accounts, & alleged that a large balance was due. C. then commenced an action in San Francisco against B. to recover the amount which he so alleged to be due. B. moved to restrain this action:—**Held**: the action ought not to be restrained, for that there was no *prima facie* inference that the bringing the action abroad, during the pendency of an action in England in which the matters in dispute could be determined, was vexatious, since the course of procedure in San Francisco might be such as to give advantages to C. of which he was entitled to avail himself, & the burden lay on B. to prove that C.'s action was vexatious, which he had failed to do.—**HYMAN v. HELM** (1883), 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258, C. A.

Annotations:—**Consd.** *Mutrie v. Binney* (1887), 35 Ch. D. 614; *Re Connolly, Wood v. Connolly*, [1911] 1 Ch. 731. **Refd.** *Logan v. Bank of Scotland*, [1906] 1 K. B. 141; *Vardopulo v. Vardopulo* (1909), 25 T. L. R. 518; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Cohen v. Rothfield*, [1919] 1 K. B. 410.

1843. — — — — —.]—**COHEN v. ROTHFIELD**, No. 1315, *ante*.

1844. — Injurious to proper trial of cause.]—**ARMSTRONG v. ARMSTRONG**, [1892] P. 98; 61 L. J. P. 63; 66 L. T. 384; 8 T. L. R. 339.

Annotation:—**Refd.** *Moore v. Moore* (1895), 12 T. L. R. 111.

1845. Similar relief claimed—Ultimate consequences different—Finality of English decision—Scottish action restrained.]—**BUSHBY v. MUNDAY** (1821), 5 Madd. 297; 56 E. R. 908.

Annotations:—**Consd.** *Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416; *Venning v. Loyd* (1859), 1 De G. F. & J. 193; *Re Connolly, Wood v. Connolly*, [1911] 1 Ch. 731; *Cohen v. Rothfield*, [1919] 1 K. B. 410. **Refd.** *Bunbury v. Bunbury* (1839), 8 L. J. Ch. 297; *MacLaren v. Stainton, MacLaren v. Carron Co.* (1855), 26 L. J. Ch. 332; *Hyman v. Helm* (1883), 24 Ch. D. 531; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

1846. Two distinct suits in different courts—For same object.]—The Ct. of Ch. will interfere by injunction to restrain a pltf. from prosecuting two distinct suits in different cts. for same object, either in this or a foreign country, but a pltf. may carry on proceedings in one ct. to establish a demand, & in another ct. to obtain security, which the former ct. is unable to give him, for what should be found due to him.

Pltfs. had obtained a decree for an account in the Ct. of Ch. in England, against defts., some of whom resided in Scotland, & had estates there. Pltfs. then instituted proceedings in the Ct. of Session in Scotland, for the same purposes as the English suit, & also to obtain a lien on the Scottish estates of defts.:—**Held**: an injunction must be granted to restrain pltfs. from proceeding with the suits in the Ct. of Session, except for the purpose of procuring security for what might be found due to them.—**WEDDERBURN v. WEDDERBURN** (1840), 4 My. & Cr. 585; 9 L. J. Ch. 205; 4 Jur. 66, 691; 41 E. R. 225, L. C.

Annotations:—**Consd.** *Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416. **Expld.** *Dawkins v. Simonetti* (1880), 50 L. J. P. 30. **Refd.** *McHenry v. Lewis* (1882), 22 Ch. D. 397.

1847. Different relief claimed—English action for account—Scottish action to obtain security.]—**WEDDERBURN v. WEDDERBURN**, No. 1346, *ante*.

1848. — English action for administration of settlement trusts—Scottish action for construction of settlement.]—An English lady married in England, a domiciled Scotsman, & a settlement in English form was executed. The settled property was wholly in England, & the trustees resided in England. The marriage was subsequently dissolved for the wife's adultery, by the Scottish ct. The effect of such a dissolution, according to Scottish law, is that the person against whom the decree is made is treated as dead for the purposes of the marriage settlement, & the question arose whether Scottish or English law was applicable. The husband brought an action in Scotland, in which the trustees were nominal pltfs., for the construction of the settlement; another action was brought in England by the wife for the administration of the trusts of the settlement:—**Held**: it was more convenient that the questions should be decided in the English action, & the husband & trustees must be restrained from proceeding with the Scottish action.—**HEARN v. GLANVILLE** (1883), 48 L. T. 356.

1849. — Relief sought abroad not obtainable in England.]—**BAIRD v. PRESCOTT & Co., HARDING CLAIMANT** (1890), 6 T. L. R. 231, C. A.

1850. — English suit for judicial separation—Foreign suit for divorce—English matrimonial domicile.]—A wife presented a petition for judicial separation, & the husband thereupon took proceedings in Austria to have the marriage, which had been celebrated in Austria, declared null & void. Neither party had an Austrian domicile:—**Held**: the proceedings in Austria were vexatious, & the husband should be restrained from proceeding with them.—**MOORE v. MOORE** (1896), 12 T. L. R. 221, C. A.

1851. — — — Foreign matrimonial domicile.]—The fact that a married woman has commenced proceedings in this country against her husband for judicial separation does not give the English cts. jurisdiction to restrain the husband from subsequently asserting & prosecuting his right to take proceedings for divorce in a foreign country where he has acquired a domicile.—**WARDOPULO v. WARDOPULO** (1909), 25 T. L. R. 518; 53 Sol. Jo. 469, C. A.

Annotation:—**Refd.** *Cohen v. Rothfield*, [1919] 1 K. B. 410.

1852. — — — Scottish suit for desertion.]—The wife instituted proceedings in England, claiming a judicial separation on the grounds of the husband's alleged cruelty, desertion & adultery. The husband appeared under protest, & filed an act on petition, disputing the jurisdiction. Negotiations were afterwards entered into for a separation to be effected by deed, & after these had been pending for some time the husband commenced proceedings in the Scottish ct., praying for a dissolution of marriage on the ground of alleged malicious desertion for a period of four years:—**Held**: an injunction must be granted restraining the husband from prosecuting the proceedings in Scotland until the act on petition should be heard & determined in this ct., or until further order.—**CHRISTIAN v. CHRISTIAN** (1897), 67 L. J. P. 18; 78 L. T. 86.

Annotation:—**Mentd.** *Armstrong v. Armstrong*, [1898] P. 178.

1853. Administration proceedings in England—Suit abroad for recovery of realty subject to trusts—Rights claimed abroad especially cognisant by

foreign law.]—A suit was commenced to administer the trusts of a will, & to restrain proceedings in a foreign ct. for the recovery of real estate, subjected by testator to the trusts of the will:—*Held*: an injunction must be granted although the rights claimed in the foreign ct. were especially cognisant by the foreign law.—*BUNBURY v. BUNBURY* (1839), 3 Jur. 644, L. C.

Annotations:—*Consd.* *Hope v. Carnegie* (1866), 1 Ch. App. 320. *Expld.* *Jopson v. James* (1908), 77 L. J. Ch. 824. *Refd.* *Re Holmes* (1861), 2 John. & H. 527; *Sichel v. Raphael* (1864), 3 New Rep. 662. *Mentd.* *Oakeley v. Ramsay* (1872), 27 L. T. 745.

1354. — Proceedings against realty & personalty of testator in Scotland—To obtain payment of debt.]—*CARRON IRON CO. v. MACLAREN*, No. 1340, *ante*.

1355. — Proceedings against executors abroad—Restrained on undertaking to obtain English administration decree.]—Testator domiciled in England, but occasionally residing in Scotland, gave the residue of his real & personal estate, the bulk of which was situate in England, to two of his sons, one of whom at the time of testator's death was indebted to an insurance co. carrying on business in England & Scotland. The will was proved in England, & probate recorded in Scotland. The insurance co., having previously obtained judgment in an English ct., instituted proceedings against the exors. in the Ct. of Session to arrest, in their hands, the share of the debtor in testator's residuary estate. One of the exors. filed a bill for administration of the estate in England, & moved for an injunction to restrain the proceedings in Scotland:—*Held*: upon pltf. undertaking to obtain an administration decree forthwith, an injunction could be granted.—*BAILLIE v. BAILLIE* (1867), L. R. 5 Eq. 175; 37 L. J. Ch. 225; 17 L. T. 376; 16 W. R. 272.

— Action abroad to set aside trusts—Valid defences available in English action.]—An action was commenced for administration of the trusts of a deed:—*Held*: an injunction would be granted until trial of the action, restraining deft. from taking proceedings in the American cts. to set aside the trusts, as any valid defence that deft. might have could be raised in the present action.—*HEILMANN v. FALKENSTEIN* (1917), 33 T. L. R. 383.

— Decree obtained in.]—*See* Sub-sect. 2, C., *post*.

1357. Pendency of English suit—No defence in colonial action.]—A suit pending in England is not a good plea in bar to a subsequent suit in the plantations for same matter. Deft. after a decree to account, though called an actor in the suit, yet is not prevented becoming pltf. in another suit for same matter.—*BAYLEY v. EDWARDS* (1792), 3 Swan. 703; 36 E. R. 1029, P. C.

Annotations:—*Consd.* *Mutrie v. Binney* (1887), 35 Ch. D. 614. *Refd.* *Esdaille v. Kynaston* (1836), Donnelly, 52; *Ostell v. Lepage* (1851), 5 De G. & Sm. 95.

1358. Effect of undertaking to stay foreign proceedings—& prosecute claim by counterclaim in

English action—Transfer of foreign action to English court.]—*CALLENDER v. GRANT* (1892), 36 Sol. Jo. 665.

C. Where Decree or Judgment obtained in Suit.

1359. General rule.]—*WEDDERBURN v. WEDDERBURN*, No. 1346, *ante*.

1360. Similar relief claimed—By action in Irish court.]—Trustees for creditors, after a decree for the execution of the trusts were restrained from proceeding in a suit in the Ct. of Ch. in Ireland having same objects.—*HARRISON v. GURNEY* (1821), 2 Jac. & W. 563; 37 E. R. 743, L. C.

Annotation:—*Refd.* *Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416.

1361. — —.]—An injunction was granted to restrain pltf. from prosecuting a suit not brought to a hearing in Ireland, the subject-matter of the suit being same as that of a suit instituted in this ct., & in which this ct. had pronounced a decree, refusing the relief sought by pltf.—*BOOTH v. LEYCESTER* (1837), 1 Keen, 579; 48 E. R. 430; *affd.* (1838), 3 My. & Cr. 459, L. C.

Annotation:—*Consd.* *Wedderburn v. Wedderburn* (1840), 2 Beav. 208.

1362. Decree in administration suit—Irish incumbrancer proving debt—Restrained from proceeding in creditor's suit in Ireland.]—After a decree for the administration of testator's estate in England & Ireland, an incumbrancer upon the Irish estate having come in & proved his debt, was restrained from proceeding in a creditor's suit instituted by him in the Ct. of Ch. in Ireland, on receiving the costs up to the time of his having notice of the decree & paying the costs of the application.—*BEAUCHAMP v. HUNTLEY (MARQUIS), CLARKE v. ORMONDE (EARL)* (1822), Jac. 546; 37 E. R. 956, L. C.

Annotation:—*Consd.* *Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416.

1363. — Creditor commencing proceedings in Scotland without notice of—Restrained on refusal to discontinue after notice.]—(1) A creditor, without notice of a decree in an administration suit, commenced an action in Scotland against the administratrix; afterwards he came in under the decree, but declined to undertake to discontinue his action:—*Held*: he must pay the costs of a motion for an injunction to restrain proceedings at law.

(2) After a decree in an administration suit, it is no ground for allowing a creditor in the first instance to proceed at law to ascertain his claim, that the cause of action arose in Scotland, & the witnesses are resident there, & that questions of Scots law are involved.—*GRAHAM v. MAXWELL* (1849), 1 H. & Tw. 247; 1 Mac. & G. 71; 18 L. J. Ch. 225; 13 Jur. 217; 47 E. R. 1403, L. C.

Annotations:—*As to* (1) *Consd.* *Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416. *Refd.* *Re Low, Bland v. Low*, [1894] 1 Ch. 147. *As to* (2) *Consd.* *Pennell v. Roy* (1853), 22 L. J. Ch. 409.

1364. — Foreign proceedings as to real & personal estate—Restrained as to personalty.]—A British subject, entitled to real & personal estate,

PART XVI. SECT. 5, SUB-SECT. 2.—C.

1362 1. Decrees in administration suits—Instituted in England & Ireland—Executor restrained from proceeding with English suit.]—Two administration suits were instituted, one in the Ct. of Ch. in England, the other in the Ct. of Ch. in Ireland. The former suit was by the exor., who resided in England, the latter by residuary legatees, who were not served with a copy of the English bill. The usual order was made in the Irish suit. The exor. subsequently entered an appearance & obtained a decree to account in the English suit. An order was subse-

quently made in the Irish suit directing that the petition should stand for a charge, & directing the exor. to file a discharge, setting forth accounts; which order was amended later, by directing an account of debts & legacies. The exor. filed a supplemental bill in England, to bind the petitions in the Irish suit by the proceedings in the original suit. The Master in the Irish suit made an order to restrain the exor. from proceeding with the supplemental suit in England:—*Held*: (1) the Ct. of Ch. in Ireland had jurisdiction to restrain the exor. from proceeding with the English suit; (2) the exor., being resident in England,

had a right to protection from the English Court of Ch., against the demands of creditors, which the Ct. of Ch. in Ireland could not give him; (3) the exor. should be restrained from proceeding in the English suit without leave of the Master of the Rolls in England.—*PARNELL v. PARNELL* (1868), 7 I. Ch. R. 322; 10 Ir. Jur. 382.—IR.

d. Decree in Irish suit for divorce—Consent signed by both parties as to alimony—Subsequent foreign proceedings for divorce & maintenance—Restrained as being against terms of consent.]—*LETT v. LETT*, [1906] 1 I. R. 618, 630.—IR.

Sect. 5.—Stay of proceedings—lis alibi pendens:
Sub-sect. 2, C.; sub-sects. 3 & 4.]

both in England & in the Netherlands, died domiciled in England, leaving a will by which he gave to trustees, upon certain trusts, all his property here & abroad; but as to his foreign property so far only as he could dispose of it according to the law of the country where it was situate. A decree was made in England for the administration of his estate. Subsequently, one of his children instituted proceedings in the Netherlands for the administration of both his real & personal estate in that country. An order was made restraining the prosecution of the pending proceedings in the Netherlands, & the taking of any other proceedings there as to the personal estate:—*Held*: (per KNIGHT BRUCE, L.J.) the order ought not to have absolutely restrained applt. from carrying on the pending proceedings in the Netherlands, but ought to have left her at liberty to carry them on as to the real estate, if she could do so without proceedings as to the personal estate; (per TURNER, L.J.) the order ought not to be thus varied, the applt. not having shown that the proceedings could be carried on as regarded the real estate alone.—*HOPE v. CARNEGIE* (1866), 1 Ch. App. 320; 14 L. T. 117; 12 Jur. N. S. 284; 14 W. R. 489, L. JJ.

Annotations:—*Consd.* *Baillie v. Baillie* (1867), L. R. 5 Eq. 175; *Oakeley v. Ramsay* (1872), 27 L. T. 745; *Ewing v. Orr Ewing* (1885), 10 App. Cas. 460, n. *Refd.* *Liverpool Marine Credit Co. v. Hunter* (1867), L. R. 4 Eq. 62.

1365. — Foreign creditor proceeding against administrator in foreign court—Court has no power to restrain.—Although judgment has been given for the administration of an estate, the ct. has no power to restrain a foreign creditor from proceeding in a foreign ct. against the administrator; but if judgment were obtained in the foreign ct. against the administrator by default, it would only be treated in the administration action as *prima facie* evidence of the debt.—*Re BOYSE, CROFTON v. CROFTON* (1880), 15 Ch. D. 591; 49 L. J. Ch. 689; 29 W. R. 169.

Annotation:—*Refd.* *Re Low, Bland v. Low*, [1894] 1 Ch. 147.

SUB-SECT. 3.—BANKRUPTCY AND WINDING UP PROCEEDINGS.

1366. Bankruptcy in England—Scottish heritable bond given by debtor—Proceedings in Scotland by obligees upon summons of ranking & sale—Restrained.—A bond had been given by a party charged upon his real estate in Scotland, who afterwards became bkpt. A suit having been instituted by the assignees against the obligees of the bond, alleging that the instrument was voluntary, & executed in contemplation of bkpcy.:—*Held*: an injunction ought to be granted to restrain proceedings by the obligees upon a summons of ranking & sale in the Ct. of Session in Scotland, until the hearing of the cause.—*JONES v. GEDDES* (1845), 14 Sim. 606; 1 Ph. 724; 60 E. R. 493, L. C.

Annotations:—*Refd.* *Pennell v. Roy* (1853), 3 De G. M. & G. 126; *Carron Iron Co. v. Maclaren* (1855), 5 H. L. Cas. 416; *Chaffers v. Baker* (1855), 3 Eq. Rep. 639. *Mentd.* *Brenan v. Preston* (1853), 20 L. T. O. S. 241.

—**Restraint of proceedings by foreign creditors.**—*See* *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 1008, Nos. 8219–8221.

1367. Bankruptcy abroad—Petition filed in

England subsequently—Business carried on & creditors resident abroad—Petition stayed till completion of foreign proceedings.]—Debtor, being a bkpt. in Hamburg, where the great majority of his creditors resided & where he carried on his business, came over to England, having no property here & only two creditors resident in this country whose debts amounted to £500, whilst his whole indebtedness amounted to about £12,000, & filed his petition here for an adjudication against himself:—*Held*: the prosecution of the bkpcy. would not be proceeded with here until he should have completed his bkpcy. proceedings in Hamburg.—*Re BEHREND* (1865), 12 L. T. 149; 13 W. R. 500.

1368. — After receiver appointed in England—Over property in England—Receiver not discharged.—*MASON & BARRY, LTD. v. LA SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX* (1889), 5 T. L. R. 582, C. A.

See, further, *BANKRUPTCY & INSOLVENCY*, Vols. IV., V.

English colonial & foreign orders of discharge.—*See* *BANKRUPTCY & INSOLVENCY*, Vol. IV., p. 593, Nos. 5425 *et seq.*

1369. Winding-up abroad—No bar to proceedings in England—Two firms with common partners—Business carried on in England & abroad.—*MAUNDER v. LLOYD*, No. 648, *ante*.

1370. Winding-up in England—Foreign action by incumbrancer on immovables situate abroad—Mortgagor company in course of winding-up.—An incumbrancer on immovable property situate in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, will not be restrained by injunction from prosecuting such proceedings, even though the mtgor. is a co. in course of winding up, at all events if the party seeking to restrain him may appear before the foreign tribunal & assert his rights.—*MOOR v. ANGLO-ITALIAN BANK* (1879), 10 Ch. D. 681; 40 L. T. 620; 27 W. R. 652.

1371. — Prior arrestment in Scotland jurisdictionis fundandae causâ—Secured creditor subject to obtaining decree.—Where, prior to the commencement of the winding-up of an English co., a creditor has arrested property of the co. in Scotland *jurisdictionis fundandae causâ*, & has followed this up by bringing an action in Scotland, & making an arrestment on the dependence of the action, he has become, subject to his obtaining a decree in such action, a secured creditor, & will not be restrained from continuing his action. In such a case the judgment or decree draws back to the date of the arrestment on the dependence, & the security thereby obtained applies to the debt subsequently established. If the arrestments are impeached on the ground that they were obtained on a misstatement of facts, this is only a ground for the recall of the process by the Scottish ct., & until so recalled, the English winding up ct. will treat the process as having been validly issued.—*Re WEST CUMBERLAND IRON & STEEL CO.*, [1893] 1 Ch. 713; 62 L. J. Ch. 367; 68 L. T. 751; 41 W. R. 265; 37 Sol. Jo. 213; 3 R. 260.

Annotation:—*Consd.* *Re Derwent Rolling Mills Co.*, York City & County Banking Co. v. Derwent Rolling Mills Co. (1904), 21 T. L. R. 81.

1372. — Jurisdiction of court to restrain foreign proceedings.—The ct. in England, which has made an order for winding up a co., has jurisdiction, under the Companies Act, 1862 (c. 89), s. 87, to

PART XVI. SECT. 5, SUB-SECT. 3.

English bankruptcy proceedings—Scottish action of multiplepoinding raised by creditors in name of one

trustee—Plea of forum non conveniens by other trustee—Scottish action dismissed.—*OKELL v. FODEN* (1884), 11 R. (Ct. of Sess.) 906.—**SCOT.**

1. Winding up abroad—By Court

of Chancery in England—Indian actions against company stayed.—*PEITSCHE v. COMMERCIAL BANKING CORPN.* (1868), 1 Ind. Jur. N. S. 363.—**IND.**

restrain a creditor in Ireland from continuing proceedings in the Irish cts. against the co.—*Re* INTERNATIONAL PULP & PAPER CO. (1876), 3 Ch. D. 594; 45 L. J. Ch. 446; 35 L. T. 229; 24 W. R. 535.

Annotation:—*Folld. Re* North Carolina Estate Co. (1889), 5 T. J. R. 328.

1373. ——— **Proceedings by Irish creditor in Ireland.**—*Re* JENKINS & CO., LTD. (1907), 51 Sol. Jo. 715.

See, further, COMPANIES.

SUB-SECT. 4.—ADMIRALTY ACTIONS.

1374. General rules.—In a cause of collision between two foreign vessels in the Bosphorus with respect to which suits had been instituted in the Ottoman Ct.:—*Held*: if the evidence established that there was a *lis alibi pendens* before a tribunal which could afford pltf. a complete remedy, whether the proceedings were instituted *in rem* or *in personam*, the ct. would suspend proceedings, or put the party to his election as to the ct. to which he would have recourse.—*THE MALI IVO* (1869), L. R. 2 A. & E. 356; 38 L. J. Adm. 34; 20 L. T. 681; 3 Mar. L. C. 244.

Annotations:—*Consd.* *The Christiansborg* (1885), 10 P. D. 141. *Refd.* *The Delta*, *The Erminia Foscolo* (1876), 1 P. D. 393. *Mentd.* *McHenry v. Lewis* (1882), 21 Ch. D. 202.

1375. ——— **Mere *lis alibi pendens* when action instituted in England—No bar to proceeding to judgment in England.**—(1) In an action of collision a judgment of a foreign ct. given in a cause between same parties cannot be pleaded as an estoppel unless such judgment was obtained prior to the institution of the action in this country; there being no *res judicata*, but only *lis alibi pendens*, when pltf. instituted his action here, he can claim to proceed to judgment in this country if he chooses.

(2) *Semble*: a judgment in a foreign ct. against a person not subject to the jurisdiction of that ct. to be an estoppel must be a judgment on the merits, & not merely by default.—*THE DELTA*, *THE ERMINIA FOSCOLO* (1876), 1 P. D. 393; 45 L. J. P. 111; 35 L. T. 376; 25 W. R. 46; 3 Asp. M. L. C. 256.

Annotations:—*As to* (1) *Distd.* *McHenry v. Lewis* (1882), 21 Ch. D. 202. *Generally, Refd.* *Houston v. Sligo* (1885), 29 Ch. D. 448. *Mentd.* *The Challenge & Duc d'Aumale*, [1904] P. 41.

1376. Action in personam in one country—Whether bar to proceeding in rem in another country.—A Scottish steamer ran down an English barque lying in the Humber, & kept out of the jurisdiction of the Ct. of Admty. The owners of the steamer were then sued in Scotland, & the steamer was arrested there, but released on bail, & then sold without notice of the unsatisfied claim. The Scottish suit still pending, she reappeared in England, when she was immediately arrested under an Admty. warrant, & an action for damage entered in the Admty. Ct. here, the cause of action being same, though instructions were immediately sent to abandon the Scottish suit. The owner of the steamer appeared under protest to this Admty. action, pleading *lis alibi pendens* & purchase without notice:—*Held*: the plea of *lis alibi pendens* was bad, as the suit in Scotland was substantially a proceeding *in personam*, while the present was *in rem*.—*HARMER v. BELL*, *THE BOLD BUCCLEUGH* (1852), 7 Moo. P. C. C. 267; 19 L. T. O. S. 235; 13 E. R. 884, P. C.

Annotations:—*Consd.* *Simpson v. Fogo* (1860), 1 John. & H. 18; *Castrique v. Imrie* (1861), 30 L. J. C. P. 177; *The Halley* (1867), L. R. 2 A. & E. 3; *The Charles Amelia*

(1868), L. R. 2 A. & E. 330; *The City of Mecca* (1881), 6 P. D. 106; *Laws v. Smith*, *The Rio Tinto* (1884), 9 App. Cas. 356; *The Christiansborg* (1885), 10 P. D. 141. *Apprvd.* *Currie v. M'Knight*, [1897] A. C. 97. *Refd.* *Cammell v. Sewell* (1860), 6 Jur. N. S. 918; *Liverpool Bank v. Fogg* (1860), 2 L. T. 594; *Tatham v. Andree* (1863), 1 Moo. P. C. C. N. S. 386; *The Ella A. Clark* (1863), Brown. & Lush. 32; *The Mali Ivo* (1869), L. R. 2 A. & E. 356; *The Parlement Belge* (1880), 5 P. D. 197; *Northcote v. The Heinrich Björn*, *The Heinrich Björn* (1886), 11 App. Cas. 270; *The Heinrich Björn* (1886), 2 T. L. R. 498; *The Africano*, [1894] P. 141; *The Marie Glaeser*, [1914] P. 218. *Mentd.* *Place v. Potts* (1853), 21 L. T. O. S. 130; *Harris v. Willis* (1855), 3 C. L. R. 609; *The Bengal*, *The John & Mary* (1859), 5 Jur. N. S. 1085; *Dean v. Richards*, *The Europa* (1863), 2 Moo. P. C. C. N. S. 1; *Nelson v. Couch* (1863), 15 C. B. N. S. 99; *The Mary Ann* (1865), L. R. 1 A. & E. 8; *The Perona* (1868), L. R. 2 A. & E. 65; *The Northumbria* (1869), 39 L. J. Adm. 3; *The St. Olaf* (1869), L. R. 2 A. & E. 360; *The Two Ellens* (1871), L. R. 3 A. & E. 345; *Stoomvaart Naast-chappy Nederland v. Peninsular & Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795; *The Fairport* (1882), 8 P. D. 48; *The Tasmania* (1888), 13 P. D. 110; *The Dictator*, [1892] P. 304; *The Ripon City*, [1897] P. 226; *The Veritas*, [1901] P. 304; *The Burns*, [1907] P. 137.

See, also, Nos. 1190, 1195, *ante*.

1377. ——— **A seaman instituted a personal action for wages against the master of a ship in Canada:—Held**: as he had not taken the proper steps to discontinue the action, this might be pleaded as a bar to proceeding in a suit *in rem* for wages before the Ct. of Admty.—*THE LANARKSHIRE* (1855), 2 Ecc. & Ad. 189; 11 L. T. 113; 1 Jur. N. S. 431; 164 E. R. 380.

Annotations:—*Refd.* *The Mali Ivo* (1869), L. R. 2 A. & E. 356. *Mentd.* *Walsh v. Lincoln* (1874), L. R. 4 A. & E. 242.

1378. ——— **Whether stayed pending proceedings in rem in another country.**—In an action of damage *in personam* by the owners of the ship G. against the owners of the ship P. it appeared that a cause of damage *in rem* relating to same collision had, prior to these proceedings, been instituted by the owners of the P. against the G. in a Vice-Admty. Ct. abroad, & was then pending:—*Held*: these proceedings must be stayed until after the hearing of the cause in the Vice-Admty. Ct. abroad.—*THE PESHAWUR* (1883), 8 P. D. 32; 52 L. J. P. 30; 48 L. T. 796; 31 W. R. 660; 5 Asp. M. L. C. 89.

Annotation:—*Consd.* *The Christiansborg* (1885), 10 P. D. 141.

1379. Actions in rem in different countries—Whether proceedings stayed—Arrest & release on bail in one action—Arrest in other action.—A collision occurred on the high seas between the W. & the C., & to recover for the damage sustained therein the owner of the W. instituted a cause of damage *in rem* in the High Ct. of Admty. of Ireland against the C., & caused her to be arrested in Ireland. The owners of the C. obtained release of the vessel on bail, & instituted a cross-suit against the W. Subsequently the C. came to England, & was there arrested in an admty. action *in rem* at the suit of the owner of the W., who claimed in such action to recover damages in respect of the collision. Whilst the proceedings in Ireland were still pending, the owners of the C. applied that the action in this ct. should be dismissed:—*Held*: the vessel should be released, & all proceedings in the action stayed.—*THE CATERINA CHIAZZARE* (1876), 1 P. D. 368; 45 L. J. P. 105; 34 L. T. 588; 3 Asp. M. L. C. 170.

Annotations:—*Distd.* *McHenry v. Lewis* (1882), 21 Ch. D. 202. *Consd.* *The Christiansborg* (1885), 10 P. D. 141. *Refd.* *The Delta*, *The Erminia Foscolo* (1876), 1 P. D. 393; *The Mannheim*, [1897] P. 13.

1380. ——— **Guarantee in lieu of bail in one action—Arrest in other action.**—Pltfs., the owners of the German vessel J., commenced an action *in rem* against the Danish vessel C. in an admty. ct. in Holland, in respect of a collision on the high seas, & the C. was arrested in this action. Pltfs.'

Sect. 5.—Stay of proceedings—lis alibi pendens:

agent in Holland & the Dutch ct. allowed the C. to be released on the underwriters of the C. giving a guarantee for the compensation which the C. might eventually have to pay by legal decision in Holland. While these proceedings were pending in Holland, pl'tfs. began an action *in rem* in England in respect of the collision, & the C. was arrested in the English action. On a motion by defts. for release of the C.:—*Held*: though it was not *prima facie* oppressive to institute an action in a foreign & in an English ct. in respect of the same collision, it would be oppressive if bail were given in both cts., but in this case the guarantee not being equivalent to bail, pl'tfs. had not so good a remedy in Holland as in England, & were entitled to bring an action in the English Admlty. Ct.—*THE CHRISTIANSBORG* (1885), 10 P. D. 141; 54 L. J. P. 84; 53 L. T. 612; 1 T. L. R. 634; 5 Asp. M. L. C. 491, C. A.

Annotations:—*Consd.* *The Reinbeck* (1889), 60 L. T. 209; *The Jasep* (1896), 12 T. L. R. 434. *Distd.* *The Mannheim*, [1897] P. 13. *Refd.* *Mutrie v. Binney* (1887), 35 Ch. D. 614; *In the Goods of Bryan*, Board of Education v. Reubell, Hand Intervening (1903), 20 T. L. R. 290; *The Hagen*, [1908] P. 189. *Mentd.* *The Dictator*, [1892] P. 304; *The Gemma*, [1899] P. 285.

1381. ————.]—*THE JASEP* (1896), 12 T. L. R. 434, C. A.

Annotation:—*Refd.* *The Mannheim*, [1897] P. 13.

1382. ———— Bail without security in one action—Arrest in other action.]—The owners of the British ship R. & the owners of her cargo sued the German steamship P. in a German Consular Ct. at C. for damages for injury to the cargo caused by collision between the two vessels. An order was made therein for the arrest of the P., or for bail, subject to pl'tfs. giving security. The action was proceeded with, but pl'tfs. never gave the required security, & consequently the P. was never arrested. The P. left C. during the pendency of the action & came to England, where she was arrested in the present action *in rem* instituted by the owners of cargo in respect of same cause of action. Previously to the institution of the present action defts. had given bail in the action at C., although pl'tfs. in that action had never given the required security. The limit of defts.' liability in the German Consular Ct. was the value of the R., a sum considerably less than the limit of their liability in this country. Upon motion by defts. to release the R. without giving bail, or to stay the action:—*Held*: bail having been given without pl'tfs. having deposited the required security, was given voluntarily & not under compulsion, & pl'tfs. were not proceeding vexatiously in instituting a second action in this country, & the ship ought not to be released.—*THE REINBECK* (1889), 60 L. T. 209; 6 Asp. M. L. C. 366, C. A.

Annotation:—*Refd.* *The Mannheim*, [1897] P. 13.

1383. No legal proceedings instituted in foreign court—Mere guarantee to put in bail to answer foreign judgment—No ground for release of ship arrested in English action.]—The fact that defts. have given a guarantee abroad to put in bail to answer the judgment of a foreign ct. in a case of collision is not a ground for ordering the release of their ship from an arrest in an action commenced in this country, where no legal proceedings have been instituted in the foreign ct.—*THE MANNHEIM*, [1897] P. 13; 66 L. J. P. 6; 75 L. T. 424; 13 T. L. R. 56; 8 Asp. M. L. C. 210.

Annotations:—*Consd.* *The Hagen*, [1908] P. 189. *Refd.* *In the Goods of Bryan*, Board of Education v. Reubell, Hand Intervening (1903), 20 T. L. R. 290.

1384. Action by mortgagee in England for declaratory judgment—Ship arrested abroad by

creditors of mortgagor.]—On default being made under a mtge. of a British ship, the mtgees., pl'tfs., took possession & chartered her to a port in France, where she & her freight were arrested by defts., British subjects, who claimed for necessities supplied to the ship, & in respect of which they had rendered executory in France a judgment obtained by default in England. The mtgees. intervened in the proceedings in France, & also commenced separate actions against them & against the mtgors. asking for judgment, declaring that they, as mtgees. in possession, were entitled to the ship & her freight in priority to the mtgors. & to defts. claiming for necessities:—*Held*: the action against defts., who claimed for necessities, was not vexatious, & ought not to be stayed, but the action against the mtgors. ought to be stayed.—*THE MANAR*, [1903] P. 95; 72 L. J. P. 41; 89 L. T. 26; 51 W. R. 687; 9 Asp. M. L. C. 420.

Annotation:—*Refd.* *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

SECT. 6.—LIMITATION OF ACTIONS.

SUB-SECT. 1.—IMMOVABLES.

1385. Governed by *lex situs*—Law converting seven years possession into absolute title—No exception in favour of absentees—Possession for nineteen years—Remedy barred.]—The effect of Stat. Limitations, or possessory law, of Jamaica, beyond Stat. Limitations in this country, is to bar not merely the legal remedy, but any suit, claim or demand, & to convert seven years possession into a positive & absolute title. There is no exception in favour of absentees, they not being within the exception expressed, in the same way as there was no such exception out of Stat. Limitations in this country, until expressly given by 4 Anne, c. 16, s. 19.—*BECKFORD v. WADE* (1805), 17 Ves. 87; 34 E. R. 34, P. C.

Annotations:—*Refd.* *A.-G. v. Murdoch* (1852), 1 De G. M. & G. 86; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *Taylor v. Davies*, [1920] A. C. 636. *Mentd.* *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *A.-G. v. Aspinall* (1837), 1 Jur. 812; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41; *Re Manchester Gas Act, Ex p. Hasell* (1839), 3 Y. & C. Ex. 617; *Portlock v. Gardner* (1842), 6 Jur. 795; *Toft v. Stephenson* (1848), 7 Hare, 1; *Eager v. Barnes & Bridger* (1862), 7 L. T. 408; *Smallcombe's Case* (1867), L. R. 3 Eq. 769; *Drummond v. Sant* (1871), L. R. 6 Q. B. 763; *Soar v. Ashwell*, [1893] 2 Q. B. 390.

1386. ———— Law making twelve years period of limitation—No provision for special cases—Possession for over forty years—Remedy barred.]—Tenants in common of house property in Calcutta, under the will of a testator who died in 1803, became in 1825 reduced to two. The property had all along been considered as leasehold, in which view one of the surviving co-tenants would, in the events that had happened, be entitled to five-ninths & the other to four-ninths of the property; & the rents had been received by a common agent, & shared accordingly. In 1827 the supposed owner of the four-ninths settled her share, describing it as a moiety. This description was, nevertheless, treated as an error, & the rents were continued to be received as before, & to be shared in same proportions, until 1864, when it was discovered that the property was freehold, upon which footing the supposed owner of the five-ninths would really be entitled to four-fifths, & the supposed owner of the four-ninths to one-fifth only. In 1850 an Act of limitations for India was passed, which provided that no suit for the recovery of immovable property should be maintained in any ct. within the British territories in India unless same, if instituted after two years from the passing of the Act, should be instituted within twelve years from the time when the cause

of action arose. The property having been sold, & the proceeds paid into ct., the owner of the four-fifths claimed upon petition to be entitled to that proportion of the fund:—*Held*: under the English law the ct. would, after so long a possession & user, have presumed a grant; (2) under the same law the ct. would have held the settlement in 1827 by one of the co-tenants to have been a legal ouster of the other; (3) the case was governed by Indian law; (4) under the provisions of the Act of the Indian Legislature the claim of petitioner had become barred, & he was entitled to five-ninths only of the fund.—*Re PEAT'S TRUSTS* (1869), L. R. 7 Eq. 302.

1387. — Annuity charged on land—Land producing no income for seventeen years—No Act applicable—Arrears recoverable.—By will in 1810 B. devised to trustees his estate in Jamaica to hold to the use that H. should, out of the rents & profits, receive for life an annuity payable quarterly for her separate use, with powers of distress & entry & perception of the rents & profits, & after her decease to the use that the trustees should pay the annuity unto her children, as she should appoint, for their lives. Testator gave other annuities out of the rents & profits of same estate, & gave the estate to the use of his son for life, with remainders over. The last payment on account of H.'s annuity was in 1842. H. died in 1853. She made an appointment, & arrears were due to her & her appointees. The estate was for some years a waste, & no rents & profits were received till 1870, & when received they were paid into ct.:—*Held*: Stat. Limitations did not apply to Jamaica, & the legal personal representative of H. was entitled to be paid the arrears due to her.—*PITT v. DACRE (LORD)* (1876), 3 Ch. D. 295; 45 L. J. Ch. 796; 24 W. R. 943.

SUB-SECT. 2.—MOVABLES.

1388. Governed by *lex fori*—General rule.—Where a ct. entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the ct. proceeds according to the prescription of the country in which it exercises jurisdiction.—*RUCKMABOYE v. LULLOOBHROY MOTTICHUND* (1853), 8 Moo. P. C. C. 4; 5 Moo. Ind. App. 234; 22 L. T. O. S. 203; 14 E. R. 2, P. C.

1389. — Remedy not barred by foreign law—Barred in England—Debt not recoverable.—In an action of debt, it was averred that, before the making of the instrument & obligation thereafter mentioned, pl'ts. carried on business in Scotland, & that one A. & def't. were resident & domiciled therein, & that, by a certain instrument & obligation in writing, which was set out, A. & def't. became bound, & obliged themselves conjointly &

severally to pay to pl'ts. the sum of £400 sterling. It was then averred that, by the law of Scotland at the time of making such instrument & thence hitherto in force, the time for bringing any suit or instituting any legal proceeding by pl'ts. against def't. upon the instrument, & the cause & right of action accruing thereon, had not yet elapsed, that is to say, by virtue of the law, pl'ts. had the right & privilege of suing & bringing any action thereon, at any time within forty years from the time of making & signing the bond. Plea that the cause of action did not accrue within six years:—*Held*: a good plea.—*BRITISH LINEN CO. v. DRUMMOND* (1830), 10 B. & C. 903; 9 L. J. O. S. K. B. 213; 109 E. R. 683.

Annotations:—*Consd.* *Huber v. Steiner* (1835), 2 Bing. N. C. 202; *Ruckmaboye v. Lulloobhoy Mottichund* (1852), 8 Moo. P. C. C. 4. *Refd.* *Trimboey v. Vignier* (1834), 1 Bing. N. C. 151; *Don v. Lippman* (1837), 5 Cl. & Fin. 1; *Clark v. Mullick* (1840), 3 Moo. P. C. C. 252; *Fergusson v. Fyffe* (1841), 8 Cl. & Fin. 121; *Maha Raja Dheeraj Raja Mahatab Chund Bahadoor v. Bengal Government* (1850), 4 Moo. Ind. App. 466; *Harris v. Quine* (1869), L. R. 4 Q. B. 653.

1390. — — — — —.]—PARDO v. BINGHAM (1869), 4 Ch. App. 735; 39 L. J. Ch. 170; 20 L. T. 464; 34 J. P. 38; 17 W. R. 419, L. C.

Annotations: *Mentd.* *Hicks v. Powell* (1869), 4 Ch. App. 741; *Re Chapman, Cocks v. Chapman*, [1896] 1 Ch. 323; *West v. Gwynne* (1911), 80 L. J. Ch. 578; *R. v. Southampton Income Tax Comrs., Ex p. Singer* (1916), 2 K. B. 249.

Right to retain security for debt unaffected.—The widow of testator, to administer whose estate this action was brought, claimed to prove under the administration judgment as a creditor against his estate in respect of two sums of £2,400 & £10,000. As regarded both debts she had obtained security by means of an attachment in France upon assets of testator in that country. The ct. held that the claim for £2,400 was barred in England by Stat. Limitations. It was not, however, barred under French law. The claim in respect of the £10,000 was admitted, & the question was then raised, whether the widow was bound to account for the proceeds of her security in France as regarded the £2,400, or bring them into hotchpot, before she could receive any dividend in respect of the £10,000:—*Held*: the widow was entitled to prove for, & receive dividends in respect of the £10,000 without accounting for the proceeds of the security in respect of the £2,400.—*Re BOWES, STRATHMORE (EARL) v. VANE*, [1889] W. N. 53.

1392. — Remedy barred by foreign law—Not barred in England—Debt recoverable.—The *lex fori*, or law of the particular place where a contract is sought to be enforced, rules the remedy, though the *lex loci*, the validity of the contract.

Where on an action brought in this country upon a bill of exchange made in France, def't. pleaded the French Stat. Limitations:—*Held*: the plea was bad, & pl'tf. was right in treating it

PART XVI. SECT. 6, SUB-SECT. 2.

1388 i. Governed by *lex fori*—General rule.—The *lex fori* & not the *lex loci contractus* ought to regulate in regard to the effect of the plea of prescription.—*FARRAR v. LEITH BANKING CO.* (1839), 1 Dunl. (Ct. of Sess.) 936; 35 Fac. Coll. 1029.—SCOT.

1388 ii. — — — — —.]—The time of prescription is that of the *lex fori* & not the *lex loci contractus*.—*HUNTER v. SONNENBERG* (1890), 3 S. A. R. 273.—S. AF.

1388 iii. — — — — —.]—Laws of prescription are laws of procedure & are governed by the *lex fori*.—*MONTAGU WINE CO., LTD. v. RABIE*, [1915] T. P. D. 483.—S. AF.

g. — Change of domicile—When

prescription begins to run.—Where an *incola* has incurred a debt while still a *peregrinus* prescription only begins to run from the date of his change of domicile.—*MONTAGU WINE CO., LTD. v. RABIE*, [1915] T. P. D. 483.—S. AF.

h. — Promissory note.—*Held*: the prescription of a promissory note made in a foreign country & payable there is governed by the *lex fori* & not by the *lex loci contractus*.—*HILLSBURGH v. MAYER* (1873), 18 L. C. J. 69.—CAN.

i. — Remedy barred by foreign law—Not barred in court where action brought.—A plea that def't. & pl'tf. were both residing in a foreign country when the cause of action accrued, & that by the laws of that country

def't. is discharged because no action was brought within six years, def't. & pl'tf. having both resided there during all that time:—*Held*: bad.—*HART v. WILSON* (1838), 6 O. S. 19.—CAN.

k. — — — — —.]—BANNER v. GIBSON (1830), 9 Sh. (Ct. of Sess.) 61; 27 Fac. Coll. 49.—SCOT.

l. — — — — —.]—LAING & IRVINE v. ANDERSON (1871), 10 Macph. (Ct. of Sess.) 74; 44 Sc. Jur. 53.—SCOT.

m. — — — — —.]—ROSS & OGILVY v. ROSS'S TRUSTEES (1811), Hume, 473.—SCOT.

n. — — — — —.]—GIBSON v. STEWART (1831), 9 Sh. (Ct. of Sess.) 625; 27 Fac. Coll. 351.—SCOT.

Sect. 6.—Limitation of actions: Sub-sects. 2 & 3. i. 1 & 2. Sect. 8.]

as a nullity.—*BURY v. GOLDNER* (1844), 1 Dow. & L. 834; 13 L. J. Q. B. 102; 2 L. T. O. S. 353: *sub nom.* *BURY v. GOODWIN*, 8 Jur. 447.

1393. ————.]—Pltfs., attorneys in the Isle of Man, conducted for deft. the defence to a suit commenced against him in the Consistory Ct. there in 1858, which was dismissed in Apr., 1861. In Sept., 1861, pltfs. in that suit appealed to the Staff of Govt., the Manx Ct. of Appeal, & pltfs. conducted the appeal on deft.'s behalf till Oct. 1, 1862, when pltfs. dissolved partnership, & the proceedings were conducted by one of them until the appeal was heard & judgment given on Apr. 7, 1865. On Oct. 30, 1865, pltfs. brought an action in the Deemsters Ct., Isle of Man, for their costs to Sept. 1, 1862, in which judgment was given for deft. on the ground that the debt was barred by the Manx Stat. Limitations, which enacted that actions of debt upon any trading contract or demand without specialty should be commenced within three years next after the cause of action. In an action on the bill of costs:—*Held*: (1) a plea of the judgment in the Manx ct. was no answer, as the Manx Stat. Limitations only barred the remedy, & did not extinguish the debt; (2) Stat. Limitations here was no bar, as in case of appeal from a judgment the attorney, who conducted the suit in the ct. below & the appeal, was not entitled to bring his action until the appeal was determined; (3) where a ct. of competent jurisdiction had decided a matter pltf. was estopped from disputing the decision or litigating the matter in the cts. of another country.—*HARRIS v. QUINE* (1869), L. R. 4 Q. B. 653; 10 B. & S. 644; 38 L. J. Q. B. 331; 20 L. T. 947; 17 W. R. 967.

Annotations:—As to (1) Consd. *Turner v. Mid. Ry.* (1911), 80 L. J. K. B. 516. *Reid.* *Casanova v. Meier* (1885), 1 T. L. R. 213; *Re Low, Bland v. Low*, [1894] 1 Ch. 147. *As to (2) Consd.* *Balle v. Balle* (1872), L. R. 13 Eq. 497.

1394. ————.]—(1) Legal proceedings in England to recover a debt contracted in India are not barred by the Indian Stat. Limitations, 1859 (No. 14).

(2) English rate of interest only is allowed on a debt contracted in India, from the time of the death of the debtor.—*FINCH v. FINCH* (1876), 45 L. J. Ch. 816; 35 L. T. 235.

1395. ————.]—Specialty debts in India have no higher legal value nor greater efficacy than simple contract debts, & the same period of limitation, viz., three years, bars the remedy for both, but where an action on a bond executed in India is brought in England, the bond cannot be treated as a simple contract; & as the English Stat. Limitations applies, the remedy is not barred until after the lapse of the period of twenty years prescribed by Civil Procedure Act, 1833 (c. 42), s. 3, as the limitation for actions on contracts under seal.—*ALLIANCE BANK OF SIMLA*

o. ———— *Unless debt discharged by foreign law.*—A debt incurred in a foreign country may be recovered in the Transvaal after the lapse of the time of prescription recognised by the laws of such foreign country, provided that by those laws the recovery of the debt only is barred & the debt itself not absolutely discharged.—*AFRICAN BANKING CORPN. v. OWEN* (1897), 4 O. R. 253.—*S. AF.*

p. ———— *LANGERMAN v. VAN IDDEKINGE*, [1916] T. P. D. 123.—*S. AF.*

q. ———— *Remedy barred in one province in Canada—Not barred in*

another.—*CARVELL v. WALLACE* (1873), 9 N. S. R. 165.—*CAN.*

r. *Foreign judgment—Action in India—Maintainable within six years from time of cause of action.*—*BOLORAM GOOY v. KAMENEE DOSSEE* (1865), 4 W. R. 108.—*IND.*

s. ———— *Recovered on cause of action barred by foreign law—How pleaded.*—*Held*: a plea to an action on a foreign judgment setting up that the cause of action on which the judgment was recovered did not accrue within twenty years before the commencement of the foreign action, was

v. CAREY (1880), 5 C. P. D. 429; 49 L. J. Q. B. 781; 44 J. P. 735; 29 W. R. 306.

1396. Foreign judgment—For money due—Whether English Statute of Limitations applicable.—*DUPLEIX v. DE ROVEN*, No. 1215, *ante*.

Foreign judgments as causes of action generally, *see* Part XIV., Sect. 4, *ante*.

1397. ———— *Recovered on ground of prescription—Period substantially less than in England—Whether bar to action in England.*—*CALLANDAR v. DITTRICH*, No. 1235, *ante*.

Foreign judgments as defences to actions generally.—*See* Part XIV., Sect. 5, *ante*.

SUB-SECT. 3.—EXTENDED JUDGMENTS.

1398. Scottish judgment extended to England—Obtained in respect of debt barred in England—Whether enforceable in England.—*Re LOW, BLAND v. LOW*, No. 1244, *ante*.

Extension of judgments generally.—*See* Part XIV., Sect. 7, *ante*.

SECT. 7.—EVIDENCE.

SUB-SECT. 1.—ADMISSIBILITY.

See, generally, EVIDENCE.

1399. General rule—Governed by lex fori.—A ct. of justice cannot delegate its jurisdiction, & ought not to be guided by any foreign opinion upon a question of law, *e.g.*, the admissibility of evidence.—*DUNBAR v. HARVIE* (1820), 2 Bli. 351; 4 E. R. 356, H. L.

1400. ————.]—The law of a country where a contract is to be enforced, not that of the country in which it is made, governs the question of admissibility of evidence on a trial arising out of such contract.—*BAIN v. WHITEHAVEN & FURNESS RY. CO.* (1850), 3 H. L. Cas. 1; 10 E. R. 1, H. L.

Annotation:—Reid. *East Gloucestershire Ry. v. Bartholomew* (1867), L. R. 3 Exch. 15.

1401. Foreign bond—Absence of seal—Admissible by foreign law—Not admissible in England.—*Qu.*: whether evidence of a custom in Jamaica, to execute bonds by substituting a mark with a pen for a seal, is admissible in support of a declaration on a bond sealed, etc.—*ADAM v. KERR* (1798), 1 Bos. & P. 360; 126 E. R. 952.

Annotation:—Mentd. *Andrew v. Motley* (1862), 12 C. B. N. S. 514.

1402. Foreign charterparty—Copy admissible by foreign law—Not admissible in England—Unless made at time of original & in presence of parties.—In Batavia charterparties were entered into by the instrument being written in the book of a notary, he being a public officer according to the Dutch law, which prevails in Batavia, & there signed by the parties. The notary made copies, which he signed & sealed, & which the principal

bad, in not stating that twenty years was the period of limitation according to the foreign law.—*FOWLER v. VAIL* (1877), 27 C. P. 417.—*CAN.*

t. ———— *Recovered on cause of action barred by Canadian law—Action on barred in Canada.*—*NORTH v. FISHER* (1884), 6 O. R. 206.—*CAN.*

u. ————.]—*BRITISH LINEN CO. v. McEWAN* (1889), 6 Man. L. R. 292.—*CAN.*

w. ———— *On promissory note made abroad—Interrupts prescription.*—*ALMOUR v. HARRIS* (1884), M. L. R. 2 Q. B. 439; 10 L. N. 109.—*CAN.*

officer of the Govt. of Java signed, upon proof of their being executed by the notary. Then one copy was delivered to each party. In the cts. of Java, in order to prove the charterparty, it was requisite to produce the notary's book, but this book was never allowed to be taken out of Java; & in Dutch cts. out of Java, faith is given to the above copies, as to an original:—*Held*: in English cts. such copies were not receivable, either as originals or as secondary evidence of the charterparty, at all events, not without proof that they were made at the time of entering into the original charterparty, & in the presence of the parties.—*BROWN v. THORNTON* (1837), 6 Ad. & El. 185; 1 Nev. & P. K. B. 339; Will. Wol. & Dav. 11; 6 L. J. K. B. 82; 1 Jur. 198; 112 E. R. 70.

Annotation:—*Reid*. *Clark v. Mullick* (1839), 2 Moo. Ind. App. 203.

1403. Unstamped document — Not admissible in England—If document invalid by foreign law.]—*ALVES v. HODGSON*, No. 668, *ante*.

1404. — — —.]—*CLEGG v. LEVY*, No. 669, *ante*.

1405. — — —.]—*BRISTOW v. SEQUEVILLE*, No. 670, *ante*.

1406. — Admissible in England—If document merely not admissible by foreign law.]—*JAMES v. CATHERWOOD*, No. 16, *ante*.

1407. — — —.]—*BRISTOW v. SEQUEVILLE*, No. 670, *ante*.

Formalities of contracts generally.]—*See* Part VII., Sect. 2, sub-sect. 3, *ante*.

SUB-SECT. 2.—PROOF OF FOREIGN LAW.

See Administration of Justice Act, 1920 (c. 81), s. 15, & generally, EVIDENCE.

SECT. 8.—APPEALS.

1408. Time for prosecuting—Governed by *lex fori*—Appeal by foreigners from decree of colonial admiralty court to Privy Council.]—The brig, *Guiana*, was seized & condemned in the Vice-Admty. Ct. at Sierra Leone at the suit of resps., the officers & crew of H.M.S. *Viper*, for a breach of the Acts against the slave trade; & L. & others, the shippers of goods on board, were found liable to the statutory penalty of double value thereof. The shippers, Brazilian subjects, appealed to Her Majesty in Council, but did not obtain an inhibition until more than twelve months from the date of the sentence. Resps. entered a protest against the reception of the appeal:—*Held*: (1) applts., though foreigners, were bound by the limitation contained in 5 Geo. 4, c. 113, s. 29; (2) Parliament had no general power to legislate for foreigners outside the dominions & beyond the jurisdiction of the British Crown, but it could by statute fix the time within which application for redress must be made to the tribunals of the Empire; (3) this was a matter of procedure & part of the *lex fori*, by which all mankind were bound.—*LOPEZ v. BURSLEM* (1843), 4 Moo. P. C. C. 300; 4 State Tr. N. S. 1331; 2 L. T. O. S. 185; 7 Jur. 1119; 13 E. R. 318, P. C.

CONFUSION OF GOODS.

See PERSONAL PROPERTY.

CONJUGAL RIGHTS.

See HUSBAND AND WIFE.

CONSIDERATION.

See CONTRACT.

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<i>King's Remembrancer</i> .	„ CROWN PRACTICE.	<i>Paymaster-General</i> .	„ REVENUE.
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		<i>Public Revenue</i>	„ REVENUE.
		<i>Rating of Ambassadors, Government Buildings and Crown Property</i> .	„ RATES AND RATING.
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		<i>Royal Forces</i>	„ ROYAL FORCES.
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		<i>Taxes</i>	„ REVENUE ; AND PARTICULAR TITLES <i>passim</i> .
		<i>Territorial Force</i>	„ ROYAL FORCES.
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Part I.—In General.

1. Sources of constitutional law—Acts of Parliament—Magna Carta—Declaratory of common law.]—R. v. CURTIS, No. 834, *post*.

Part II.—The Title to the Crown.

2. At common law—By descent.]—(1) Allegiance is a true & faithful obedience of the subject due to his Sovereign. This allegiance & obedience is an incident inseparable to every subject ; for as soon as he is born he owes by birthright allegiance & obedience to his Sovereign.

(2) As the subject owes to the King his true & faithful allegiance & obedience, so the Sovereign is to govern & protect his subjects, *regere et protegere subditos suos* ; so as between the Sovereign & subject there is *duplex et reciprocum ligamen* ; *quia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem* ; *merito igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen*. Allegiance is the mutual bond & obligation between the King & his subjects, whereby subjects are called his liege subjects, because they are bound to obey & serve him ; & he is called their liege lord, because he should maintain & defend them.

(3) There are found in the law four kinds of allegiances : (a) *Ligeantia naturalis, absoluta, pura*

et indefinita, & this originally is due by nature & birth-right, & is called *alta ligeantia*, & he that oweth this is called *subditus natus*. (b) *Ligeantia acquisita*, not by nature but by acquisition or denization, being called a denizen, or rather denizon, because he is *subditus datus*. (c) *Ligeantia localis*, wrought by the law, & that is when an alien that is in amity cometh into England because as long as he is within England he is within the King's protection ; therefore so long as he is here, he oweth unto the King a local obedience or allegiance, for that the one draws the other. (d) A legal obedience, or allegiance which is called legal, because the municipal laws of this realm have prescribed the order & form of it ; & this to be done upon oath at the torn or leet.

(4) *Ligeantia acquisita*, or denization, appears to be three-fold : (a) Absolute as the common denizations be, to them & their heirs, without any limitation or restraint ; (b) Limited, as when the King doth grant letters of denization to an alien, & to the heirs males of his body, or to an

alien for term of his life; (c) It may be granted upon condition, for *cujus est dare, ejus est disponere*, & this denization of an alien may be effected three manner of ways: by Parliament; by letters patent, as the usual manner is; & by conquest, as if the King & his subjects should conquer another kingdom or dominion, as well *antenati* as *postnati*, as well they which fought in the field, as they which remained at home, for defence of their country, or employed elsewhere, are all denizens of the kingdom or dominion conquered.

(5) Concerning the local obedience it is observable, that as there is a local protection on the King's part, so there is a local allegiance of the subjects' part.

(6) In the oath of allegiance five things were observed:—(a) That for the time it is indefinite, & without limit, "from this day forward." (b) To be true & faithful. (c) To whom, "to our sovereign lord the King & his heirs." (d) In what manner, "& faith & troth shall bear, etc., of life & member," that is, until the letting out of the last drop of our dearest heart's blood. (e) Where & in what places ought these things to be done, in all places whatsoever, for, "you shall neither know nor hear of any ill or damage, etc." that you shall not defend, etc. so as natural allegiance is not circumscribed within any place.

(7) The King hath two capacities in him:—one a natural body, being descended of the blood royal of the realm; & this body is of the creation of Almighty God, & is subject to death, infirmity, & such like; the other is a politic body or capacity, so called, because it is framed by the policy of man & in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy, nonage, etc. Now seeing the King hath but one person, & several capacities, & one politic capacity for the realm of England, & another for the realm of Scotland, it is necessary to be considered, to which capacity allegiance is due; & it was resolved, that it was due to the natural person of the King (which is ever accompanied with the politic capacity, & the politic capacity as it were appropriated to the natural capacity) & it is not due to the politic capacity only, that is, to his Crown or Kingdom distinct from his natural capacity.

(8) The title is by descent; by Queen Elizabeth's death the Crown & Kingdom of England descended to his Majesty, & he was fully & absolutely thereby King, without any essential ceremony or act to be done *ex post facto*: for coronation is but a royal ornament & solemnization of the royal descent, but no part of the title.

(9) By the laws of England there can be no interregnum within the same.—CALVIN'S CASE (1608), 7 Co. Rep. 1a; Jenk. 306; 2 State Tr. 559; 77 E. R. 377; *sub nom.* UNION OF SCOTLAND & ENGLAND CASE, Moore, K. B. 790.

Annotations:—As to (1) & (2) *Consd.* *Re* Johnson, Roberts v. A.-G., [1903] 1 Ch. 821; Markwald v. A.-G., [1920] 1 Ch. 348. *Refd.* *Ex p.* Anderson (1861), 3 E. & E. 487. As to (3) *Consd.* Rittson v. Stordy (1855), 3 Sm. & G. 230; De Geer v. Stone (1882), 22 Ch. D. 243; Isaacson v. Durant (1886), 54 L. T. 684; *Re* Stepney Election Petn., Isaacson v. Durant (1886), 17 Q. B. D. 54; Gibson, Gavin v. Gibson, [1913] 3 K. B. 379. *Refd.* Collingwood v. Pace (1661), O. Bridg. 410; Lane v. Bennett (1830), 1 M. & W. 70; Lyons Corp. v. East India Co. (1836), 1 Moo. P. C. C. 175; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895; R. v. Lopez, R. v. Sattler (1858), Dears. & B. 525; *Ex p.* Brown (1864), 5 B. & S. 280; R. v. Francis, *Ex p.* Markwald, [1918] 1 K. B. 617. As to (4) *Refd.* Thomas v. Sorrel (1673), 3 Keb. 143; Markwald v. A.-G., [1920] 1 Ch. 348. As to (5) *Consd.* R. v. Cowle (1759), 2 Burr. 834. *Appld.* Low v. Routledge (1865), 1 Ch. App. 42. *Consd.* *Re* Johnson, Roberts v. A.-G., [1903] 1 Ch. 821; Tingley v. Müller, [1917] 2 Ch. 144; Rodriguez v. Speyer, [1919] A. C. 59. *Expld.* Markwald v. A.-G., [1920] 1 Ch. 348; Johnstone v. Pedlar, [1921] 2 A. C. 262. *Refd.* R. v. Tucker (1694), Show. Parl. Cas. 186; R. v. Keyn (1876), 2 Ex. D. 63; *Re* Stepney Election Petn., Isaacson v. Durant (1886), 17 Q. B. D. 54. As to (6) *Consd.* Omichund v. Barker (1745), Willes, 538; Markwald v. A.-G., [1920] 1 Ch. 348. *Refd.* Bowman v. Secular Soc., [1917] A. C. 406; R. v. Francis, *Ex p.* Markwald, [1918] 1 K. B. 617. As to (7) *Consd.* Campbell v. Hall (1774), 1 Cowp. 204. *Refd.* R. v. Hampden (1637), 3 State Tr. 825; Owen v. Saunders (1697), 1 Ld. Raym. 158; Brunswick v. Hanover (1844), 6 Beav. 1. *Generally, Mentd.* Parliament in Ireland Case (1613), 12 Co. Rep. 109; Manby v. Scot (1662), 1 Keb. 361; Anon. (1678), Freem. K. B. 249; R. v. Knowles (1694), 12 Mod. Rep. 55; Loddington v. Kime (1695), 3 Lev. 431; Clayton v. Kinaston (1699), 1 Ld. Raym. 419; Scot v. Schawrtz (1739), 2 Conn. 679; Ruding v. Smith (1821), 2 Hag. Con. 371; Jephson v. Riera (1835), 3 Knapp. 130; Tolson v. Watson (1837), 3 Bing. N. C. 770; Taylor v. Best (1854), 14 C. B. 487; R. v. Speyer, [1916] 2 K. B. 858.

3. Under statute—Statutory entail.]—The Crown is entailed to the King by Act of Parliament with all the prerogatives & franchises belonging to it: this Act does not extend to take away the liberties or franchises which lords & others have by charter or lawful prescription. An entail of the Crown extends only to the royal power & prerogatives belonging to it but not to possessions or matters of profit (*per CUR.*).—ANON. (1485), Jenk. 168; 145 E. R. 110.

See, now, Act of Settlement, 1700 (c. 2).

4. Accession—King never dies—No interregnum.]—CALVIN'S CASE, No. 2, *ante*.

5. Coronation—Not part of title.]—CALVIN'S CASE, No. 2, *ante*.

See, now, Act of Settlement, 1700 (c. 2).

Crown cannot be devised.]—*See* No. 172,

Part III.—Relations between the Crown and the Subject.

SECT. 1.—DUTY OF THE CROWN TOWARDS THE SUBJECT.

6. To govern & protect.]—CALVIN'S CASE, No. 2, *ante*.

7. — On narrow seas.]—Letters patent are to be construed benign, favourably & liberally.

The narrow seas are parcel of the allegiance of the King, he is to scour them, & to defend his merchants in them, for their safer conduct; the narrow seas are parcel of the allegiance of the King, & parcel of the Crown of England.

The King's grants ought to have a very beneficial construction, & this for the honour of the King, & for the relief of his subjects, & not to have any strict or literal construction made in subversion of his grants.

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It is to be observed for a rule, *quod privilegium est beneficium personale, & extinguitur cum personâ*.

Portus est locus inclusus & that for safety from pirates, & the King is at the charge of this, & ports are as the gates of the kingdom, & none is owner of them but the King only.

As to that which hath been said, that a woman may be a citizen: this she cannot be, to what end, she cannot bear *civilia*, or *publica onera* of the city, she cannot do any thing for the benefit of the city, she cannot perform watch & ward, she can bear no office in the city, neither can she be of any of the companies; she cannot be an attorney, she may be a free woman, but this is only to have her will (as many so have), but to no other purpose: but if she be to have any benefit of this immunity,

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Sect. 1.—Duty of the Crown towards the subject. Sect. 2: Sub-sect. 1, A., B., C., D. & E.; sub-sect. 2. Sect. 3. Part IV. Sect. 1.]

this is only as executrix of her husband, & she hath only relied upon this.

Prisage is a prerogative of the Crown to take so much wine from English merchants bringing in wines from the ports beyond sea, & the Crown can grant exemption.

This charter also was made, *pro melioratione civitatis*: also here is death in the case, which is the act of God, & the rule of law is, that the act of God shall turn no man to a prejudice: & notwithstanding here is not *civis*, yet these wines are *vina civium*, & so to be discharged of prisage. If George Hanger had sold these wines to a stranger, he should pay prisage, for this was his own act.

The last & principal reason, is because this grant here made was for the advancement of trade & traffic, & therefore this is to be taken & construed favourably & largely: & all charters made which do hinder trade & traffic are to be void.—*R. & WALLER v. HANGER* (1615), 3 Bulst. 1; 1 Roll. Rep. 138; 81 E. R. 1; *sub nom.* *WALTER v. HANGER*, Moore, K. B. 832.

Annotations:—Consd. *Ashby v. White* (1703), 2 Ld. Raym. 938; *Cocksedge v. Fanshaw* (1779), 1 Doug. K. B. 119; *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633; *Re Free Fishermen of Faversham Co.* (1887), 36 Ch. D. 329. *Reid.* *Thomas v. Sorrel* (1673), 3 Keb. 155, 223; *Hornbee, Petitioner* (1691), *Freem. K.B.* 331. *Mentd.* *R. v. Percival* (1665), 1 Sid. 243; *Bankers' Case* (1695), *Skin.* 601; *Ryall v. Rowles* (1750), 1 Ves. Sen. 348; *R. v. Cotton* (1751), *Park.* 112; *Lynn Regis Corpn. v. London Corpn.* (1791), 4 Term Rep. 130.

SECT. 2. DUTY OF THE SUBJECT TOWARDS THE CROWN.

SUB-SECT. 1.—ALLEGIANCE.

A. Nature of Allegiance.

8. Definition of allegiance.]—CALVIN'S CASE, No. 2, *ante*.

9. — Different kinds of allegiance.]—CALVIN'S CASE, No. 2, *ante*.

10. To whom due—Sovereign in natural capacity.]—CALVIN'S CASE, No. 2, *ante*.

11. — Sovereign in political capacity—4 Geo. 2, c. 21, & 13 Geo. 3, c. 21.]—The language of the statutes 4 Geo. 2, c. 21 & 13 Geo. 3, c. 21, as to the children & grandchildren of British subjects is remarkable for they speak of the Crown & not the Sovereign and to our minds clearly recognise that to the King in his politic & not in his personal capacity is the allegiance of his subjects due (LORD COLERIDGE, C.J.).—*Re STEPNEY ELECTION PETITION, ISAACSON v. DURANT* (1886), 17 Q. B. D. 54; 55 L. J. Q. B. 331; 54 L. T. 684; 34 W. R. 547; 2 T. L. R. 559.

Annotation:—Mentd. *Re Southampton School Board Election Petn.* (1886), 2 T. L. R. 900.

Abjuration of allegiance.]—See ALIENS, Vol. II., p. 191, Nos. 527, 529, 530.

PART III. SECT. 2, SUB-SECT. 1.—A

a. Definition of loyalty.]—Attachment to the person of the reigning sovereign does not complete the idea of loyalty. That comprehensive term includes within its meaning not only affection to the person, but also to the office of the King; not only attachment to royalty, but, as the word itself imports, attachment to the law and to the constitution of the realm; & he who would, by force or by fraud, endeavour to prostrate that law & constitution, though he may retain his affection for its head, can boast

but an imperfect & spurious species of loyalty.—*R. v. O'CONNELL* (1844), 7 I. L. R. 261.—IR.

b. Abjuration of allegiance—Occupied territory—Progress of hostilities.]—Where territory is occupied in the course of hostilities by an enemy's force, even if the annexation of the occupied country is proclaimed by the enemy, there can be no change of allegiance during the progress of hostilities on the part of a citizen of the occupied country.—*R. v. VERMAAK* (1900), 21 N. L. R. 204.—S. AF.

B. Natural Allegiance and Natural-born British Subjects.

12. Natural allegiance defined.]—CALVIN'S CASE, No. 2, *ante*.

13. By whom due—Natural-born British subject—Immediately on birth.]—CALVIN'S CASE, No.

are natural-born British subjects.]—See ALIENS, Vol. II., pp. 121–128.

C. Local Allegiance.

14. Nature of.]—CALVIN'S CASE, No. 2, *ante*.

15. By whom due—Alien friend within realm.]—CALVIN'S CASE, No. 2, *ante*.

.]—A ship & cargo were taken on a voyage from Madras to the Spanish settlement of Manilla, & claimed on behalf of Armenian merchants, resident in Madras. It was asserted, on the part of the claimant, that a trade of this nature had been carried on by this peculiar class of merchants under the knowledge & permission of the government of Madras, & that it had in former wars also been a trade specially privileged by the East India Co.'s governing officers in India, & by the Spanish government at Manilla. There had been a subsequent permission of the governor of Madras & of the governor-general for the carrying on a similar trade, granted to the claimant:—*Held*: by the general law, all foreigners resident within the British dominions incurred all the obligations of British subjects.—THE ANGELIQUE (1801), 3 Ch. Rob. App. 7.

Annotation:—Consd. *Casdagli v. Casdagli*, [1919] A. C. 145.

17. — — —.]—An alien, coming into a British colony, becomes temporarily a subject of the Crown; he thus acquires rights both within & beyond the colony, & the latter cannot be affected by the laws of the colony into which he comes.—ROUTLEDGE v. LOW (1868), 1 L. R. 3 H. L. 100; 37 L. J. Ch. 454; 18 L. T. 874; 16 W. R. 1081, H. L.; *affg.* S. C., *sub nom.* *Low v. ROUTLEDGE* (1865), 1 Ch. App. 42, L. J.

Annotations:—Reid. *Low v. Ward* (1868), L. R. 6 Eq. 415; *Reid v. Maxwell* (1886), 2 T. L. R. 790. *Mentd.* *Mathieson v. Harrod* (1868), L. R. 7 Eq. 270; *Re Graves, Ex p. Walker* (1869), 10 B. & S. 680; *Collingridge v. Emmott* (1887), 57 L. T. 864; *Davidsson v. Hill*, [1901] 2 K. B. 606.

See, generally, ALIENS, Vol. II., p. 129.

D. Acquired Allegiance.

18. By denization—How denization effected.]—CALVIN'S CASE, No. 2, *ante*.

— Effect of denization.]—See ALIENS, Vol. II., pp. 188, 189, No. 514.

By residence within British Dominions.]—See Sub-sect. 1. C. *ante*.

E. Oath of Allegiance.

19. Nature of.]—CALVIN'S CASE, No. 2, *ante*.

20. Taken by atheist—Validity of oath.]—A member of Parliament, who does not believe in the existence of a Supreme Being, & upon whom an oath has no binding effect as an oath but only as a

PART III. SECT. 2, SUB-SECT. 1.—C.

15 i. By whom due—Alien friend within realm.]—Natives of Brit. Ind., though foreigners, owe allegiance to the common Sovereign of England & Brit. Ind.—MOAZIM HOSSEIN v. ROBINSON (1901), 1 L. R. 28 Calc. 641.—IND.

PART III. SECT. 2, SUB-SECT. 1.—D.

c. By enlistment in Indian army.]—A native of Afghanistan enrolled in H.M. Indian army:—*Held*: a British subject.—IBRAHIM v. R., [1914] A. C. 599; 83 L. J. P. C. 185; 111 L. T. 20; 30 T. L. R. 383; 24 Cox C. C. 174, P. C.—HONG KONG.

solemn promise, is, owing to his want of religious belief, incapable by law of "making and subscribing" the oath of allegiance appointed by the Parliamentary Oaths Act, 1866, ss. 1, 3, as amended by the Promissory Oaths Act, 1868; & if he takes his seat & votes as a member, although he has gone through the form of making & subscribing the oath appointed by those statutes, he will be liable upon an information at the suit of the A.-G. to the penalty imposed by the Parliamentary Oaths Act, 1866 (c. 19), s. 5. In order that the oath of allegiance imposed upon members of the House of Commons upon taking their seats by the Parliamentary Oaths Act, 1866 (c. 19), as amended by the Promissory Oaths Act, 1868 (c. 72), may be "solemnly and publicly made and subscribed" within the meaning of sect. 3 of the former statute, it must be taken by a member with the assent of the House according to the requirements of the Standing Orders, & after he has been called upon by the Speaker to be sworn. Upon the trial of an information at the suit of the A.-G. against a member of the House of Commons for voting without having taken the oath of allegiance within the meaning of the Parliamentary Oaths Act, 1866 (c. 19), as amended by the Promissory Oaths Act, 1868 (c. 72), evidence of the practice observed in the House of Commons as to taking the oath of allegiance is admissible for the purpose of explaining the construction of those statutes, & the journals of the House of Commons are admissible as evidence for the purpose of showing, from the member's conduct as therein recorded, that owing

to his want of religious belief he is by law incapable of taking an oath.—*A.-G. v. BRADLAUGH* (1885), 14 Q. B. D. 667; 54 L. J. Q. B. 205; 52 L. T. 589; 49 J. P. 500; 33 W. R. 673, C. A.

Annotations:—*Mentd. R. v. Hausmann* (1909), 73 J. P. 516; *Clifford & O'Sullivan*, [1921] 2 A. C. 570.

See, now, Oaths Act, 1888 (c. 46).

21. Affirmation in lieu of oath.—A person presenting himself for military service is entitled to make an affirmation instead of taking the oath. If a recruiting officer refuses to accept a man for enlistment because the man declares himself to be an atheist & wishes to affirm & will not take the oath, such refusal constitutes a rejection within Military Service Act, 1916 (c. 104), sched. 1 (6).—*TOWLER v. SUTTON* (1916), 86 L. J. K. B. 46; 115 L. T. 836; 80 J. P. 461; 14 L. G. R. 1154, D. C.

Annotation:—*Appld. Blake v. Dungoor* (1917), 87 L. J. K. B. 326.

SUB-SECT. 2.—OFFENCES AGAINST THE CROWN AND PUBLIC TRANQUILLITY.

See CRIMINAL LAW & PROCEDURE.

SECT. 3.—RIGHT OF THE CROWN TO PREVENT THE SUBJECT LEAVING THE REALM—WRIT OF NE EXEAT REGNO.

See EQUITY.

Part IV.—The Royal Family.

SECT. 1.—THE KING OR QUEEN REGNANT.

22. Royal style & titles — "Rex."—*"Supremum caput ecclesie anglicane"* was omitted from a writ:—*Held*: writ was good for it was not part of the Royal name but only an addition. The word "rex" comprehends all the Royal dignities & attributes.—*ANON.* (1555), *Jenk.* 209; 1 *Dyer*, 98a; 145 E. R. 142.
Annotation:—*Mentd. Meriton v. Stevens* (1741), *Willes*, 271.

23. Kingly dignity — Not transferable.—The Kingly dignity is an inherent inseparable to the Royal blood of the King; & cannot be transferred to another, no more than a duke, or earl, or baron, may transfer over their dignities, for these are incidents inseparable.

The law & customs of England are the inheritance of the subject, which he cannot be deprived of without his assent in Parliament.—**OATHS BEFORE AN ECCLESIASTICAL JUDGE EX OFFICIO** (1607), 12 Co. Rep. 26; 77 E. R. 1308.

Annotations:—*Refd. London City v. Wood* (1701), 12 Mod. Rep. 669; *Grand Opinion for the Prerogative Concerning the Royal Family* (1717), *Fortes. Rep.* 401. *Mentd. R. v. Knowles* (1694), 12 Mod. Rep. 55.

24. ——*CALVIN'S CASE*, No. 2, *ante*.

25. Capacities of Sovereign.—(a) By the common law no act which the King does as King, shall be defeated by his nonage. (b) The King has in him two bodies, viz. a body natural, & a body politic. His body natural if it be considered in itself, is a body mortal, subject to all infirmities that come by nature or accident, to the imbecility of infancy or old age & to the like defects that happen to the natural bodies of other people. But his body politic is a body that cannot be seen or handled, consisting of policy & govern-

ment, & constituted for the direction of the people & the management of the public-weal, & this body is utterly void of infancy, & old age, & other natural defects & imbecilities, which the body natural is subject to, & for this cause, what the King does in his body politic, cannot be invalidated or frustrated by any disability in his natural body. Therefore his letters-patent, which give authority or jurisdiction, or which give lands or tenements that he has as King, shall not be avoided by reason of his nonage. (c) If the King has land by descent, on the part of his mother or other ancestor, or which he, when King, purchased in fee in the capacity of his body natural, or which he purchased before he was King, if he, being King, gives them to another during his nonage, such gift, by the course of the common law, shall never be defeated by reason of his nonage. For although he has or takes the land in his natural body, yet to this natural body is conjoined his body politic, which contains his royal estate & dignity, & the body politic includes the body natural, but the body natural is the lesser, & with this the body politic is consolidated. So that he has a body natural, adorned & invested with the estate & dignity royal, & he has not a body natural distinct & divided by itself from the office & dignity royal, but a body natural & a body politic together indivisible, & these two bodies are incorporated in one person, & make one body & not divers, that is the body corporate in the body natural, *et c contra* the body natural in the body corporate. So that the body natural, by the conjunction of the body politic to it, which body politic contains the office, government, & majesty royal, is magnified, & by the consolidation hath in it the body politic, for which reason the acts which the King

Sect. 1.—The King or Queen regnant. Sects. 2, 3
4: *Sub-sects. 1 & 2. Sect. 5.*]

does touching the things that he possesses or inherits in the body natural, require the same circumstance & order as the things which he possesses or inherits in the body politic do; for the thing possessed is not of such consideration as to change the nature of the King's person, but the person who possesses it changes the course of the thing possessed (*per* CUR.).—LANCASTER (DUCHY) CASE (1561), 1 Plowd. 212; 75 E. R. 325.

Annotations:—*Refd.* Magdalen College, Cambridge, Case (1616), 11 Co. Rep. 66b; Cheetham v. Crook (1825), M'Cle. & Yo. 307; Alcock v. Cooke (1829), 5 Bing. 340; Meath v. Winchester (1836), 3 Bing. N. C. 183. *Mentd.* Sutton's Hospital Case (1612), 10 Co. Rep. 1a; Wilbraham v. Scarisbrick (1847), 1 H. L. Cas. 167; *Re* Gorham v. Exeter, *Ex p.* Exeter (1850), 10 C. B. 102.

26. Rights over Royal Family—Care, education & marriage.]—Held: the education & the care of the grandchildren of George I., now in England, & of Prince Frederick, eldest son of the Prince of Wales, when your Majesty should think fit to cause him to come into England, & the ordering the place of their abode, & the care & approbation of their marriages, when grown up, did belong of right to your Majesty, as King of this realm.—GRAND OPINION FOR THE PREROGATIVE CONCERNING THE ROYAL FAMILY (1718), Fortes. Rep. 401; 92 E. R. 909.

Annotations:—*Mentd.* Blundell v. Catterall (1821), 5 B. & Ald. 268; Gifford v. Yarborough (1828), 5 Bing. 163.

SECT. 2.—THE QUEEN CONSORT.

27. Is feme sole—Right to sue as ordinary person.]—In an action of *quare impedit* by Queen Philippa:—Held: she could sue as a common person.—PHILIPPA (QUEEN) v. CHICHESTER (ABBESS) (1344), Y. B. 18 Edw. 3, fo. 1, pl. 6.

Annotations:—*Refd.* Walsingham's Case (1573), 2 Plowd. 547; Clarke v. Pennifather (1584), 4 Co. Rep. 23b; Sutton's Hospital Case (1612), 10 Co. Rep. 1a.

28. ——— Without joining King.]—The Queen Consort is a sole person exempt by the common law; & may make leases, grants, & sue & be sued, without a King. Where the Queen is tenant for life of a manor, she may make voluntary grants of copyholds escheated, which shall bind the King by the custom of the manor.—CLARKE v. PENNIFATHER (1584), 4 Co. Rep. 23b; 76 E. R. 923.

Annotations:—*Generally, Mentd.* Eylliff v. Chopley (1610), 1 Bulst. 42; Heyden v. Smith (1610), 2 Brownl. 328; Barnes v. Corke (1690), 3 Lev. 308; Doe d. Hamilton v. Clift (1840), 12 Ad. & El. 566; *R. v.* Venn (1875), 44 L. J. Q. B. 158.

29. By information.]—The Queen Consort can sue by information in name of the A.-G.—FLOYDE'S CASE (1618), 2 Roll. Abr. 213.

30. ——— Power to make leases & grants.]—CLARKE v. PENNIFATHER, No. 28, ante.

31. Right to coronation.]—On June 9, 1821, a Royal Proclamation declaring the King's pleasure to celebrate his coronation on July 19 was published. On June 25, 1821, the Queen presented a memorial claiming, as Queen-Consort, a right to celebrate the ceremony of coronation at the same time as the King. The question, whether she was of right entitled to be crowned with the King, was referred to a Committee of Lords of the Privy Council:—Held: a Queen-Consort is not entitled as of right to be crowned.—QUEEN CAROLINE'S CLAIM TO BE CROWNED (1821), 1 State Tr. N. S. 949.

SECT. 3.—THE QUEEN DOWAGER.

32. Status of Queen.]—Eleanor Queen Dowager of Henry III. in 1273 endowed St. Katharine's hospital reserving to herself during her life & to her successors Queens of England the nomination of the master. In 1660 Henrietta Maria Queen mother granted the mastership to H. Montague for life & the King in the same year reciting his mother's grant & that the right of it belonged to her confirmed it by his letters patent & by the same letters patent granted the mastership to Montague. The King afterwards married Katherine who granted the mastership to Sir Robert Atkins for life. The lessee of Sir Robert Atkins brought ejectment for part of the lands of the hospital against G. Montague:—Held: (1) an inheritance might be limited in this manner in a thing *de novo*. (2) This reservation being to Queen Eleanor, & her successors, Queens of England, did not exclude Queen Dowagers, & extend only to Queen Consorts, for (a) a Dowager Queen is Queen of England, & has the prerogative to sue in the Exchequer. (b) When once she is so qualified as to have the estate vest in her, it shall continue, though she doth not remain in the same capacity. (3) Queen Eleanor was only Dowager at the time of the foundation, & so could never be intended to exclude such Queens as should succeed her in that capacity. (4) During such time that there should be no Queen the King was to constitute the Master; for he was heir to Queen Eleanor.

(5) A thing of this nature could not be granted in reversion; for it was not like an office, but rather as a Prebendary or Incumbency of a Church; & the master, as head of the corp., with his brethren, had the whole estate in him.—ST. KATHERINE'S HOSPITAL CASE (1671), 1 Vent. 149; 86 E. R. 102. **Annotations:—***As to (5) Refd.* Owen v. Saunders (1696), 1 Ld. Raym. 158. *Generally, Mentd.* Stainer v. Droitwich (1694), 1 Salk. 281; Read v. Lincoln (Bp.), [1892] A. C. 644.

SECT. 4.—THE PRINCE AND PRINCESS OF WALES.

SUB-SECT. 1.—TITLES OF THE HEIR APPARENT.

33. By inheritance—Duke of Cornwall—Whether title limited to first born son or eldest surviving son included.]—Held: (1) the instrument by which Prince Edward was created Duke of Cornwall & the possessions of the dukedom of Cornwall given to him, with special limitations, & the possessions annexed to the duchy so as they shall not be severed, with a special clause of revivification if the special limitations at any time should cease, etc. was a charter made by authority of Parliament. Note differences touching letters patent which pass by bill signed without Privy Seal, those which pass by bill signed & by Privy Seal also, & those made by authority of Parliament; (2) the charter having the authority & force of Parliament was sufficient in itself without any other Act & if the King's *sci. fa.* had sufficient matter, it should never abate, for surplusage not material; (3) the prince had an estate in fee-simple in the dukedoms; (4) this Act was an Act whereof the Judges & all the kingdom ought to take notice; (5) if the prince, as Prince of Wales, had judgment to recover & afterwards the Crown descended to him, he, as King, should sue execution; (6) the Act by 3 Eliz. of confirmation of letters patent supplied only particular defects as misnomer of the manors, &c. misrecital, &c. & made the letters patent good only against the King, his heirs & successors, with a saving to all others; (7) the son & heir apparent

of the King, if he was not the first begotten son, was not within the limitation in the instrument.—**THE PRINCE'S CASE** (1606), 8 Co. Rep. 1a; 77 E. R. 481.

Annotations:—*As to* (1) **Consd.** *A.-G. v. Plymouth Corpn.* (1754), Wight. 134; *Jowison v. Dyson* (1842), 9 M. & W. 640; *Wensleydale Peerage Case* (1856), 8 State Tr. N. S. 479; *G. E. Ry. v. Goldsmid* (1884), 9 App. Cas. 927. **Refd.** *Dublin Corpn. Case* (1620), Palm. 1; *Hutchins v. Player* (1663), O. Bridg. 272; *Thornby v. Fleetwood* (1720), 1 Stra. 318; *Bassot v. Bassot* (1744), 3 Atk. 203; *Clayton v. A.-G.* (1834), 1 Coop. temp. Cott. 97; *Tolson v. Kaye* (1843), 6 Man. & G. 536; *Penryn Corpn. v. Holm* (1877), 2 Ex. D. 328. *As to* (2) **Refd.** *A.-G. to the Prince of Wales v. St. Aubyn* (1811), Wight. 167. *As to* (3) **Refd.** *A.-G. v. London (Bp.), Lancaster & Birch* (1692), 4 Mod. Rep. 200; *R. v. London* (1694), 1 Ld. Raym. 23. *As to* (4) **Refd.** *Grand Opinion for the Prerogative concerning the Royal Family* (1717), Fortes. Rep. 401. *As to* (7) **Consd.** *Clayton v. A.-G.* (1834), 1 Coop. temp. Cott. 97. **Refd.** *Lomax v. Holmden* (1749), 1 Ves. Sen. 290; *Wensleydale Peerage Case* (1856), 8 State Tr. N. S. 479. *Generally*, **Consd.** *Buckhurst Peerage* (1876), 2 App. Cas. 1. **Refd.** *St. Katherine's Hospital Case* (1671), 1 Vent. 149. **Mentd.** *Needler v. Winchester* (1614), Hob. 220; *Ossery's Case* (1620), Palm. 22; *R. v. Warden of the Fleet* (1700), 1 Eq. Cas. Abr. 129; *Jones v. Strafford* (1730), 3 P. Wms. 79; *Miller v. Taylor* (1769), 4 Burr. 2303; *Beauchamp v. Winn* (1869), 4 Ch. App. 562.

34. ———.]—The case of Duchy of Cornwall is direct; that the eldest son of the King of England, & therefore Richard II. required a special grant, takes it as *primogenitus*; although Lord Coke at the end of the Prince's case says otherwise. But that has ever been held a mistake of that great man. He was also mistaken in the fact in saying that Henry VIII. was not Duke of Cornwall because not *primogenitus* for Lord Bacon in his history of Henry VII. affirms the contrary that the Dukedom devolved to him upon the death of Arthur. So was Edward VI. in his father's life without a new creation, although the King's second son (**LORD HARDWICKE, C.**)—**CORNWALL (DUCHY) CASE** (1613), cited in 1 Ves. Sen. 292; 27 E. R. 1039.

Annotation:—**Refd.** *Driver v. Frank* (1814), 3 M. & S. 25.

35. ———.]—The King's eldest son is born Duke of Cornwall but is made or created Prince of Wales & Earl of Chester.—**PRINCE HENRY'S CHARTER** (1611), 1 Bulst. 133; 80 E. R. 827.

Duchy of Cornwall.]—*See, generally*, Part XXI., Sect. 3, sub-sect. 2, *post*.

36. By creation—Prince of Wales & Earl of Chester.]—**PRINCE HENRY'S CHARTER**, No. 35, *ante*.

SUB-SECT. 2.—STATUS AND PRIVILEGES.

37. Prince of Wales—Right to sue in ordinary way.]—**PRINCE DE GALES v. BASSET** (1347), Y. B. 21 Edw. 3, fo. 41, pl. 46.

Annotations:—**Mentd.** *Chudleigh's Case*, *Dillon v. Freine* (1595), 1 Co. Rep. 113b; *The Prince's Case* (1606), 8 Co. Rep. 1a; *Crogate's Case* (1608), 8 Co. Rep. 66b.

38. ——— **Right to enforce judgment after becoming King.**]—*R. v. St. Asaph (Bp.)* (1413), Y. B. 1 Hen. 5, fo. 7, pl. 2.

Annotations:—**Refd.** *The Prince's Case* (1606), 8 Co. Rep. 1a.

Mentd. *Morton v. Hopkins* (1567), 3 Dyer, 271a; *Pennant's Case*, *Harvey v. Oswald* (1596), 3 Co. Rep. 64a.

39. ———.]—**The PRINCE'S CASE**, No. 33, *ante*.

40. Princess of Wales—Sues as ordinary subject.]—Upon a motion in an action in which the Princess of Wales was pltf.:—No duty is more imperative upon an English judge than this, that he shall look upon all persons suing in his ct. merely as subjects of his Majesty (**LORD ELDON, C.**).—**PRINCESS OF WALES v. LIVERPOOL (EARL)** (1819), 3 Swan. 567; 2 Wils. Ch. 29; 36 E. R. 978, L. C.

Annotations:—**Mentd.** *Milligan v. Mitchell* (1833), 6 Sim. 186; *Brown v. Newall* (1837), 2 My. & Cr. 558; *Taylor v. Heming* (1841), 4 Beav. 235; *Bate v. Bate* (1844), 7 Beav. 528; *Prioleau v. United States & Johnson* (1866), L. R. 2 Eq. 659; *Kennedy v. Wakefield* (1870), 39 L. J. Ch. 827.

SECT. 5.—ROYAL MARRIAGES.

41. Royal Marriages Act, 1772 (c. 11)—Application to marriages celebrated abroad.]—On the death of the Duke of Sussex, fifth son of George III., Augustus Frederick d'Este presented a petition to the Crown claiming the honours of the late Duke as the issue of a marriage contracted at Rome in the year 1793, between the late Duke, then Prince Augustus Frederick, a minor, & the Lady Augusta Murray, according to the rites of the Church of England, but without the previous consent of the reigning Sovereign. The Crown referred the question to the House of Lords, and the House to the Committee for Privileges:—**Held**: the above Act applied to marriages celebrated abroad.—**SUSSEX PEERAGE CASE** (1844), 11 Cl. & Fin. 85; 6 State Tr. N. S. 79; 3 L. T. O. S. 277; 8 Jur. 793; 8 E. R. 1034, H. L.

Annotations:—**Mentd.** *Davis v. Lloyd* (1844), 1 Car. & Kir. 275; *Vander Douekt v. Thellusson* (1849), 8 C. B. 812; *Leroux v. Brown* (1852), 12 C. B. 801; *R. v. Povey* (1852), Dears. C. C. 32; *Stapylton v. Clough* (1853), 2 E. & B. 933; *Papendick v. Bridgwater* (1855), 5 E. & B. 166; *Fenton v. Livingstone*, *Livingstone v. Livingstone* (1859), 5 Jur. N. S. 1183; *Bright v. Legerton* (1860), 29 Beav. 60; *Brook v. Brook* (1861), 9 H. L. Cas. 193; *A.-G. v. Sillem* (1863), 2 H. & C. 431; *Di Sora v. Philipps* (1863), 10 H. L. Cas. 624; *Re Coppin* (1866), 2 Ch. App. 47; *Smith v. Blakey* (1867), L. R. 2 Q. B. 326; *Gaudet v. Brown*, *Cargo ex Argos*, *Geipel v. Cernforth*, *The Hewsons* (1873), L. R. 5 P. C. 134; *Rowley v. L. & N. W. Ry.* (1873), 29 L. T. 180; *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Re Lambert* (1886), 56 L. J. Ch. 122; *Income Tax Comrs. for Special Purposes v. Pemsel*, [1891] A. C. 531; *R. v. City of London Court Judge* [1892] 1 Q. B. 273; *R. v. Brixton Prison Governor*, *Re Percival* (1907), 76 L. J. K. B. 619; *R. v. Dibden*, [1910] P. 57; *Tucker v. Oldbury U. C.*, [1912] 2 K. B. 317; *Vacher v. London Soc. of Compositors*, [1913] A. C. 107; *Ward v. Pitt*, *Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130; *Re Vexatious Actions Act*, 1896, *Re Boaler*, [1915] 1 K. B. 21; *R. v. Naguib*, [1917] 1 K. B. 359; *G. W. Ry. & Mid. Ry. v. Bristol Corpn.* (1918), 87 L. J. Ch. 414; *Bourne v. Keane*, [1919] A. C. 815; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468.

Part. V.—The Royal Prerogative.

SECT. 1.—NATURE AND LIMITATIONS GENERALLY OF THE PREROGATIVE

SUB-SECT. 1.—NATURE OF THE PREROGATIVE.

42. Origin of prerogative—Common law.]—The prerogative of the King is a treatise of the common law, & not statute nor declaration by Parliament.—ANON. (*circa* 1547), Bro. N. C. 152; 73 E. R. 913.

43. Extent of prerogative—Applies to inland & foreign trade.]—EAST INDIA CO. *v.* SANDYS, No. 47, *post*.

44. ——— Runs to colonies.]—A legatee of personal property, having been convicted of felony, was sent out to Botany Bay, where he was again convicted for penal offences, & administration having been granted of his estate:—*Held*: the property was forfeited to the Crown.

The prerogative of the Crown runs in the colonies to same extent as in England.—*Re* BATEMAN'S TRUSTS (1873), L. R. 15 Eq. 355; 42 L. J. Ch. 553; 28 L. T. 395; 37 J. P. 484; 21 W. R. 435; 12 Cox, C. C. 447.

45. ——— Ascertainment by law of colony in which question of prerogative arises.]—(1) The prerogative of the Crown with regard to aliens, must be determined by the laws of the particular colonies in which the questions arise, & not by the law of England, which is only to be looked at in order to determine who are, & who are not, aliens.

(2) The *droit d'aubaine* became the law of Lower Canada, with regard to aliens, on the ancient French law being established there, by 14 Geo. 3, c. 83.

(3) The Judicial Committee will not notice any alteration of rights that may have taken place between the parties in consequence of an Act of the provincial Legislature, but which does not appear on the record.—*DONEGANI v. DONEGANI* (1835), 3 Knapp. 63; 12 E. R. 571, P. C.

Annotations:—*As to* (1) *Reid*. *Re* Adam (1837), 1 Moo. P. C. C. 460; *A.-G. for Canada v. Calh.*, *A.-G. for Canada v. Gilhula*, [1906] A. C. 542.

46. Classification of prerogatives.]—(1) The issue was whether the King could by writ under the Great Seal when the good & safety of the kingdom demanded it command his subjects at their charge to furnish such number of ships, men & stores as he should think fit, & for such time as he should think fit:—*Held*: the imposition without Parliamentary authority was lawful.

(2) The chief prerogatives royal are: (a) the King may give laws to his subjects, & this does not detract from him, when he does it in Parliament; (b) to make peace & war; (c) to create supreme magistrates; (d) that the last appeal be to the King; (e) to pardon offences; (f) to coin money; (g) to have allegiance, fealty & homage; (h) to impose taxes, without common consent in Parliament (*CRAWLEY, J.*).—*R. v. HAMPDEN, SHIP MONEY CASE* (1637), 3 State Tr. 826.

Annotations:—*As to* (1) *Reid*. *Robinson Gold Mining Co. v. Alliance Insce. Co.*, [1901] 2 K. B. 919; *Re* Petition of *Right*, [1915] 3 K. B. 649; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508; *The Crown of Leon v. Admiralty Comrs.*, [1921] 1 K. B. 595. *Generally*, *Mentd.* *Stockdale v. Hansard* (1840), 3 State Tr. N. S. 723.

PART V. SECT. 1, SUB-SECT. 1.

d. Extent of prerogative — Applies to all British Empire.]—Whenever a demand may be properly sued for in the name of the Sovereign, the prerogative right of the Crown attaches in all portions of the British Empire subject to English law, irrespective

of the locality in which the debt arose & of the govt. in right of which it accrued.—*R. v. SIVEWRIGHT* (1896), 34 N. B. R. 144.—CAN.

44 i. ——— Runs to colonies.]—The prerogatives of the Crown exist in British colonies to the same extent as in United Kingdom,—

47. ———.]—A patent is good to make persons a corporation & to enable them to enjoy & apply to trade all the privileges derived from being a body corporate.

A monopoly not only grants to a person or corporation rights of trading, but seeks to restrain other persons & corporations of a freedom they had before or to hinder them in this lawful trade.

It was an inherent prerogative of the Crown that none should trade with foreigners without the King's licence.

By declaring war the King can determine a public trade though settled by Act of Parliament.

All subjects are bound to take notice of the King's Great Seal & Privy Seal. The prerogative of the Crown applies both to inland trade & to foreign trade.

The common law takes note of the law merchant which is part of the law of nations.

The king is absolute master of law & peace & is the fountain of honour & may ennoble as many of his subjects as he pleases.—*EAST INDIA CO. v. SANDYS (CASE OF MONOPOLIES)* (1685), 10 State Tr. 371; *Skin*. 132, 165, 197, 223; 2 Show. 366; 90 E. R. 62, 76, 91, 103.

48. ——— Imposition of tolls.]—The King cannot at his pleasure put any imposition upon any merchandise to be imported into this kingdom, or exported, unless it be for advancement of trade and traffic. Such impositions so put cannot be demised or granted to any subject.

Although the King may prohibit any person in some cases with some commodities to pass out of the realm; yet this cannot be where the end is private, but where the end is public.

At common law no customs were paid but only for wools, wool-fells, & leather.

The subsidies of tonnage & poundage might be granted by the King so long as he lived.

For the benefit of the subject, the King may make an imposition or toll within the realm to repair highways, bridges, & to make walls for defence: but then the sum imposed ought to be proportionable to the benefit.—*CUSTOMS, SUBSIDIES & IMPOSITIONS* (1607), 12 Co. Rep. 33; 77 E. R. 1314.

49. ———.]—No private individual has a right to fix a toll, which is a royal prerogative, although he may take a composition from individuals. He may do so indeed by Act of Parliament, & erect gates & stop passengers till a toll is paid.—*NORTHAM BRIDGE & ROADS CO. v. LONDON & SOUTHAMPTON RY. CO.* (1840), 6 M. & W. 428; 1 Ry. & Can. Cas. 665; 9 L. J. Ex. 165; 4 Jur. 892; 151 E. R. 479.

Annotations:—*Mentd.* *R. v. West Hoe Highways Trustees* (1846), 10 J. P. 405; *Ex p. Potter* (1867), 16 L. T. 350; *R. v. French* (1879), 4 Q. B. D. 507; *West Riding JJ. v. R.* (1883), 8 App. Cas. 781; *Northam Bridge Co. v. R.* (1886), 55 L. T. 759.

50. ——— Prisage.]—*R. & WALLER v. HANGER*, No. 7, *ante*.

51. ——— Appointment of officers to gauge imported articles.]—*LONDON CORPN. v. LONG*, No. 739, *post*.

BANK v. R. (1888), 17 S. C. R. 657.—CAN.

e. Removable only by ———. Crown prerogatives can only be taken away by express statutory enactment.—*MARITIME BANK v. R.* (1888), 17 S. C. R. 657.—CAN.

52. When part of law of England.]—BROADFOOT'S CASE, No. 494, *post*.

53. Assignment of prerogatives—By statutory authority.]—(1) In the Charter establishing the Supreme Ct. of Judicature at Bombay, the following clauses on the subject of appeals were contained:—"And it is our further will & pleasure, that, in all indictments, informations, & criminal suits & causes whatsoever, the said Supreme Ct. shall have full & absolute power & authority to allow or deny the appeal of a party pretending to be aggrieved, & also to award & regulate the terms upon which the appeal shall be allowed in such cases in which the Ct. may think fit to allow such appeal. & we do hereby also reserve to ourselves, our heirs & successors in our or their Privy Council, full power & authority, upon the humble petition of any person or persons aggrieved by the judgment or determination of the Supreme Ct. of Judicature at Bombay, to refuse or admit his, her, or their appeal thereupon, upon such terms, & under such limitations, restrictions, & regulations, as we or they shall think fit, & to reform, correct, or vary such judgment or determination, as to us or them shall seem meet:"—*Held*: there was no power to the Crown to grant appeals in criminal cases created or reserved by this Charter; but the reservation was confined to civil cases only.

(2) Although the Crown may not of its own authority part with any portion of its prerogative, yet, where the Crown has acted under the authority of Parliament, it may part with its prerogative:—*Held*: under the words of the Charter, that Charter having been granted by the Crown by force of an Act of Parliament, the Supreme Ct. had the sole & absolute power to allow or refuse permission to appeal in cases of alleged error of record in criminal cases; & the Crown had *pro tanto* delegated its prerogative.—*R. v. EDULJEE BYRAMJEE* (1817), 5 Moo. P. C. C. 276; 3 Moo. Ind. App. 577; 13 E. R. 496; *sub nom.* PARSEE MURDER CASE, *Ex p.* EDULJEE BYRAMJEE, 11 Jur. 855, P. C.

54. S.P. R. v. ALLOO PAROO (1847), 5 Moo. P. C. C. 296; 3 Moo. Ind. App. 488; 13 E. R. 504; *sub nom.* *Ex p.* ALOO PAROO, 11 Jur. 857, P. C.

SUB-SECT. 2.—LIMITATIONS OF THE PREROGATIVE.

A. In General.

55. Limited to prerogatives allowed by law.]—The King, by his proclamation, cannot create an offence which was not an offence before. The King hath no prerogative but that which the law of the land allows him. If an offence be not already punishable in the Star Chamber, the prohibition of it by proclamation cannot make it punishable there. The King, for prevention of

offences, may by proclamation admonish his subjects that they keep the laws & do not offend against them.—**PROCLAMATIONS' CASE** (1611), 12 Co. Rep. 74; 2 State Tr. 723; 77 E. R. 1352. *Annotation*:—*Mentd.* Middleton v. Crofts (1736), 2 Atk. 650.

56. Must not be contrary to liberty of subject.]—Royal prerogative which tends to the high prejudice of the subject is not allowable.—**WARRAM'S CASE** (1587), Moore, K. B. 239; 72 E. R. 553.

57. —.]—The ct. is cautious of extending the prerogative of the Crown, in such a way as to restrain the liberty of the subject, & his power over himself & his estate, further than the law will allow.—*Ex p.* BARNSELY (1744), 3 Atk. 168; 26 E. R. 899, L. C.

Annotations:—*Refd.* *Ex p.* Wragg (1800), 5 Ves. 450; *Ex p.* Cranmer (1806), 12 Ves. 445.

58. Crown cannot make contract limiting future power of executive action.]—During the war neutral shipowners, being aware of the liability of neutral ships to be detained in British ports, obtained an undertaking from the British Govt. that if they sent a particular ship to this country with a particular class of cargo she should not be detained. On the faith of that undertaking the owners sent the ship to a British port with a cargo of the stipulated kind. The British Govt. subsequently withdrew their undertaking & refused her clearance. On a petition of right for damages for breach of contract:—*Held*: the Govt.'s undertaking was not enforceable in a Ct. of law, it not being within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future.—**REDERIAKTIEBOLAGET AMPHITRITE v. R.**, [1921] 3 K. B. 500; 91 L. J. K. B. 75; 126 L. T. 63; 37 T. L. R. 985.

B. As regards Creation, Suspension, Dispensation and Alteration of Laws.

Power to make or unmake laws—By proclamation.]—*See* No. 96, *post*.

59. Power to dispense with laws—Before Bill of Rights, 1688 (c. 2).]—**ANON.** (1513), 1 Dyer, 52a; **DISPENSATIONS' CASE** (1604), Jenk. 307; **ANON.** (1609), 12 Co. Rep. 30; **THOMAS v. WATERS** (1667), Hard. 442; **THOMAS v. SORREL** (1673), 1 Freem. K. B. 85; **GODDEN v. HALES** (1686), 2 Show. 475.

See, now, Bill of Rights, 1688 (c. 2).

60. Power to alter laws without consent of Parliament—Before Bill of Rights, 1688 (c. 2).]—**ANON.** (1429), Jenk. 97; **YORK (ARCHBP.) & SEDGWICK'S CASE** (1612), Godb. 201.

See, now, Bill of Rights, 1688 (c. 2).

C. As regards Taxation.

61. Power to impose taxation without parliamentary sanction—Before Bill of Rights, 1688 (c. 2).]—**A.-G. v. BATES, IMPOSITIONS' CASE**

PART V. SECT. 1, SUB-SECT. 2.—A.

55 i. Limited to prerogatives allowed by law.]—Where the greater rights & prerogatives of the Crown are in question, recourse must be had to the public law of the Empire by which alone they can be determined, but where its minor prerogatives & interests are in question, they must be regulated by the established law of the place where the demand was made.—**A.-G. & BLACK** (1828), Stuart, K. B. 325—**CAN.**

i. Crown can create legislative assembly in colony.]—The Crown, by its prerogative, can create a legislative assembly in a settled colony, subordin-

ate to Parliament but with supreme power within the limits of the colony for the govt. of its inhabitants.—**KIELLEY v. CARSON, KENT** (1841), 2 Nfld. L. R. App. 10.—**NFLD.**

58 i. Crown cannot make contract limiting future power of executive action.]—The undertaking by a Minister of the Crown on behalf of the Crown that the Crown by its representative will do a certain act at a future time conditional upon the occurrence in the meantime of an event yet uncertain is not one which H.M.'s responsible ministers have any power or authority to enter into so as to bind the Crown.—**A.-G. v. GOLDSBOROUGH** (1889), 15 V. L. R. 638.—**AUS.**

PART V. SECT. 1, SUB-SECT. 2.—B.

g. Power to make or unmake laws—By Order in Council.]—H.M. has prerogative powers to make laws for the govt. of her subjects by Orders in Council.—**R. v. WEAVER** (1889), Udall, 155.—**FIJI.**

h. Power to dispense with laws—Abandonment of revenue.]—W. imported certain cement, upon which a duty was leviable, into a colony. The Govt. agreed to abandon the duty & to allow the cement to be landed free of duty:—*Held*: Govt. could not legally abandon a statutory source of revenue.—**CUSTOMS COLLECTOR v. CAPE CENTRAL RAILWAYS, LTD.** (1889), 6 S. C. 402.—**S. AF.**

Sect. 1.—Nature and limitations generally of the prerogative: Sub-sect. 2, C. & D.; sub-sect. 3. Part VI. Sects. 1 & 2: Sub-sect. 1.]

(1610), 2 State Tr. 371; EXACTION OF BENEVOLENCE (1613), 12 Co. Rep. 119; R. v. HAMPDEN, SHIP MONEY CASE (1637), 3 State Tr. 826; SAY'S (LORD) CASE (1639), Cro. Car. 524; CHAMBERS v. BRUMFEILD (1641), Cro. Car. 601; ANON. (1664), 1 Sid. 218.

See, now, Bill of Rights, 1688 (c. 2), s. 1.

62. — Income tax.—A resolution of the Committee of the House of Commons for Ways & Means, assenting to income tax at a certain rate for the ensuing financial year commencing Apr. 6, does not either *per se*, or after adoption by the House of Commons authorise the Crown to levy on the subject the tax so assented to, before the tax has been actually imposed by Act of Parliament; nor can the Bank of England, before the tax is so imposed by statute, lawfully deduct any income tax from the dividends payable by the Bank to a stockholder without the assent of the holder.—BOWLES v. BANK OF ENGLAND, [1913] 1 Ch. 57; 82 L. J. Ch. 124; 108 L. T. 95; 29 T. L. R. 42; 57 Sol. Jo. 43; 6 Tax Cas. 136.

Annotations:—Reid. Argyll v. I. R. Comrs. (1913), 109 L. T. 893; Gresham Life Assoc. Soc. v. A.-G., [1916] 1 Ch. 228.

See, now, Provisional Collection of Taxes Act, 1913 (c. 3).

D. By Statute.

63. Magna Carta.—GILES v. GROVER, No. 831, *post*.

64. 25 Edw. 3, Stat. 5, c. 19.—GILES v. GROVER, No. 831, *post*.

65. 33 Hen. 8, c. 39.—A.-G. v. ANDREW, No. 833, *post*.

See, also, Bill of Rights, 1688 (c. 2); Act of Settlement, 1700 (c. 2).

How far Crown bound by statutes.—*See Part IX., Sect. 5, sub-sect. 2, post.*

SUB-SECT. 3.—EFFECT OF DEMISE OF THE CROWN.

66. On annuity by Sovereign—Binding on successors.—King Henry VIII. grants to one an annuity for the exercise of the office of usher of the Privy Chamber to Prince Edward his son, in this case if the service is not done, the annuity shall cease as well as it should if the service was to be done to King Henry VIII. himself, & though by the death of King Henry VIII. & the prince's accession to the Crown, the patentee was discharged by law from doing the service any longer to Edward when King, & by the death of King Edward he was discharged by law from doing the service at all after his death, yet he shall have the annuity, not only during the life of King Edward, but after his death, as long as he the patentee himself lives, & this notwithstanding

King Henry VIII. did not expressly bind his heirs or successors in the grant of the annuity, but wholly omitted to mention them in the patent. In such a case a writ of execution shall be granted to petitioner directed to the Treasurer & Chamberlain of the Exchequer.—WROTH'S CASE (1572), 2 Plowd. 458; 75 E. R. 678.

Annotations:—Consd. Thomas v. R. (1874), L. R. 10 Q. B. 31. Reid. Needler v. Winchester (1614), Hob. 220; Howard's Case (1627), Cro. Car. 59; Holland v. Fisher (1662), O. Bridg. 181; Foot v. Berkley (1670), 1 Vent. 83; Thomas v. Sorrell (1673), Freem. K. B. 85; R. v. Hornby (1694), 5 Mod. Rep. 30; Banker's Case (1695), Skin. 601; Re Pering (1837), 2 M. & W. 873. Mentd. Cromwel's Case (1601), 2 Co. Rep. 69 b.

67. On dispensation by Sovereign—Not determined by death of Sovereign.—As to the dispensing power of the Crown & the distinction between *mala in se* & *mala quia prohibita*, dispensation not determined by King's death.—THOMAS v. SORRELL (1673), 2 Keb. 372, 791; 3 Keb. 184, 223, 233; 1 Freem. K. B. 85, 137; Vaugh. 330; 84 E. R. 233, 500, 665, 689, 694, Ex. Ch.

Annotations:—Mentd. Jeverson v. Moor (1698), 12 Mod. Rep. 262; Shaw v. Bull (1701), 12 Mod. Rep. 592; R. v. Papinian (1725), 2 Sess. Cas. K. B. 34; Ex p. Armitage (1756), Amb. 294; Muskett v. Hill (1839), 5 Bing. N. C. 694; Wood v. Leadbitter (1845), 13 M. & W. 838; Washbourne v. Burrows (1847), 16 L. J. Ex. 266; Taplin v. Florence (1851), 10 C. B. 744; Congreve v. Evetts (1854), 10 Exch. 298; Bailey v. Stephens (1862), 12 C. B. N. S. 91; L. C. C. v. Dundas, [1904] P. 1; Warr v. L. C. C., [1904] 1 K. B. 713; Smith v. Colbourne, [1914] 2 Ch. 533; British Actors Film Co. v. Glover, [1918] 1 K. B. 299.

68. On bond to Sovereign—Subsisting to successors.—A bond to the King in his political capacity subsists to his successor. Whereas a writ of *scire facias* issued against deft., upon his not having performed the condition of a bond entered into by him, & P., in the penalty of £500 to her late Majesty Queen Ann, her heirs, exors., & administrators, to which, upon rules given, deft. appeared, & put in a demurrer, & his Majesty's A.-G. having joined in the same:—*Held*: the bond having been given to her late Majesty in her political capacity, the same subsisted to his present Majesty as her successor, & therefore the demurrer should be over-ruled.—R. v. BRADFORD (1714), Dick. 24; 2 Ld. Raym. 1327; 21 E. R. 175.

69. On appointment of justices—Names added to schedule in commission after death of Sovereign.—The Crown Office Act, 1877 (c. 41), does not authorise the addition of names to a Commission of Oyer and Terminer or of Gaol Delivery, & no mere Commission to act as a Justice of the Peace can confer the jurisdiction of these Commissions.

Conviction quashed as being *coram non iudice*, some of the convicting justices sitting only by virtue of their names being added, after the demise of the Crown issuing a Commission, to a schedule in that Commission.—R. v. HOLDICH (1920), 15 Cr. App. Rep. 122; 37 T. L. R. 300, C. C. A.

See, also, Succession to Crown Act, 1707 (c. 41), s. 5; Demise of Crown Act, 1727 (c. 5, s. 7); Demise of Crown Act, 1830 (c. 43); Demise of Crown Act, 1901 (c. 5).

PART V. SECT. 1, SUB-SECT. 3.

k. On contract respecting construction of public work.—An action arising out of a contract for the hire of horses to be used in the construction of a public work lies against the executive authority of the Dominion, & is not affected or defeated by the demise

of the Crown.—JOHNSON v. R. (1903), 8 Exch. C. R. 360; 24 C. L. T. 2.—CAN.

l. On status of justices.—A justice had been for many years on the commission of the peace & was in the fresh commission issued since the accession of King Edw. 7, but had not

taken afresh the oaths of allegiance & office after the death of the Queen: he had attested an affidavit of debt:—*Held*: the ct. could not inquire, upon a question of the validity of such affidavit, into defects of his qualification.—*Re CARDEW, Ex p. BANK OF AUSTRALASIA* (1900), 10 Q. B. J. 176.—AUS.

Part. VI.—The Crown in relation to the Executive.

SECT. 1.—IN GENERAL.

70. Sovereign acts by executive officers—Formerly might have acted himself.]—The Offences at Sea Act, 1536 (c. 15), directs a commission to be made by the Chancellor to certain persons. Although there be no Chancellor, the Keeper of the great Seal may do it; if there be neither Chancellor nor Keeper of the great Seal, the King may make such a commission. This Statute concerns Government; it was made only for the ease of the King, & not to take from him the power of Government, which God, Nature, Birthright & the Common Law have given him.

So of the Patent for Alnage, notwithstanding stat. 35 H. 6, c. 5, which ordains it to be granted by the Treasurer. So of the King's Patent for Plurality of Benefices without the Archbishop's dispensation, notwithstanding stat. 25 Hen. 8, c. 21. So for the appointment of sheriffs, notwithstanding the stat. 9 Edw. 2. These things concern the Government of the public; & before these statutes the King might of himself do all the matters aforesaid; & so he may at this day.—ANON. (1561), Jenk. 225; 145 E. R. 156, Ex. Ch.

71. Right to subjects' services—General rule.]—The King has a natural interest in every subject & may compel him to serve in any function in which he shall judge him capable.—R. v. LARWOOD (1694), 1 Ld. Raym. 29; 12 Mod. Rep. 67; Comb. 315; Skin. 574; 1 Salk. 167; 3 Salk. 133; Carth. 306; 91 E. R. 916.

*Annotations:—*Distd. R. v. Grosvenor (1743), 1 Wils. 18. *Refd.* London City v. Vanacker (1699), Carth. 480; R. v. Aldborough Borough (1712), 10 Mod. Rep. 100; Evans v. Harrison (1762), Wilm. 130; R. v. Walker (1817), 6 M. & S. 277; R. v. Westwood (1825), 4 B. & C. 781; R. v. Westwood (1830), 7 Bing. 1. *Mentd.* Johnston v. Willson (1741), 7 Mod. Rep. 345.

72. — As member of House of Lords.]—QUEENSBERRY'S (DUKE) CASE (1719), 1 P. Wms. 582; 2 Eq. Cas. Abr. 707; 24 E. R. 527.

*Annotations:—**Refd.* Duff v. Atkinson (1803), 8 Ves. 577. *Mentd.* Stair v. Macgill (1827), 1 Bl. N. S. 662; Egerton v. Brownlow (1853), 4 H. L. Cas. 1.

73. — As head-borough.]—A younger brother of the corpn. of the Trinity-House is not exempt from serving the office of head-borough. The office of constable may be served by deputy. The Crown may grant exemptions from serving offices of this sort, provided a sufficient number of persons be left to serve them.—R. v. CLARKE (1787), 1 Term Rep. 679; 99 E. R. 1317.

*Annotation:—**Mentd.* R. v. Booth (1848), 12 Q. B. 884.

74. — As member of Parliament.]—Every person who is returned to Parliament is bound by the law of the land to serve & it has been argued, & seemingly on probable grounds, that he may be compelled to serve (ELLENBOROUGH, C.J.).—MORRIS v. BURDETT (1813), 2 M. & S. 212; 1 Camp. 218; 105 E. R. 361, N. P.

*Annotation:—**Refd.* Davies v. Kensington (1874), L. R. 9 C. P. 728.

See, further, PARLIAMENT.

75. Power to exempt subject from services.]—R. v. CLARKE, No. 73, *ante*.

SECT. 2.—APPOINTMENT AND REMOVAL OF EXECUTIVE OFFICERS.

SUB-SECT. 1.—PUBLIC OFFICERS AND SERVANTS.

76. Public officers & servants generally—Suspension of—Though appointed for life.]—

Prerogative of the King by letters patent, to suspend a public officer, though the office is granted for life. After suspension the officer is entitled to receive the salary, but not to exercise the functions, of the office.—SLINGSBY'S CASE (1680), 3 Swan, 178; 36 E. R. 821.

77. — Dismissal at pleasure of Crown—Colonial servant—Office held during pleasure.]—The office of Commissioner of Crown Lands, in New South Wales, created by the Act of the Legislature of that Colony, 4 Will. IV., No. 10, is not a patent office, though made under the Great Seal of the Colony, within the meaning of the Colonial Leave of Absence Act, 1782 (c. 75); but is an office held *durante bene placito*, & there is no right of appeal to the Queen in Council under that statute, from an Order of amotion from such office by the Governor-General & Executive Council.

The Colonial Leave of Absence Act, 1782 (c. 75), applies only to offices held by patent, for life, or for a certain term.

The Judicial Committee have no jurisdiction to take into consideration the propriety of the dismissal of a public servant by a Governor-General of a Colony from an office held during his pleasure, unless the matter is expressly referred to them by the Crown.—*Re NEW SOUTH WALES (GOVERNOR-GENERAL & EXECUTIVE COUNCIL), Ex p. ROBERTSON* (1858), 11 Moo. P. C. C. 288; 8 State Tr. N. S. 1065; 14 E. R. 704, P. C.

*Annotation:—**Folld.* *Re Sree Mohun Ghutuck* (1870), 13 Moo. Ind. App. 343.

78. — — — — —.]—A Colonial Govt. is on the same footing as the Home Govt. as to the employment & dismissal of servants of the Crown; & in the absence of special contract they hold their offices during the pleasure of the Crown.

Where A. during the absence on leave of B. was gazetted to act temporarily in his office & was dismissed before B.'s leave expired:—*Held*: A. had no cause of action.—SHENTON v. SMITH, [1895] A. C. 229; 64 L. J. P. C. 119; 72 L. T. 130; 43 W. R. 637; 11 R. 375, P. C.

*Annotations:—**Consd. & Folld.* Dunn v. R., [1896] 1 Q. B. 116. *Folld.* *Re Hales' Petition of Right* (1918), 34 T. L. R. 341. *Refd.* Fisher v. Steward (1920), 36 T. L. R. 395.

79. — — — — — Unless restricted by statutory provisions.]—The Crown has by law, whether in England or New South Wales, power to dismiss at pleasure either its civil or military officer, a condition to that effect being an implied term of the contract of service except where it is otherwise expressly provided:—*Held*: certain provisions of the New South Wales Civil Service Act of 1884, being manifestly intended for the protection & benefit of the officer, are inconsistent with such a condition & consequently restrict the power of the Crown in that respect.—GOULD v. STUART, [1896] A. C. 575; 65 L. J. P. C. 82; 75 L. T. 110; 12 T. L. R. 595, P. C.

*Annotations:—**Consd.* Young v. Adams, [1898] A. C. 469; Young v. Waller, [1898] A. C. 661. *Refd.* Hollinshead v. Hazleton, [1916] 1 A. C. 428; Denning v. Secretary of State for India in Council (1920), 37 T. L. R. 138.

80. — — — — — Notwithstanding contract of service for fixed term.]—*Semble*: a contract of service with the Crown for a fixed term of years is determinable at the pleasure of the Crown.—DE DOHSE v. R. (1886), 66 L. J. Q. B. 422, n; 3 T. L. R. 114, H. L.

*Annotations:—**Folld.* Dunn v. R., [1896] 1 Q. B. 116; Hales v. R. (1918), 34 T. L. R. 589. *Refd.* Gould v. Stuart,

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[1896] A. C. 575; *Raphael Steamship v. Brandy* (1911), 105 L. T. 116; *Leaman v. R.*, [1920] 3 K. B. 663.

81. ——— Notwithstanding contract for termination by notice.]—There is a custom that a servant of the Crown retains his employment only during the pleasure of the Crown, & even if a special contract to the contrary could be proved it could not bind the Crown.—*HALES v. R.* (1918), 34 T. L. R. 589, C. A.; *affg. S. C. sub nom. Re HALES' PETITION OF RIGHT*, 34 T. L. R. 341. *Annotation:—Refd. Fisher v. Steward* (1920), 36 T. L. R. 395.

82. ——— ———.]—A Crown servant, against whom no misconduct is alleged, is liable to dismissal at the pleasure of the Crown without notice, even if the form of agreement under which he has been engaged implies that except in case of misconduct the engagement can be terminated only by notice.—*DENNING v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1920), 37 T. L. R. 138.

83. ——— Unless otherwise provided for by statute.]—Servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown.—*DUNN v. R.*, [1896] 1 Q. B. 116; 65 L. J. Q. B. 279; 73 L. T. 695; 60 J. P. 117; 44 W. R. 243; 12 T. L. R. 101; 40 Sol. Jo. 129, C. A.

Annotations:—Folld. Hales v. R. (1918), 34 T. L. R. 589; *Denning v. Secretary of State for India in Council* (1920), 37 T. L. R. 138. *Apld. Leaman v. R.*, [1920] 3 K. B. 663. *Refd. Gould v. Stuart*, [1896] A. C. 575; *Dunn v. Macdonald*, [1897] 1 Q. B. 401; *The Raphael v. Brandy*

PART VI. SECT. 2, SUB-SECT. 1.

81 i. Public officers & servants generally.—Dismissal at pleasure of Crown.—Notwithstanding contract for termination by notice.]—*HUGHES v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1871), 7 B. L. R. 688.—IND.

83 i. ——— Unless otherwise provided for by statute.]—The Crown has power to dismiss its servants at will & no authority representing the Crown is able in the employment of persons in the service of the Crown to contract with them so as to deprive the Crown of the enjoyment of that power. Such power can only be excluded & restricted by an Act of the Legislature.—*VOSS v. SECRETARY OF STATE FOR INDIA* (1906), 1 L. R. 33 Calc. 669.—IND.

m. ——— Without prior notice.]—The Crown can legally dismiss its servants at its pleasure without prior notice to them.—*JOYCE v. ERSKINE*, [1866] F. N. D.—S. AF.

n. ——— ———.]—*ALLISON v. COLONIAL GOVERNMENT* (1882), 3 N. L. R. 159.—S. AF.

o. ——— ———.]—*LYNE v. COLONIAL GOVERNMENT* (1890), 11 N. L. R. 176.—S. AF.

p. ——— Without cause assigned.]—A servant of the Crown is liable to dismissal without cause assigned.—*RAM DAS HAZRA v. SECRETARY OF STATE FOR INDIA* (1912), 18 C. W. N. 106.—IND.

q. ——— Absence of special contract.]—A colonial govt. is on the same footing as the Imperial Government as to the employment & discharge of servants of the Crown, & in the absence of special contract, they hold their office during the pleasure of the Crown.—*BARNES v. NEWFOUNDLAND GOVERNMENT* (1875), 6 Nfld. L. R. 89.—NFLD.

r. ——— ———.]—*SKELTON v. NEWFOUNDLAND GOVERNMENT* (1888), 7 Nfld. L. R. 243.—NFLD.

s. ——— Authority to enter into special contract.]—The Administrator's commission of July 4, 1900, empowering him to take all such measures & to make & enforce such laws as he might deem necessary for the peace, order & good govt. of the Transvaal, did not authorise the engagement of a civil servant upon terms that the latter should not be liable to be dismissed at will.—*SHEARD v. A.-G.*, [1909] T. S. 659.—S. AF.

t. ——— Civil Service Act, 1884.]—Under the above Act, the Crown has no longer the right to dismiss a civil servant at its pleasure, for misconduct; a dismissal can only take place after the procedure provided for by the Act has been observed.—*STUART v. GOULD* (1895), 16 N. S. W. L. R. 132; 11 N. S. W. W. N. 175.—AUS.

a. ——— ———.]—Except in cases of misconduct, the above Act does not restrict the prerogative right of the Crown to dismiss its servants at pleasure.—*ADAMS v. YOUNG* (1898), 19 N. S. W. L. R. 325; 15 N. S. W. W. N. 121.—AUS.

b. ——— Officers of Education Department.—Public Services Act, 1890.]—An officer of the Education Department is an officer of H.M., who may, like any other officer of H.M., be dismissed without notice, by the exercise of H.M.'s will & pleasure. H.M.'s will & pleasure may be made known in the case of officers in such department by dismissal by the Public Service Board with the consent of the Governor-in-Council, though no intimation to the officer of the intention of the Board to deal with the matter has been given, & no communication to the officer of the result has been made.—*MATTINGLEY v. R.* (1895), 22 V. L. R. 80.—AUS.

c. ——— Public Services Act, 1902.]—There is no right to dismiss an officer at will or otherwise than in accordance with the procedure prescribed in the above Act.—*WILLIAMS v. COMMONWEALTH* (1907), 5 C. L. R. —AUS.

(1911), 80 L. J. K. B. 1067; *Hollinshead v. Hasleton*, [1916] 1 A. C. 428; *Fisher v. Steward* (1920), 36 T. L. R. 395.

— **Action for wrongful dismissal of.]—See PUBLIC AUTHORITIES & PUBLIC OFFICERS.**

84. Military officers.—Dismissal at pleasure of Crown.]—The Secretary of War is not personally responsible for everything said or done by a Regimental Board of Inquiry; when a Board of Inquiry is appointed it is their duty to conduct it according to established rules, and if they do not do so, *prima facie*, the responsibility rests upon them; unless it is shown that not mere irregularities, but errors inconsistent with substantial justice, were brought to the personal knowledge of the Secretary for War.

Semble: the Secretary of State for War could only give evidence of the grounds of his recommendation to Her Majesty by first obtaining the permission of Her Majesty, as without that permission his oath as a Privy Councillor would have precluded his doing so.

If a public servant does an act in the honest discharge of his public duty he is responsible to his Sovereign, but not before a jury. The removal of an officer under such circumstances by the Secretary for War is not a judicial act at all. It is an exercise of the pleasure of the Sovereign through a high officer of State. The Sovereign has the power of dismissing any officer. He receives his commission from his Sovereign & holds it at his pleasure, & it is in the will of the Sovereign to withdraw it. It is the will of the Sovereign to exercise that power through respon-

d. ——— Though servant not appointed under Royal Warrant or Commission.—Power entrusted to Governor.]—The Crown has the power to dismiss summarily any public servant who holds office during the pleasure of the Crown, even though such servant has not been appointed under Royal Warrant or Commission, & such power is usually entrusted to the Governor.—*FAURE v. COLONIAL SECRETARY*, [1880] F. 82.—S. AF.

e. ——— Right not affected by statute.]—*MALCOLM v. RAILWAYS COMR.* (1904), T. S. 947.—S. AF.

f. ——— Concurrence of Parliament.]—In the case of the removal of an officer under Act 32, 1895, s. 35, there must be a concurrence in such removal by both Houses of Parliament, but where such concurrence has been given the Ct. cannot inquire whether the reorganisation of the dept. to which the officer belonged was necessary or conduced to greater sufficiency or economy.—*CORDEROY v. COLONIAL GOVERNMENT* (1907), 24 S. C. 634.—S. AF.

g. ——— Appointment to statutory office.]—If a person is appointed by the Crown to an office to the holder of which rights are given by statute, there is a contract by the Crown with the holder of the office that he shall hold it upon the terms which the statute prescribes.—*COKER v. R.* (1896), 16 N. Z. L. R. 193.—N.Z.

84 i. Military officers.—Dismissal at pleasure of Crown.]—*KING v. SECRETARY OF STATE FOR INDIA* (1908), 15 C. W. N. 486.—IND.

h. Interpreter of Supreme Court.]—The Interpreter of the Supreme Ct. is an officer of that Ct. & holds office during pleasure of the Crown.—*FAURE v. COLONIAL SECRETARY*, [1880] F. 82.—S. AF.

k. Police.—Police Act, 1863.]—Under the above Act a constable holds office during pleasure of the Crown.—*RYDER v. FOLEY* (1906), 4 C. L. R. 422.—AUS.

sible servants of the Crown, & they are not responsible for its exercise before a jury.—*DICKSON v. COMBERMERE (Viscount)* (1863), 3 F. & F. 527, N. P.

Annotations:—*Consd. Grant v. Secretary of State for India* (1877), 2 C. P. D. 445. *Mentd. Dawkins v. Paulet* (1869), L. R. 5 Q. B. 94.

85. ———.]—T. was in 1846 appointed by a letter of the then Under-Secretary at War to the permanent medical charge of a military prison on the condition, first suggested by T., that he should forego all future claim to promotion. T. was afterwards appointed to another district office, on the abolition of which he received promotion; he was in 1874 deprived of the medical charge of the prison & compulsorily retired on half pay. T. then filed a petition of right to which the Attorney-General demurred.

Held: T. being a military officer could only be appointed subject to the rules & regulations of the service, & was liable to dismissal or removal at any moment at the pleasure of the Crown; & the demurrer must be allowed.—*Re TUFNELL* (1876), 3 Ch. D. 164; 45 L. J. Ch. 731; 34 L. T. 838; 24 W. R. 915.

Annotations:—*Consd. Grant v. Secretary of State for India* (1877), 2 C. P. D. 445. *Mentd. Cooper v. R.* (1880), 14 Ch. D. 311.

86. ———.]—In an action against the Secretary of State for India the claim stated *pltf.* accepted a commission in the military service of the East India Co. upon the basis & faith of the customs, laws, regulations, & provisions of the Co.'s service, which were that an officer entering the service should continue therein so long as he was physically & mentally efficient, & that, before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him, & should be summoned to make his defence, having a reasonable time allowed him for that purpose, & that *pltf.* was compelled to subscribe to a military fund to provide for widows & orphans of officers, & that if he had continued in the service his widow would have been entitled to an allowance out of a fund called "Lord Clive's Fund;" that after the Indian forces had been transferred to the Crown he, while in the performance of military duty, & in all respects physically & mentally competent to perform any duties which were or might be required of him, was, without any charge of misconduct, called upon to retire from the service, in pursuance of a general order made by the Governor-General of India with the sanction of *deft.*, by which order unemployed officers ineligible for employment by reason of clear misconduct, or proved physical or mental inefficiency, etc., might be required to retire upon a pension; & upon his declining voluntarily to retire, he was compulsorily placed upon the pension-list; & the fact of his removal to the pension-list was notified in the usual way by a general order of the Commander-in-Chief published in the *Gazette*:—*Held*: the claim disclosed no cause of action, for the Crown, acting by *deft.*, had a general power of dismissing a military officer at its will & pleasure, & *deft.* could make no contract with a military officer in derogation of such power, & the customs, regulations, etc., relied on by *pltf.* must be taken to be always subject to it, & incapable of superseding it, & further the publication in the *Gazette* was an official act under the authority of the Crown, for which *deft.* could not be responsible in an action for libel.—*GRANT v. SECRETARY OF STATE FOR INDIA* (1877), 2 C. P. D. 445; 46 L. J. Q. B. 681; 37 L. T. 188; 25 W. R. 848.

Annotation:—*Reid. The Raphael v. Brandy* (1911), 80 L. J. K. B. 1067.

87. ———.]—*DE DOHSE v. R.*, No. 80, *ante*.

88. ———.]—*DUNN v. R.*, No. 83, *ante*.

——— Action for wrongful dismissal of.]—*See PUBLIC AUTHORITIES & PUBLIC OFFICERS; ROYAL FORCES.*

Naval officer—Action for wrongful dismissal of.]—*See PUBLIC AUTHORITIES & PUBLIC OFFICERS; ROYAL FORCES.*

89. Army nurse—Retirement before time for superannuation.]—*RYAN v. R.* (1904), 48 Sol. Jo. 674.

See, generally, ROYAL FORCES.

Actions against public officers and servants.]—*See AGENCY*, Vol. I., pp. 654–657; *PUBLIC AUTHORITIES & PUBLIC OFFICERS.*

Salaries, pensions, allowances, etc. of public officers generally.]—*See PUBLIC AUTHORITIES & PUBLIC OFFICERS; REVENUE.*

——— Whether assignable or liable to be taken in execution.]—*See CHOSSES IN ACTION*, Vol. VIII., p. 436, Nos. 135 *et seq.*, & *EXECUTION.*

Compensation for abolition of office.]—*See PUBLIC AUTHORITIES & PUBLIC OFFICERS.*

SUB-SECT. 2.—JUDICIAL OFFICERS.

Appointment.]—*See Part IX., Sect. 1, post.*

90. Duty to attend—Forfeiture of office.]—

(1) A grant by the Crown of the office of steward of the manors of M. B. & H. is sufficiently certain without saying in what county the manors lie; but the grantee in pleading must name the county, & if *non concessit* be pleaded, may show by evidence what manor was granted; but if the other party demand oyer of the letters patent, & demur, it must be adjudged against him, for it is matter of fact what manor shall pass.

(2) A grant by the King of an office from a day past, although void for the time past, is good for the future, & begins by the grant.

(3) Rules concerning abbreviations & incongruous writings in grants.

(4) When an office concerns the administration of justice, or the commonwealth, & the officer *ex officio*, or of necessity, ought to attend without any demand or request, *non user*, or non attendance in *ct.*, is a forfeiture of the office; but when the officer need not attend, or exercise his office, but on demand or request made, *non user* is no cause of forfeiture, unless there has been a request & a subsequent neglect.—*SHREWSBURY'S (EARL) CASE* (1610), 9 Co. Rep. 42a; 77 E. R. 793.

Annotations:—*As to (2) Reid. R. v. Kemp* (1695), Comb. 334; *Doe d. Devine v. Wilson* (1855), 10 Moo. P. C. C. 502. *As to (4) Consd. R. v. Wells* (1767), 4 Burr. 1998. *Reid. R. v. Larwood* (1694), 1 Salk. 167; *R. v. Ballivos* (1705), 2 Ld. Raym. 1232; *R. v. Ponsonby* (1753), 1 Keny. 1. *Generally, Mentd. Foster v. Jackson* (1615), Hob. 52; *Sury v. Pigot* (1626), Poph. 166; *Tyffyn v. Wingfield* (1633), Cro. Car. 325; *Holmes's Case* (1634), Cro. Car. 376; *Cooper v. St. John* (1648), Sty. 130; *Lyn v. Wyn* (1665), O. Bridg. 122; *R. v. Knollys* (1693), 1 Ld. Raym. 10; *Vaspor v. Edwards* (1701), 12 Mod. Rep. 658; *Hunt v. Bourne* (1702), 1 Com. 124; *Keble v. Hickerlingell* (1707), Kel. W. 276; *Peak v. Bourne* (1732), 2 Stra. 942; *Hamblly v. Trott* (1776), 1 Cowp. 371; *Rafael v. Verelst* (1776), 2 Wm. Bl. 1055.

91. Removal on misconduct—Complaint in House of Lords—Criminal complaint.]—*FOX'S CASE* (1805), 45 Lords Journals 181, 203.

92. ——— Right to appear.]—*BARRINGTON'S CASE* (1830), 62 Lords Journals 599.

93. ——— Complaint in House of Commons.]—*ABINGER'S (LORD) CASE* (1843), 66 Hansard 3rd Series 1037.

Actions against.]—*See LIBEL & SLANDER; PUBLIC AUTHORITIES & PUBLIC OFFICERS.*

SECT. 3.—EXECUTIVE DOCUMENTS.

94. General rule—Subject bound by Great & Privy Seal of King.]—EAST INDIA CO. *v.* SANDYS (CASE OF MONOPOLIES), No. 47, *ante*.

95. Proclamations—Cannot make or unmake law—May call attention to existing law.]—PROCLAMATIONS' CASE, No. 55, *ante*.

96. ———.]—The object of a proclamation is to make known the existing law, & it can neither make nor unmake law.—*Re* GRAZEBROOK, *Ex p.* CHAVASSE (1865), 4 De G. J. & Sm. 655; 6 New Rep. 6; 34 L. J. Bcy. 17; 12 L. T. 249; 11 Jur. N. S. 400; 13 W. R. 627; 2 Mar. L. C. 197; 46 E. R. 1072, L. C.

Annotations:—Mentd. The Helen (1865), L. R. 1 A. & E. 1; Austin Friars Steam Shipping Co. *v.* Strack, [1905] 2 K. B. 315; Connelly *v.* Sibery (1905), 69 J. P. 115; Caine *v.* Palace Steam Shipping Co., [1907] 1 K. B. 670.

97. ——— Must be under Great Seal.]—A Royal Proclamation is not binding unless it be under the Great Seal, & therefore it ought to be so pleaded.—KEYLEY *v.* MANNING (1630), Cro. Car. 180; 79 E. R. 758.

98. ——— Construction of—Trading with Enemy Proclamation.]—Whether any given transaction is "supplying to" the enemy or "obtaining from" them "goods, wares or merchandize" within the Royal Proclamations under the Trading with the Enemy Act, 1914 (c. 87), is a question of law for the Judge.

In construing such Royal Proclamation the ct. will look at the recital only if it thinks there is an ambiguity in the words of the operative part.—*R. v.* OPPENHEIMER & COLBECK, [1915] 2 K. B. 755; 84 L. J. K. B. 1760; 113 L. T. 383; 79 J. P. 383; 31 T. L. R. 369; 59 Sol. Jo. 442; 26 Cox. C. C. 39; 11 Cr. App. Rep. 146, C. C. A.

Trading with enemy.]—*See, generally,* ALIENS, Vol. II., pp. 169 *et seq.*

Prerogative of the Crown to create, alter, or suspend law.]—*See* Part V., Sect. 1, sub-sect. 2 B, *ante*.

99. Sign manual—Necessity for counter signature by Lords of Treasury or Secretary of State.]—A sign manual not countersigned by the Lords of the Treasury, nor by a Secretary of State, is not good.—VERNON *v.* BENSON (1723), 9 Mod. Rep. 47; 88 E. R. 307.

100. Order in Council—Based on erroneous construction of statute—Cannot impose obligation nor add new exemption.]—An Order in Council, which is based on an erroneous construction of a statute, cannot impose a new obligation, nor add a new exemption.—THE EARL OF AUCKLAND (1861), 1 Lush. 164; 30 L. J. P. M. & A. 121; 3 L. T. 786; 1 Mar. L. C. 27; *affd.* 1 Lush. 387, P. C.

Annotations:—Consd. The Vesta (1882), 7 P. D. 240. *Refd.* The Cayo Bonito, [1903] P. 203. *Mentd.* The Stettin (1863), Brown. & Lush. 199; The Hanna (1866), L. R. 1 A. & E. 283; General Steam Navigation Co. *v.* British & Colonial Steam Navigation Co. (1869), L. R. 4 Exch. 238; The Moselle (1874), 32 L. T. 570; The Bristol City, [1902] P. 10.

—— Power to prescribe or alter law administered in Prize Court.]—*See* PRIZE LAW & JURISDICTION.

SECT. 4.—OFFICIAL SECRETS.

101. What are official secrets—Information obtained through position as public servant—Not entrusted in confidence to such servant.]—C. a clerk in the War Office, handed to H. a director & secretary of a firm of tailors, copies of documents

containing particulars of contracts between the War Office & contractors for army officers' clothing. Proceedings were taken against C. & H. by summons under the Official Secrets Act, 1911 (c. 28), in regard to the communication & receiving of the information.

The case was heard at the Westminster Police ct., & the magistrate dismissed the summons. Later the prosecution received the direction of the A.-G. to prefer this indictment against C. & H.:—*Held*: there was evidence that C. having in his possession information which he had obtained owing to his position as a person who held office under his Majesty, communicated it to a person other than a person to whom he was authorised to communicate it. It was not necessary to show that the documents had been entrusted specially in confidence to C., but it was sufficient if it was shown that he obtained the documents owing to his position as a person who held office under his Majesty. Where there was no ambiguity in the enacting part of the statute the words could not be altered or limited merely by the title "Official Secrets," but, even if this could be done, there was evidence that these documents were official secrets. Official Secrets Act, 1911 (c. 28), s. 2, applied to any document or information of an official character which had been obtained by a person holding office under his Majesty, provided that he communicated it to some person to whom he was not authorised to communicate it.—*R. v.* CRISP & HOMEWOOD (1919), 83 J. P. 121.

102. ——— Plans not relating to or used in prohibited place.]—The Official Secrets Act, 1911 (c. 28), s. 2, sub-s. 1 (b), provides: "If any person having in his possession or control any sketch, plan, model, article, note, document, or information, which relates to or is used in a prohibited place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained owing to his position as a person who holds or has held office under His Majesty, or as a person who holds or has held a contract made on behalf of His Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract . . . retains the sketch, plan, etc., in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it: that person shall be guilty of a misdemeanour":—*Held*: in that clause the words "which relates to or is used in a prohibited place or anything in such a place" belonged to the first of the alternative provisions of the clause only, & were not to be read into any of its subsequent alternative provisions beginning with the words, "or which"; &, consequently, if a person having in his possession any sketch, plan, etc., which he had obtained as a person holding office under His Majesty, or employed under a person so holding office, retained the sketch, plan, etc., when he had no right to do so, he was guilty of an offence under the clause, notwithstanding that the sketch, plan, etc., did not relate to a prohibited place.—*R. v.* SIMINGTON, [1921] 1 K. B. 451; 90 L. J. K. B. 471; 125 L. T. 128; 85 J. P. 179; 37 T. L. R. 114; 26 Cox, C. C. 736; 15 Cr. App. Rep. 97, C. C. A.

103. Form of indictment.]—An indictment under Official Secrets Act, 1889 (c. 62), against defts. for conspiracy to incite, & for inciting & attempting to procure a person employed by

PART VI. SECT. 3.

95 1. Proclamations—Cannot make or unmake law—May call attention to existing law.]—GRIEVE *v.* EDINBURGH & DISTRICT WATER TRUSTEES, [1918] S. C. 700.—SCOT.

persons holding a contract with the Government, involving an obligation of secrecy, corruptly to communicate documents & information, must contain an averment that such person incited, etc., has by means of his office, etc., either obtained possession of or control over such document or has acquired the information.—*R. v. STUART & PAGE* (1899), 63 J. P. 712.

See, further, CRIMINAL LAW & PROCEDURE.

SECT. 5.—THE MINISTRY AND THE CABINET.

104. Ministers of the Crown—Not exempted from attendance on subpoena.]—The ct. has jurisdiction both in civil & criminal cases to set aside a subpoena served on a witness where it is satisfied that such witness cannot give relevant evidence, & that the subpoena has been served, not with the object of obtaining relevant evidence, but for some ulterior purpose. Ministers of the Crown have no special privilege exempting them from the obligation of attending upon subpoena to give evidence.—*R. v. BAINES*, [1909] 1 K. B. 258; 78 L. J. K. B. 119; 100 L. T. 78; 72 J. P. 524; 25 T. L. R. 79; 53 Sol. Jo. 101; 21 Cox, C. C. 756.

Subpoenas generally, see EVIDENCE.

General privileges & exemptions of the Crown in legal proceedings.]—See Part IX., Sect. 5, post.

Appointment & removal of executive officers generally.]—See SECT. 2, ante.

SECT. 6.—THE PRIVY COUNCIL.

Appointment of Privy Councillors—Rights of alien born subject to membership of.]—See ALIENS, Vol. II., p. 139, No. 142.

Jurisdiction of Privy Council.]—See Particular Titles *passim*.

Judicial Committee of Privy Council.]—See COURTS; DEPENDENCIES, COLONIES & BRITISH POSSESSIONS.

SECT. 7.—THE LORD CHANCELLOR.

105. General rule—No judicial powers in Scotland—Statutory powers only.]—The Lord Chancellor, though “Chancellor of Great Britain,” has only certain statutory powers in Scotland, which are not of a judicial nature.—*STUART v. BUTE*, *STUART v. MOORE* (1861), 9 H. L. Cas. 440; 4 L. T. 382; 7 Jur. N. S. 1129; 9 W. R. 722; 11 E. R. 799, H. L.

Annotations :—*Mentd.* *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704; *Brown v. Collins* (1883), 25 Ch. D. 56.

106. Authority of—Whether sitting in Equity, Bankruptcy or Lunacy.]—The Lord Chancellor sometimes sits in Equity, sometimes in Bkpcy., & sometimes in Lunacy, but still he has the authority of Lord Chancellor in whichever he is sitting.

The Lord Chancellor, sitting in Bkpcy., committed the solr. to the commission, for not obeying an order :—*Held* : (1) the Lord Chancellor had jurisdiction so to do, & that no action lay against him for so doing; (2) the Lord Chancellor, in an

action brought against him for so doing, need not plead specially.

The Lord Chancellor has authority, in any particular case, to make an order altering the practice of the Ct. of Ch.—*DICAS v. BROUGHAM* (LORD) (1833), 6 C. & P. 249; 3 State Tr. N. S. 569; 1 Mood. & R. 309, N. P.

Annotations :—*Reid.* *Re Martin, Ex p. Van Sandau* (1844), 1 Ph. 445; *Christopherson v. Bare* (1848), 11 Q. B. 473; *Houlden v. Smith* (1850), 14 Q. B. 841. *Mentd.* *R. v. Koops* (1837), 6 Ad. & El. 198; *Green v. Elgie* (1843), 5 Q. B. 99; *Brown v. Watson* (1871), 23 L. T. 745.

107. — To issue writ of habeas corpus—In vacation.]—The Lord Chancellor can issue the writ of *habeas corpus* at common law in vacation.—*CROWLEY'S CASE* (1818), 2 Swan. 1; Buck, 264; 36 E. R. 514, L. C.

Annotations :—*Distd.* *Re Belson* (1850), 7 Moo. P. C. C. 114. *Reid.* *Re Venables, Ex p. Bardwell* (1834), Coop. temp. Brough. 440; *R. v. Wixon* (1839), 8 L. J. Q. B. 129; *Re Martin* (1847), 16 L. J. Bey. 6. *Mentd.* *Re Leak* (1829), 3 Y. & J. 46.

See, further, CROWN PRACTICE.

108. — To commit on order not being obeyed.]—*DICAS v. BROUGHAM* (LORD), No. 106, ante.

109. — To alter practice of Court of Chancery.]—*DICAS v. BROUGHAM* (LORD), No. 106, ante.

Whether decisions of Lord Chancellor binding.]—See JUDGMENTS & ORDERS.

Jurisdiction over coroners.]—See CORONERS.

Jurisdiction over infants.]—See INFANTS & CHILDREN.

Lunacy jurisdiction.]—See COURTS; LUNATICS & PERSONS OF UNSOUND MIND.

SECT. 8.—THE SECRETARIAT.

SUB-SECT. 1.—IN GENERAL.

110. Petition to Sovereign—Petition of right—Duty of Secretary of State to inquire into claim & tender advice to Sovereign—Not examinable on advice tendered.]—An action having been brought against the Secretary of State for the Home Department, for not submitting to Her Majesty a petition of right left with him by pltf., it appeared at the trial that he had, in fact, submitted the petition, but, at the same time, had advised Her Majesty not to grant her *fiat* as prayed :—*Held* : this was a complete answer to the action, & no question, if objected to, would be allowed to be put to the Secretary of State touching any advice given by him to Her Majesty.

Semble : it is the duty of the Secretary of State to inquire into the circumstances of petitioner's claim, & to tender to the Sovereign his advice thereon; & the power to present a petition of right is limited to such matters as are cognisable in a ct. of law between party & party (*ERLE, C. J.*).—*IRWIN v. GREY* (1867), L. R. 2 H. L. 20; 36 L. J. C. P. 148; 16 L. T. 74; 15 W. R. 593, H. L.; *affg.* (1862), 3 F. & F. 635, N. P.; (1863), L. R. 1 C. P. 171, Ex. Ch.

Annotations :—*Reid.* *Tobin v. R.* (1864), 16 C. B. N. S. 310; *Dawkins v. Paulot* (1870), 21 L. T. 584; *Dawkins v. Prince Edward of Saxe Weimar, Same v. Wynyard, Same v. Stephenson* (1876), 24 W. R. 670. *Mentd.* *Met. Ry. v. Wilson* (1871), L. R. 6 C. P. 376.

111. — Relating to matter of state—Proper means of communication.]—The Lord President of the Council having received a petition from S. setting forth the coronation oath & Act of Settlement, & representing the Irish Church Act as

PART VI. SECT. 5.

1. Ministers of the Crown—Power to dispose of matters of ordinary routine—No power to enter into contracts for government, for which money vote essential.]—*R. v. WATEROUS ENGINE*

WORKS CO. (1893), Q. R. 3 Q. B. 222.—CAN.

m. — When subject to mandamus.]—Although a minister of the Crown is not subject to a *mandamus* when acting as agent of the Crown,

still, where under any Act he is appointed to do a particular act a *mandamus* will lie to compel him to do it.—*Re SOOKA NAND VERMA* (1905), 7 W. A. L. R. 225.—AUS.

Sect. 8.—The secretariat: Sub-sects. 1, 2 & 3. Sect. 9: Sub-sect. 1, A.]

inconsistent with them, & praying that his plea might be heard in one of the cts. of law, refused to submit the case to the Queen, as the question could not legally be tried before any ct. of law. Thereupon S. applied to the ct. for a mandamus to the Lord President to present the petition:—*Held*: as the petition did not refer to any judicial matter, but to a matter of state, the proper medium of communication if there was any under the circumstances was probably the Secretary of State & not the Lord President; & as, even if the petition were presented & listened to by the Queen, there was no judicial body in the country by which the validity of an Act of Parliament could be questioned, the ct. would not grant the mandamus.—*Ex p. SELWYN* (CANON) (1872), 36 J. P. Jo. 54.

112. Responsibility to Sovereign—Not to private person—Unless act dishonest or corrupt.]—*DICKSON v. COMBERMERE* (VISCOUNT), No. 84, *ante*.

113. Money in hands of Secretary of State—Whether trust funds—Money for public service.]—The funds voted by Parliament for the public service are not trust funds in the hands of the Secretaries of State who receive them from the Treasury; & the Ct. of Ch. has no jurisdiction to take any account of the application of such funds.—*GRENVILLE-MURRAY v. CLARENDON* (EARL) (1869), L. R. 9 Eq. 11; 39 L. J. Ch. 221; 21 L. T. 448; 18 W. R. 124.

Annotation:—*Mentd.* *Hayman v. Rugby School, Governors* (1874), L. R. 18 Eq. 28.

Money for particular purpose.]

By a royal warrant booty of war was expressed to be granted to the Secretary of State for India in Council, in trust to be distributed by him or any person he might appoint amongst the persons found entitled to share it by the judgment of the Ct. of Admty. The warrant authorised the Secretary of State, or referees nominated by him, to give a decision on any doubts that might arise, which was to be final, unless within three months the Queen should otherwise order:—*Held*: the warrant did not operate as a transfer of property or create a trust; the Crown still retained control of the booty; & the Secretary of State, being merely an agent for the distribution, could not be made to account by those found by the Ct. of Admty. entitled to share.—*KINLOCH v. SECRETARY OF STATE FOR INDIA* (1882), 7 App. Cas. 619; 51 L. J. Ch. 885; 47 L. T. 133; 30 W. R. 845, II. L.

Annotations:—*Consd.* *Re Banda & Kirwee Booty, Kinloch v. R., & Kinloch v. R. & Secretary of State for India in Council*, [1882] W. N. 164. *Refd.* *R. v. Secretary of State for War*, [1891] 2 Q. B. 326; *Dunn v. Macdonald* (1896), 66 L. J. Q. B. 209; *Te Toira Te Paea v. Te Roera Tareha*, [1902] A. C. 56. *Mentd.* *Bowie v. Ailsa* (1887), 13 App. Cas. 371; *Faulds v. Vere*, [1888] W. N. 162; *Hollinshead v. Hazleton*, [1916] 1 A. C. 428.

Communication to Secretary of State—Whether privileged.]—See LIBEL & SLANDER.

Whether decision of Secretary of State binding—Under Local Government Acts.]—See LOCAL GOVERNMENT.

SUB-SECT. 2.—POWERS OF SECRETARY OF STATE.

115. To commit—For assisting in escape of prisoner charged with high treason.]—A Secretary of State, although he is neither a conservator nor a justice of the peace, by virtue of his office may commit a person for assisting another in the

custody of a messenger for high treason to escape; but if the particular species of treason for which the prisoner was in custody be not clearly & certainly expressed in the warrant, the Ct. of K. B. will admit the party to bail.—*R. v. ROW & KENDALL* (1695), 12 Mod. Rep. 82; Comb. 343; Skin. 596; Holt, K. B. 144; 1 Ld. Raym. 65; 1 Salk. 347; 88 E. R. 1178; *sub nom.* *KENDAL'S CASE*, 5 Mod. Rep. 78.

Annotations:—*Consd.* *R. v. Derby* (1711), Fortes. Rep. 140; *R. v. Wyndham* (1716), 1 Stra. 2. *Refd.* *R. v. Earbury* (1733), 2 Barn. K. B. 346; *Entick v. Carrington* (1765), 2 Wils. 275; *R. v. Platt* (1777), 1 Leach. 157; *Butt v. Conant* (1820), 1 Brod. & Bing. 548; *R. v. Bartlett* (1843), 12 L. J. M. C. 127.

For high treason.]—A commitment by warrant of a Secretary of State for treasonable practices is legal.—*R. v. DESPARD* (1798), 7 Term Rep. 736; 101 E. R. 1226.

Annotations:—*Consd.* *Ex p. Terraz* (1878), 4 Ex. D. 63. *Refd.* *R. v. Jacobi & Hiller* (1881), 46 L. T. 595, n.

117. — For libel.]—A Secretary of State may lawfully commit for libel without oath.—*R. v. DERBY* (1712), Fortes. Rep. 140; 92 E. R. 794.

Annotations:—*Refd.* *Entick v. Carrington* (1765), 19 State Tr. 1029; *Butt v. Conant* (1820), 1 Brod. & Bing. 548.

118. To issue general warrant—To enter house & search for papers—No name of person charged—Bare suspicion of libel.]—In an action of trespass for entering pltf.'s house, breaking his locks, & seizing his papers, etc. it appeared that on a warrant granted by Lord Halifax deft. with several of the King's messengers & a constable entered Mr. Wilkes' house & seized his papers, & question was whether a Secretary of State had any such power upon a bare suspicion of a libel by a general warrant without name of the person charged:—*Held*: (1) the general warrant was clearly illegal & contrary to the common law of the land even though it was in conformity to many precedents in the Secretary of State's office from the time of the Revolution; (2) pltf. was entitled to liberal damages.—*WILKES v. WOOD* (1763), Loft, 1; 19 State Tr. 1153; 98 E. R. 489.

Annotations:—*Refd.* *Entick v. Carrington* (1765), 19 State Tr. 1029; *Feathers v. R.* (1865), 12 L. T. 114.

119. — — —.]—A Secretary of State does not come within the provisions of the Constables Protection Act, 1750 (c. 44) & has no jurisdiction to grant a warrant to break open doors in a search for libellous papers, & such a warrant is illegal & void.—*ENTICK v. CARRINGTON* (1765), 2 Wils. 275; 19 State Tr. 1029; 95 E. R. 807.

Annotations:—*Consd.* *Jones v. German*, [1896] 2 Q. B. 418. *Mentd.* *Gosset v. Howard* (1845), 10 Q. B. 411; *Harrison v. Bush* (1856), 5 E. & B. 344.

120. — — —.]—Pltf. commenced an action for trespass & false imprisonment against three King's messengers, who, under a general warrant issued by the Earl of Halifax, one of the Secretaries of State, entered pltf.'s house, assaulted & imprisoned him for four days & made a search for the authors, printers & publishers of a seditious libel called *The North Briton*. The jury having returned a verdict in pltf.'s favour, defts. brought a bill of exceptions in error to set aside the verdict:—*Held*: the general warrant was illegal & void.—*LEACH v. MONEY, WATSON & BLACKMORE* (1765), 19 State Tr. 1001.

121. — — — Personal liability.]—*WILKES v. WOOD*, No. 118, *ante*.

SUB-SECT. 3.—ACTIONS AGAINST.

See *AGENCY*, Vol. I., pp. 654, 655, Nos. 2720-2734; *PUBLIC AUTHORITIES & PUBLIC OFFICERS*.

SECT. 9.—LEGAL REPRESENTATIVES AND ADVISERS OF THE CROWN.

SUB-SECT. 1.—THE ATTORNEY-GENERAL.

A. In General.

122. Position, functions & powers of.]—I wish to say a word or two about the position of the A.-G., because in my judgment it is of importance in this case, & his position appears likely to be lost sight of. Everybody knows that he is the head of the English Bar. We know that he has had from the earliest times to perform high judicial functions which are left to his discretion to decide. For example, where a man who is tried for his life & convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the A.-G., & no ct. in the kingdom has any controlling jurisdiction over him. That perhaps is the strongest case that can be put as to the position of the A.-G. in exercising judicial functions. Another case in which the A.-G. is pre-eminent is the power to enter a *nolle prosequi* in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, & the judge may do so if he is satisfied that there is no case; but the A.-G. alone has power to enter a *nolle prosequi*, & that power is not subject to any control. Another case is that of a criminal information at the suit of the A.-G., a practice which has, I am sorry to say, fallen into disuse. The issue of such an information is entirely in the discretion of the A.-G., & no one can set such an information aside. There are other cases to which I could refer to be found in old & in recent statutes, but I have said enough to show the high judicial functions which the A.-G. performs. There is one other matter to which I will refer before I come to the facts of this case. In *Re Van Gelder's Patent* (No. 128, *post*) the position of the A.-G. in these matters is stated in the judgments in the Divisional Ct. & in the Ct. of Appeal. I will read a passage from the judgment of Bowen, L.J.: "At common law, the A.-G. is, when he is exercising his functions as an officer of the Crown, in no case that I know of a ct. in the ordinary sense." It follows that his decisions, when exercising such functions, were not subject to review by the ct. of Q.B., & are not now subject to review by the Q.B. Div. or this ct. (A. L. SMITH, L.J.).—*R. v. COMPTROLLER-GENERAL OF PATENTS, Ex p. TOMLINSON*, [1899] 1 Q. B. 909; 68 L. J. Q. B. 568; 80 L. T. 777; 47 W. R. 567; 15 T. L. R. 310; 16 R. P. C. 233, C. A.

Annotation:—**Mentd.** *Re A. & B.'s Appln.* (1910), 28 R. P. C. 454.

123. Represents Crown.]—*R. v. GREGORY* (1672), 3 Keb. 127; 2 Lev. 82; 84 E. R. 633.

Annotations:—**Refd.** *Wilkes v. R.* (1768), Wilm. 322; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354.

124. —.]—The Ct. of Exch. on an application for the discharge of an insolvent debtor

ordered that notice of the motion should be given to the Crown:—**Held**: all such notices must in every case be served on the A.-G. as the only legal representative of the Crown recognised in the ct.—*R. v. AUSTEN, R. v. LEWIS* (1821), 9 Price, 142, n.; 147 E. R. 48.

125. Officer of Crown.]—The A.-G. is the officer of the King. Informations exhibited by the King's A.-G. are considered as the King's own prosecutions & are called "Declarations for the King," therefore no costs are paid upon them (*YATES, J.*).—*R. v. WILKES* (1770), 4 Burr. 2527; 19 State Tr. 1075; 98 E. R. 327; *subsequent proceedings, sub nom. WILKES v. R.*, 4 Bro. Parl. Cas. 360, H. L.

Annotations:—**Refd.** *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856; *Ex p. Newton* (1855), 4 E. & B. 869. **Mentd.** *Barrington v. R.* (1789), 3 Term Rep. 499; *Steel v. Sowerby* (1795), 6 Term Rep. 171; *Thellusson v. Woodford* (1799), 4 Ves. 227; *Wood v. Plant* (1807), 1 Taunt. 44; *Beauchamp v. Tomkins* (1810), 3 Taunt. 141; *Moody v. Stracey* (1812), 4 Taunt. 588; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *Douglas v. R.* (1848), 12 Jur. 974; *Wray v. Toke* (1848), 17 L. J. M. C. 183; *Wright v. R.* (1849), 14 Q. B. 148; *R. v. Charlesworth* (1861), 1 B. & S. 460; *R. v. Cutbush* (1867), L. R. 2 Q. B. 379; *Castro v. Murray* (1875), 32 L. T. 675; *Bradlaugh v. R.* (1878), 3 Q. B. D. 607; *Castro v. R.* (1881), 6 App. Cas. 229; *R. v. Martin*, [1911] 2 K. B. 450; *Hines v. Hines & Burdett*, [1918] P. 364; *Gibbs v. Gibbs & Heathcote* (1920), 123 L. T. 206.

126. —.]—The A.-G. is an officer of the Crown, & in that sense only, the officer of the public.—*A.-G. v. BROWN* (1818), 1 Swan. 265; 1 Wils. Ch. 323; 36 E. R. 384, L. C.

Annotations:—**Refd.** *A.-G. v. Magdalen College, Oxford* (1854), 18 Beav. 223; *A.-G. & Spalding R. C. v. Garner*, [1907] 2 K. B. 480. **Mentd.** *Meux v. Maltby* (1818), 2 Swan. 277; *A.-G. v. Heelis* (1824), 2 Sim. & St. 67; *A.-G. v. Dublin Corp.* (1827), 1 Bl. N. S. 312; *A.-G. v. Carlisle Corp.* (1828), 2 Sim. 437; *A.-G. v. Wilson* (1840), Cr. & Ph. 1; *A.-G. v. Compton* (1842), 1 Y. & C. Ch. Cas. 417; *George v. Chambers* (1843), 7 Jur. 836; *Nightingale v. Goulburn* (1848), 2 Ph. 594; *Macintyre v. Connell* (1851), 1 Sim. N. S. 252; *A.-G. v. Eastlake* (1853), 11 Hare, 205; *A.-G. v. Mid-Kent Ry. & S. E. Ry.* (1867), 3 Ch. App. 100; *Re St. Botolph-without-Bishopsgate Parish Estates* (1887), 35 Ch. D. 142.

127. Opinion of—Not evidence.]—Deft. was indicted for conspiring to disturb the peace, to excite discontent & disaffection, to excite hatred & contempt of the Govt. & constitution & for unlawfully assembling. Evidence was given that deft. marched with others in military formation to a place of assembly, with the intention of obtaining a reform in the House of Commons & that he had presided at other meetings for a like purpose. Deft. contended that the opinion of the A.-G. regarding the legality of other previous meetings should be used in evidence on his behalf:—**Held**: such evidence could not be admitted.

The opinion of the A.-G. has no effect here. You must take the law from me (*BAYLEY, J.*).—*R. v. HUNT* (1820), 1 State Tr. N. S. 171; *affd.* on other grounds, 3 B. & Ald. 566.

Annotations:—**Mentd.** *R. v. Fursey* (1833), 6 C. & P. 81; *R. v. Frost* (1839), 9 C. & P. 129; *R. v. Vincent* (1839), 3 State Tr. N. S. 1037; *Jones v. Tarleton* (1842), 9 M. & W.

r. Exercise of prerogative by.]—If an alleged Crown right is a right in behalf of a province, then the A.-G. of the province is the proper officer to exercise the prerogative.—*A.-G. FOR BRITISH COLUMBIA & NEW VANCOUVER COAL MINING & LAND CO., LTD. v. ESQUIMALT & NANAIMO RY. CO.* (1899), 7 B. C. R. 221.—CAN.

s. Vacancy in office of—Occurring during pendency of suit—Suit not abated.]—*A.-G. v. JOSEPHSON* (1865), 4 N. S. W. S. C. R. 135.—AUS.

t. — Court will take judicial notice of.]—*SOLICITOR-GENERAL v. DUNEDIN CORPN.*, 1 J. R. N. S. 1.—N.Z.

PART VI. SECT. 9, SUB-SECT. 1.—A.

n. Position, functions & powers of — Provincial Attorney-General — As compared with Dominion Attorney-General.]—The Provincial A.-G., & not the A.-G. of the Dominion, is the proper party to file an information, when the complaint is not of an injury to property vested in the Crown as representing the Dominion Govt., but of a violation of the rights of the public of Ontario. The Provincial A.-G. is the proper person to file an information in respect of a nuisance, & he is the officer of the Crown who is considered as present in the cts. of a province, to assert the rights of the Crown, & of those under its protection.

—*A.-G. v. NIAGARA FALLS INTERNATIONAL BRIDGE CO.* (1873), 20 Gr. 34.—CAN.

o. Appointment under provincial seal.]—*Re YOUNG (A.-G.) & HENRY (SOLICITOR-GENERAL)* (1854), James, 182.—CAN.

p. Not necessary party to suit when interest of Crown not affected.]—*BENNET v. O'MEARA* (1868), 15 Gr. 396.—CAN.

q. Duty to allow use of name as plaintiff—When disputed rights cannot be vindicated by private individuals.]—*ANDERSON v. VICTORIA CORPN.* (1884), 1 B. C. R. 107.—CAN.

Sect. 9.—Legal representatives and advisers of the Crown: Sub-sect. 1, A., B., C. & D.; sub-sects.

675; *R. v. Hinley*, *R. v. Hinley* (1843), 1 Cox, C. C. 12; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *R. v. Lacey*, *Cuffey & Fay* (1848), 3 Cox, C. C. 517; *Boosey v. Davidson* (1849), 13 Q. B. 257.

Right to intervene in proceedings between subjects.]—See Part IX., Sect. 5, sub-sect. 5, *post*.

Certiorari by.]—See CROWN PRACTICE.

In relation to charities.]—See CHARITIES, Vol. VIII., pp. 396–398, 401, Nos. 2195–2200, 2213–2234, 2293, 2295, 2296, 2299–2301.

Jurisdiction in criminal matters.]—See CRIMINAL LAW & PROCEDURE.

Proceedings against railway company by Attorney-General.]—See RAILWAYS & CANALS.

In relation to patents.]—See No. 122, *ante*, No. 128, *post*, &, generally, PATENTS & INVENTIONS.

B. When performing Judicial Functions.

128. Not a court—Prohibition does not lie against.]—V. having applied at the Patent office for leave to amend his patent S. opposed. The comptroller allowed the proposed amendment. S. appealed to the Law Officer & the A.-G. then intimated that the amendment should be allowed. S. applied to the Ct. of Q.B. for a prohibition to prohibit the A.-G. from allowing the amendment on the grounds: (a) that the amendment if allowed, would make the specification claim a larger invention than that originally patented; (b) that the amendment proposed to be allowed had not been advertised. A rule having been granted. S. appealed & the Ct. of Appeal intimated that the owners of the patent & the A.-G. ought to be heard in the matter & directed them to be served with notice of motion. This having been done, the matter was argued:—*Held*: no prohibition would issue against the A.-G. in the matter.

The A.-G. is not a ct. He may have a judicial function to perform, but he is not a ct. & prohibition does not lie to him (*ESHER, M.R.*).—*Re VAN GELDER'S PATENT* (1888), 6 R. P. C. 22, C. A.

Annotation:—*Reid*. *R. v. Comptroller-General of Patents*, [1899] 1 Q. B. 909.

129. Whether decision subject to review—Refusal of fiat for writ of error.]—The A.-G. having refused his fiat for a writ of error to a deft. convicted of a misdemeanour:—*Held*: in a proper case, the fiat was due *ex debito justitiæ*, but the A.-G. was to determine, on his own responsibility, whether or not each case was proper; & the ct. could not review his decision.—*Ex p. NEWTON* (1855), 4 E. & B. 869; 119 E. R. 323; *sub nom.* *R. v. NEWTON*, 24 L. J. Q. B. 246; 25 L. T. O. S. 65; 19 J. P. 611; 1 Jur. N. S. 591; 3 W. R. 374; 3 C. L. R. 1351.

Annotation:—*Reid*. *Ex p. Lees* (1858), 5 Jur. N. S. 333.

130. ———.]—*R. v. COMPTROLLER-GENERAL OF PATENTS*, No. 122, *ante*.

In relation to charities.]—See CHARITIES, Vol. VIII., pp. 400, 401, 408, Nos. 2287, 2288, 2448, 2450.

C. When acting as Counsel.

131. Control of court over.]—The cts. exercise over the A.-G. the same authority which they

exercise over every other suitor; & the A.-G. will not, any more than any other suitor, be permitted to prosecute any proceeding which is merely vexatious, or has no legal object; but the A.-G. conducts the proceedings on a *scire facias* according to his own judgment & discretion, & may, when he thinks fit, stay the proceedings, or enter a *nolle prosequi*. The control which the A.-G. exercises is subject only to the responsibility to which every public servant is liable in the discharge of his duty, & subject to the jurisdiction which the cts. may have over him, upon a charge properly brought against him, for a negligent or erroneous performance of his duty.—*R. v. PROSSER* (1848), 11 Beav. 306; 18 L. J. Ch. 35; 12 L. T. O. S. 509; 13 Jur. 71; 50 E. R. 834.

132. Authority to appear presumed.]—The ct. will assume that law officers appearing for divers departments of state have authority to appear without requiring them to prove their instructions.—*THE DICKENSON* (1776), Marr. 1.

133. Precedence of—Over Lord Advocate of Scotland—In House of Lords.]—The A.-G. of England has precedency over the Lord Advocate of Scotland, in all matters in which they may appear as counsel at the bar of the House of Lords.—*A.-G. v. LORD ADVOCATE* (1831), 2 Cl. & Fin. 481; 6 E. R. 1236, H. L.

134. Admission of law by—Not binding on court.]—(1) An admission by the A.-G. in matters of law does not bind the ct.

(2) A charter before time of memory cannot be pleaded without showing some allowance of it within time of memory by matter of record; if the same is of things granted, in point of charter; but of things in point of prescription, there is no need to show a charter, but usage time out of mind is sufficient; *e.g.* for leets, waifs & strays.

(3) A common person may have a chase, but not a forest, at least not a real forest, but he may have a nominal forest for the liberty of wild beasts.—*R. v. BRIGGS* (1614), 2 Bulst. 295; 80 E. R. 1133.

135. ——— Not binding on Crown.]—The confession of the A.-G. is not binding to the King in matter of law, though it is in matter of fact.—*WALL v. PENNINGTON* (1660), Hard. 170; 145 E. R. 436.

136. Admission of fact by—Binding on Crown.]—*WALL v. PENNINGTON*, No. 135, *ante*.

137. Power to enter nolle prosequi.]—The A.-G. may proceed by the King's prerogative, to take issues upon the rest, or may enter a *nolle prosequi*.—*A.-G. v. FARNHAM TOWN* (1669), Hard. 504; 145 E. R. 569.

Annotations:—*Consd.* *R. v. Mitchel* (1848), 3 Cox, C. C. 93. *Mentd.* *Knight v. Wells Corpn.* (1696), 1 Ld. Raym. 80.

138. ——— Proceedings on scire facias.]—*R. v. PROSSER*, No. 131, *ante*.

139. ——— Sole right of Attorney-General.]—A *nolle prosequi* can only be entered by the authority of the A.-G.—*R. v. DUNN* (1843), 1 Car. & Kir. 730.

Annotations:—*Mentd.* *Stroud v. Watts* (1846), 2 C. B. 929; *R. v. Schlesinger* (1847), 10 Q. B. 670.

140. ———.]—*R. v. COMPTROLLER-GENERAL OF PATENTS*, No. 122, *ante*.

141. ——— Criminal proceedings.]—Where a deft.

PART VI. SECT. 9, SUB-SECT. 1.—B.

a. Whether decision subject to review—Cancellation of letters patent—Extra-judicial opinion on mode of exercise of discretion.]—An action having been brought by the A.-G. against an incorporated co. for a declaration that they were carrying on an illegal business & for forfeiture of their charter, the A.-G., while the action was pending, summoned defts.

before him to show cause why their charter should not be revoked by order in council:—*Held*: whether the right of cancellation of letters patent of incorporation be now only statutory & merely a power, or whether the prerogative right still subsists, the bringing of an action does not clothe the ct. with jurisdiction to restrain the exercise of the power. The ct. has no jurisdiction, at the suit of a

subject, to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign. It is not proper for a judge to express an extra-judicial opinion as to the mode in which the discretion of the A.-G. should be exercised.—*A.-G. FOR ONTARIO v. TORONTO JUNCTION RECREATION CLUB* (1904), 8 O. L. R. 410; 4 O. W. R. 72.—*CAN.*

has been found guilty upon several counts of an information, the A.-G. may enter a *nolle prosequi* on one of them after a rule *nisi* for a new trial.—*R. v. LEATHAM* (1861), as reported in 7 Jur. N. S. 674.

Annotations :—*Mentd.* *Taylor v. Vergette* (1861), 30 L. J. Ex. 400 ; *Milnes v. Bale*, *Milnes v. Lea* (1875), L. R. 10 C. P. 591.

142. Where no steps taken in action—In reasonable time—Failure to reply or demur—Whether judgment entered for defendant.]—Where deft. pleads a title against the Crown, & the A.-G. will not reply nor demur in a reasonable time, the ct. will order judgment to be entered for deft. unless the A.-G. upon being attended, will either enter a *nolle prosequi*, or proceed.—*R. v. MUSTERS* (1744), Park. 50 ; 145 E. R. 710.

Annotation :—*Consd.* *R. v. Evans* (1819), 6 Price, 480.

143. ————.]—The ct. will not give judgment, as if the plea were confessed, for defts., claiming as assignees the goods of bkpt. seized under an extent, on motion for that purpose, where the A.-G. has not demurred, replied nor otherwise proceeded.

Semble : a writ of *amoveas manus* would be granted in such a case.—*R. v. EVANS* (1819), 6 Price, 480 ; 146 E. R. 873.

144. ———— Bill against Attorney-General taken pro confesso.]—If the A.-G. does not put in his answer to a bill filed against him, within a reasonable time, the ct. will order that unless the answer be put in by a short day, the bill be set down to be taken *pro confesso*.—*PETO v. A.-G.* (1827), 1 Y. & J. 509 ; 148 E. R. 77.

145. ———— Order to reply to plea to extent—Not made without previous application to Attorney-General.]—The ct. will not make an order on the A.-G., to reply to a plea to an extent, without a previous application to him for that purpose.—*R. v. SLEE* (1825), M'Cle. & Yo. 361 ; 148 E. R. 452.

When acting for Crown—Choice of forum & venue.]—See Part IX., Sect. 6, sub-sect. 2, *post*.

Right to demand trial at bar.]—See Part IX., Sect. 6, sub-sect. 5, A., *post*.

Right to begin & reply.]—See Part IX., Sect. 6, sub-sect. 5, B., *post*.

Choice of issue.]—See Part IX., Sect. 6, sub-sect. 5, C., *post*.

Right to withdraw proceedings.]—See Part IX., Sect. 6, sub-sect. 5, D., *post*.

Receipt & payment of costs.]—See Part IX., Sect. 6, sub-sect. 7, B., C., *post*.

When acting at instance of relator.]—See Sub-sect. 1, D., *post*.

D. Enforcement of Public Rights.

Attorney-General acting at instance of relator.]—See, generally, CROWN PRACTICE.

When necessary party to proceedings—Relating to rights of common.]—See p. 47, *ante*.

Relating to charities.]—See CHARITIES, Vol. VIII., pp. 397, 398.

Relating to highways.]—See HIGHWAYS, STREETS & BRIDGES ; INJUNCTION.

To obtain injunction.]—See INJUNCTION.

Relating to nuisance.]—See NUISANCE.

PART VI. SECT. 9, SUB-SECT. 2.

b. Represents Crown—Crown interested as private individual.]—Where the King may have such an interest, as a private individual, in the subject matter of an information, that distinct interest should be represented by the Solicitor-General, who may be a deft. or may be present at the hearing without being made a party in the

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A.-G. v. GALWAY CORPN. (1828), 1 Mol. 95, 97, 104.—*IR.*

c. Appointment of—Power delegated to Governor—Judicial notice of holder of office.]—The Crown has the power, unless taken away by legislation, of appointing a Solicitor-General in New Zealand, & the prerogative of the Crown in this respect is sufficiently delegated in the Governor

Under Public Health Acts.]—See PUBLIC HEALTH & LOCAL ADMINISTRATION.

Relating to water.]—See WATERS & WATER-COURSES.

SUB-SECT. 2.—THE SOLICITOR-GENERAL.

When performing judicial functions—In relation to patents.]—See PATENTS & INVENTIONS.

146. When acting as counsel for Crown—Acts in Absence of Attorney-General.]—In 1763, His Majesty's then Solicitor-General, the office of A.-G. being vacant, filed an information, *ex officio*, in the Ct. of K.B. against pltf. in error. Pltf. pleaded not guilty ; & the Solicitor-General who had in the meantime been appointed A.-G., joined issue in that character for His Majesty :—*Held* : (1) an information, filed by the King's Solicitor-General, during the vacancy of the office of A.-G., was good in law ; (2) it was not necessary, in point of law, to aver upon the record that the A.-G.'s office was vacant.—*WILKES v. R.* (1770), 4 Bro. Parl. Cas. 360 ; Wilm. 322 ; 2 E. R. 244 ; *sub nom.* *R. v. WILKES*, 4 Burr. 2527 ; 19 State Tr. 1075, II. L.

Annotations :—*As to* (1) *Refd.* *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856 ; *Ex p. Newton* (1855), 4 E. & B. 869. *Generally, Mentd.* *R. v. Platt* (1777), 1 Leach, 157 ; *Barrington v. R.* (1789), 3 Term Rep. 499 ; *Steel v. Sowerby* (1795), 6 Term Rep. 171 ; *R. v. Despard* (1798), 7 Term Rep. 736 ; *Thellusson v. Woodford* (1799), 4 Ves. 227 ; *Wood v. Plant* (1807), 1 Taunt. 44 ; *Beauchamp v. Tomkins* (1810), 3 Taunt. 141 ; *Moody v. Stracey* (1812), 4 Taunt. 588 ; *Crowley's Case* (1818), 2 Swan. 1 ; *Butt v. Conant* (1820), 1 Brod. & Bing. 548 ; *Stockdale v. Hansard* (1839), 2 Per. & Dav. 1 ; *Gray v. R.* (1844), 11 Cl. & Fin. 427 ; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1 ; *Re Reay* (1847), 8 L. T. O. S. 476 ; *Douglas v. R.* (1848), 12 Jur. 974 ; *Wray v. Toke* (1848), 17 L. J. M. C. 183 & Q. B. 355 ; *Wright v. R.* (1849), 14 Q. B. 148 ; *Haylock v. Sparke* (1853), 1 E. & B. 471 ; *R. v. Charlesworth* (1861), 1 B. & S. 460 ; *Re Paine* (1867), 8 B. & S. 319 ; *R. v. Cutbush* (1867), L. R. 2 Q. B. 379 ; *Castro v. Murray* (1875), 32 L. T. 675 ; *Bradlaugh v. R.* (1878), 3 Q. B. D. 607 ; *Castro v. R.* (1881), 6 App. Cas. 229 ; *R. v. Martin*, [1911] 2 K. B. 450 ; *Hines v. Hines & Burdett*, [1918] P. 364 ; *Gibbs v. Gibbs & Heathcote* (1920), 123 L. T. 206.

147. ———— Authority to appear presumed.]—THE DICKENSON, No. 132, *ante*.

Right to begin & reply.]—See Part IX., Sect. 6, sub-sect. 5, B., *post*.

SUB-SECT. 3.—THE ATTORNEY-GENERAL OF THE DUCHY OF LANCASTER.

148. Whether entitled to attend proceedings—In lunacy.]—A lunatic who was illegitimate & unmarried was resident in Lancashire, & a part of her property consisted of copyholds held of the Duchy of Lancaster :—*Held* : the A.-G. was entitled to attend the proceedings in the lunacy as representing the Crown, & the A.-G. of the Duchy of Lancaster was not entitled to do so.—*Re KERSHAW* (1882), 21 Ch. D. 613 ; 48 L. T. 51 ; 31 W. R. 130, C. A.

149. Whether competent to exhibit information—In High Court of Justice.]—It is not competent to the A.-G. of the Duchy of Lancaster to exhibit an information in the High Ct. of Justice, & the

by his commission. The ct. will take judicial notice of the fact that a certain person is the holder of the office of Solicitor-General, & that there is a vacancy in the office of A.-G.—*SOLICITOR-GENERAL v. DUNEDIN CORPN.*, 1 J. R. N. S. 1.—*N.Z.*

d. ———— Under provincial seal.]—*Re YOUNG* (A.-G.) & *HENRY* (SOLICITOR-GENERAL) (1854), James, 182.—*CAN.*

I. I.

Sect. 9.—Legal representatives and advisers of the Crown: Sub-sects. 3 & 4. Sect. 10. Parts VII., VIII. & IX. Sect. 1.]

ct. will order an information exhibited by him to be taken off the file on the application of deft., even after answer put in by deft.—*A.-G. OF DUCHY OF LANCASTER v. DEVONSHIRE (DUKE)* (1884), 14 Q. B. D. 195; 54 L. J. Q. B. 271; 33 W. R. 367; 1 T. L. R. 185.

Annotation:—Mentd. A.-G. of Duchy of Lancaster v. L. & N. W. Ry., [1892] 3 Ch. 274.

SUB-SECT. 4.—OTHER LEGAL OFFICIALS.

150. Solicitor to public Department—Exempt under Solicitors Act, 1828 (c. 25)—Revenue matter.]—A suggestion, that deft. defended by B., who had been appointed solr. on behalf of His Majesty, & acted as such in this behalf:—*Held*: a sufficient disclosure that B. had authority to act under the above Act, & pltf. could not treat the plea as a nullity, although, otherwise than by such suggestion, the record did not show that the cause concerned matters of revenue—*WEST v. TAUNTON* (1830), 6 Bing. 404; 4 Moo. & P. 79; 8 L. J. O. S. C. P. 129; 130 E. R. 1336.

151. Treasury Solicitor—Whether solicitor's certificate necessary—Power to act for subject—In proceedings in which Crown interested.]—R. v. CANTERBURY (ARCHBP.), No. 376, *post*.

152. — Appointment as trustee in place of alien enemy unwilling to act—On forfeiture of rights to Crown.]—On the outbreak of war between this country & Bulgaria the then Tsar of Bulgaria owned certain securities in this country, & ultimately an inquisition was held & it was found that his rights had been forfeited & that he was a trustee for the Crown. The ex-Tsar was beyond the jurisdiction & was unwilling to act:—*Held*: under Trustee Act, 1893 (c. 53), ss. 25, 35, the Treasury Solr. should be appointed new trustee & the interest of the ex-Tsar should be vested in him.—*Re FERDINAND (EX-TSAR OF BULGARIA)*, [1920] 1 Ch. 107; 90 L. J. Ch. 1, C. A.

153. Queen's Proctor—Pleading—In same position as any other suitor.]—The Queen's Proctor is in same position with regard to pleading as any other suitor.—*QUEEN'S PROCTOR v. WALLIS* (1862), 31 L. J. P. M. & A. 97; 26 J. P. 487.

— **Right to intervene in matrimonial suit.]**—*See HUSBAND & WIFE.*

SECT. 10.—THE DEPARTMENTS OF STATE

Admiralty.]—See ADMIRALTY, Vol. I., p. 99, Nos. 1–3; SHIPPING & NAVIGATION.

154. Board of Trade—Decisions of—Not binding on court.]—A decision of the Board of Trade cannot govern the Admlty. Ct.—*THE CITY OF LONDON* (1857), Sw. 245; 30 L. T. O. S. 236; *subsequent proceedings*, Sw. 300, P. O.

155. Secretary of State—For War—Duty imposed upon by royal warrant—Duty to Sovereign alone.]—The duty imposed upon the principal Secretary of State for War by a royal warrant, which creates him sole administrator & interpreter of its terms, is a duty owing to the Sovereign alone, and no *mandamus* to such Secretary of State to hear & determine an application for an increase of the amount awarded to a retired officer of the army as additional compensation on his retirement will lie.—*R. v. SECRETARY OF STATE FOR WAR*, [1891] 2 Q. B. 326; 60 L. J. Q. B. 457; 64 L. T. 764; 56 J. P. 105; 40 W. R. 5; 7 T. L. R. 279, C. A.

Annotations:—Consd. R. v. Income Tax Special Purposes Comrs., Ex p. Dr. Barnardo's Homes National Incorporated Assocn., [1920] 1 K. B. 26. Mentd. Dunn v. Macdonald (1897), 76 L. T. 444.

156. — Home Secretary—May refer question of sentence only to court—Criminal Appeal Act, 1907 (c. 23).]—The Home Secretary may refer a question of sentence only to the Ct. of Criminal Appeal.—*R. v. SMITH, R. v. WILSON*, [1909] 2 K. B. 756; 79 L. J. K. B. 4; 101 L. T. 126; 73 J. P. 407; 22 Cox, C. C. 151; 2 Cr. App. Rep. 271, C. C. A.

Annotation:—Mentd. R. v. Rabjohns (1913), 109 L. T. 414.

See, further, CRIMINAL LAW & PROCEDURE.

— **Powers of.]—See Sect. 8, sub-sect. 2, ante.**

157. Treasury Board—Consent of Lords of Treasury—Signified through Secretary of Treasury.]—The consent of the Lords of the Treasury may be signified through the Secretary of the Treasury.—*ARNOLD v. GRAVESEND CORPN., PALLISTER v. GRAVESEND CORPN.* (1856), 25 L. J. Ch. 776; 27 L. T. O. S. 282; 20 J. P. 611; 2 Jur. N. S. 706; 4 W. R. 763.

Annotation:—Refd. Davis v. Leicester Corpn., [1894] 2 Ch. 208.

Actions by & against Departments of State & heads of Departments.]—See AGENCY, Vol. I., pp. 654, 655, Nos. 2725–2734; PUBLIC AUTHORITIES & PUBLIC OFFICERS.

Part VII.—The Crown in relation to Parliament.

158. Necessity for royal assent—For each session.]—Every session, in which the King doth sign bills, is a day, & a Parliament by itself, & there can be no roll without a session, no Parliament without a roll, & no session without the royal assent.—*CONFERENCE OF JUDGES* (1614), 2 Bulst 235; 80 E. R. 1087.

159. — For dissolution.]—A Parliament cannot be discontinued or dissolved but by matter of record, & that by the King alone.—*JUDGES RESOLUTIONS ON 35 Eliz. c. 1* (1623), Hut. 61; 123 E. R. 1101.

160. — For new laws.]—No new laws can be made to bind the whole people, but by the King, with the advice & consent of both Houses of

Parliament, & by their united authority.—*MIDDLETON v. CROFTS* (1736), 2 Atk. 650; Ridg. temp H. 109; 2 Stra. 1056; Cunn. 114; Cas. temp. Hard. 326; 26 E. R. 788.

Annotations:—Consd. Exeter v. Marshall (1868), L. R. 3 H. L. 17. Refd. Wynn v. Davies & Woever (1835), 1 Curt. 69; R. v. Chadwick (1846), 11 J. P. 140; R. v. York (1888), 20 Q. B. D. 740; Ex p. Brinckman (1895), 11 T. L. R. 387. Mentd. R. v. Yorke (1795), 6 Term Rep. 490; Dakins v. Seaman (1842), 9 M. & W. 777; Marshall v. Exeter (1860), 7 C. B. N. S. 653; Shepherd v. Payne (1863), 9 Jur. N. S. 354; R. v. Allen (1872), L. R. 8 Q. B. 69; R. v. Morton (1873), 42 L. J. M. C. 58; Jenkins v. Cook (1875), L. R. 4 A. & E. 463; Mackonochie v. Penzance (1881), 6 App. Cas. 424; Kutner v. Phillips, [1891] 2 Q. B. 267; Marshall v. Graham, Bell v. Graham, [1907] 2 K. B. 112; R. v. Dibdin, [1910] P. 57.

See, generally, PARLIAMENT.

Part VIII.—The Crown in relation to the Church.

See ECCLESIASTICAL LAW.

Part IX.—The Crown in relation to the Law.

SECT. 1.—THE CROWN AS SOURCE OF ALL JURISDICTION.

161. Sovereign deemed always to be present in court.]—On an information in the name of the Queen there cannot be a non-suit because she is always present in court.—*WEARE v. ADAMSON* (1583), Sav. 56; 123 E. R. 1010.

162. Sovereign cannot adjudge personally—Nor effect arrest in person.]—(1) The King in his own person cannot adjudge any case, either criminal or between party & party, but it ought to be determined & adjudged in some ct. of justice, according to the law & custom of England.

(2) The King may sit in the K.B., but the ct. gives the judgment. No King after the conquest assumed to himself to give any judgment in any cause whatsoever which concerned the administration of justice, within the realm, but these causes were solely determined in the cts. of justice.

(3) The King cannot arrest any man.—*PROHIBITIONS DEL ROY* (1607), 12 Co. Rep. 63; 77 E. R. 1342.

163. ——— Delegation of power to judges.]—By our constitution, the King is the fountain of every species of justice, which is administered in this kingdom. The King is *de jure* to distribute justice to all his subjects, & because he cannot do it himself to all persons, he delegates his power to his judges, who have the custody & guard of the King's oath, & sit in the seat of the King concerning his justice.—*R. v. ALMON* (1765), Wilm. 243; 97 E. R. 94.

*Annotations:—***Reid.** *R. v. Davison* (1821), 4 B. & Ald. 329; *Re Martin, Ex p. Turner* (1844), 3 Mont. D. & De G. 523; *R. v. Gray*, [1900] 2 Q. B. 36. **Mentd.** *R. v. Shipley* (1784), 4 Doug. K. B. 73; *R. v. Clement* (1821), 4 B. & Ald. 218; *A.-G. v. Siddons* (1830), 1 Cr. & J. 220; *R. v. Siddons* (1830), 9 L. J. O. S. Ex. 7; *R. v. Faulkner* (1835), 2 Cr. M. & R. 525; *Miller v. Knox, Knox v. Gavan* (1838), 4 Bing. N. C. 574; *Re Martin, Ex p. Van Sandan* (1844), De G. 55; *Re Crawford* (1849), 13 Q. B. 613; *Yousens v. Keen* (1859), 2 C. B. N. S. 384; *Mersey Docks & Harbour Board v. Penhallow* (1861), 8 Jur. N. S. 486; *Ex p. Jolliffe* (1873), 42 L. J. Q. B. 121; *R. v. Lefroy* (1873), L. R. 8 Q. B. 134; *Ex p. Martin* (1879), 4 Q. B. D. 212; *R. v. Harrington* (1879), 48 L. J. Q. B. 300; *Re Johnson* (1887), 20 Q. B. D. 68; *R. v. Davies*, [1906] 1 K. B. 32; *Scott v. Scott*, [1912] P. 241.

164. Right to establish courts—Limitations on.]—Although the Crown may by its prerogative establish cts. to proceed according to common law, it cannot create any new ct. to administer any other law.—*Re NATAL* (LORD BP.) (1865), 3 Moo. P. C. C. N. S. 115; 5 New Rep. 471; 12 L. T. 188; 11 Jur. N. S. 353; 13 W. R. 549; 16 E. R. 43, P. C.

*Annotations:—***Consd.** *Natal (Bp.) v. Gladstone* (1866), L. R. 3 Eq. 1. **Reid.** *Merriman v. Williams* (1882), 7 App. Cas. 484; *Read v. Lincoln* (1889), 14 P. D. 88. **Mentd.** *Ex p. Jenkins* (1868), L. R. 2 P. C. 258; *Cape Town (Bp.) v. Natal* (1869), L. R. 3 P. C. 1; *Ex p. Selwyn* (1872), 36 J. P. Jo. 54.

165. ———.]—The King may appoint a new ct., & appoint new judges in it: but after the ct. is established, the judges of the ct. ought to determine matters in it.—*JENTLEMAN'S CASE, CROSBY v. JENTLEMAN* (1583), 6 Co. Rep. 11 a; 77 E. R. 269.

*Annotations:—***Mentd.** *Anon.* (1673), Freem. K. B. 319; *Tunno v. Morris* (1835), 2 Cr. M. & R. 298.

166. Right to appoint judicial officers—Cannot

be transferred.]—The power of justice & mercy belongs to the King only.—*ANON.* (1469), Jenk. 79; 145 E. R. 56.

167. ———.]—The King cannot grant power to any one to make justices of oyer & terminer: but he ought to constitute such justices himself, for it is a high prerogative. A grant to pardon treasons is void: but in Scotland & Ireland such a grant to be executed in the name of the King or to make Knights there is good, because of the distance & circumstances.—*ANON.* (1485), Jenk. 171; 145 E. R. 112.

*Annotation:—***Mentd.** *Idle v. Cooke* (1705), 2 Salk. 620.

168. Right of subject to petition Sovereign.]—A petition to the King by any man that thinks himself wronged, is no offence, but petitioner must come as a suitor, not as a consurer.—*WRENHAM'S CASE* (1618), Hob. 220; 80 E. R. 367; *sub nom. R. v. WRAYNHAM*, 2 State Tr. 1059.

169. ———.]—The subject cannot be deprived of his right to appeal by any words in the King's grant to that purpose, much less if the grant be silent in that particular.—*CHRISTIAN v. CORREN* (1716), 1 P. Wms. 329; 24 E. R. 411.

*Annotations:—***Consd.** *Ex p. Parsee Murder Case, Ex p. Eduljee Byramjee Aloo Paroo* (1847), 11 Jur. 855. **Reid.** *Re Nahon & Pariente* (1832), 2 Knapp, 66; *R. v. Stephenson* (1847), 5 Moo. P. C. C. 296. **Mentd.** *Plunkett v. Burlington* (1837), 1 Jur. 376.

— **Appeal from colonial courts to Judicial Committee of Privy Council.]**—See DEPENDENCIES, COLONIES & BRITISH POSSESSIONS.

170. Law suspended during usurpation.]—From the death of Charles I. to the restoration of Charles II., the law did not die, but was only suspended in its operation by the impediment of the usurpation.—*BENYON v. EVELYN* (1664), O. Bridg. 324; 124 E. R. 614.

*Annotation:—***Mentd.** *Stockdale v. Hansard* (1839), 9 Ad. & El. 1.

171. Judges guided by settled law of land—Not by will or desire of Government.]—On motion made by Her Majesty's Govt. to the Prerogative Ct. to deliver up to a Secretary of State the original will & codicils of Napoleon Bonaparte for the purpose of being made over to the French Govt.:—*Held*: the papers should be delivered out, & a receipt taken for them from the Secretary of State, after notarial copies made, in order that they might be sent to the legal authorities in France to be recorded there in the proper place.

Public policy of itself is not sufficient to induce the ct. to grant such application, it is necessary to show that the step is conformable to law. The ct. must not venture to go beyond the limits of legal authority. In a country governed by settled laws, it is necessary for cts. to be guided by those laws, & not by the will & desire of a govt.—*Re NAPOLEON BONAPARTE (LATE EMPEROR)* (1853), 2 Rob. Eccl. 606; 1 Ecc. Ad. 9; 17 Jur. 328; 163 E. R. 1429.

*Annotation:—***Reid.** *The Log of Mayflower* (1897), 76 L. T. 296.

Prerogative of Crown as regards suspension, dispensation & alteration of laws, see Part V., Sect. 1, sub-sect. 2, B., *ante*.

SECT. 2.—PARDONS AND REPRIEVES.

SUB-SECT. 1.—NATURE OF THE RIGHT OF PARDON.

172. Inseparable incident to Crown—Cannot be transferred or extinguished.]—The King cannot dispose of his crown by testament, though under the Great Seal; nor of the ports of the kingdom; nor of the jewels of the Crown; nor of power to pardon treason or felony within the kingdom; nor of power to make judges, justices of the peace or sheriffs, etc. The King may grant goods & chattels by word of mouth & lands which he has *in jure coronæ* by letters patent or by will under the Great Seal.—ANON. (1340), Jenk. 79; 145 E. R. 56.

173. ——— May be delegated.]—ANON., No. 167, *ante*.

174. ———.]—The power of pardoning all offences, including murder, is an inseparable incident to the Crown, but the King shall not pardon by general words.—R. v. PARSONS (1692), Holt, K. B. 519; 2 Salk. 499; 1 Show. 283; 90 E. R. 1186; *sub nom.* PARSON'S CASE, 1 Freem. K. B. 501; *sub nom.* R. v. ANON., 4 Mod. Rep. 61.

175. ———.]—All fines for offences belong *de jure* to the King, but he may grant them over. His power however of pardoning any offence, & thereby preventing the fine, continues notwithstanding. The King cannot transfer or extinguish his right to pardon offences.—GROENVELT'S CASE (1697), 1 Ld. Raym. 213; 91 E. R. 1038; *sub nom.* GROANVELT'S CASE, 3 Salk. 265; *sub nom.* R. v. GREENVELT, 12 Mod. Rep. 119.

Annotations:—Mentd. R. v. Green (1715), Fortes. Rep. 274; Evans v. Harrison (1762), Wilm. 130; R. v. Rogers (1822), 1 Dow. & Ry. K. B. 156; Daniell v. Philipps (1835), 1 Cr. M. & R. 662; *Ex p.* Bartlett (1843), 7 Jur. 649; R. v. Bartlett (1843), 7 J. P. 578; *Ex p.* Fernandez (1861), 9 W. R. 832; Wildes v. Russell (1866), L. R. 1 C. P. 722.

176. Right exercised on advice of Executive — Not a judicial function.]—Upon the hearing of a petition to the Judicial Committee for leave to appeal from a death sentence, & for the postponement of the execution of the sentence pending the hearing of the appeal: — *Held*: (1) with regard to staying execution of sentences the board were unable to interfere & did not think it right to express any opinion as to whether on the facts stated leave to appeal should be granted; (2) the board was not a ct. of criminal appeal, & the question whether His Majesty should be advised to exercise his prerogative of pardon was a matter for the Executive Govt. & was outside the jurisdiction of the board.—BALMUKAND v. KING-EMPEROR, [1915] A. C. 629; 84 L. J. P. C. 136; 113 L. T. 55; 24 Cox, C. C. 720, P. C.

SUB-SECT. 2.—NATURE AND FORM OF PARDON.

177. Whether express words necessary—To pardon treason—Necessary.]—RAWLEIGH'S (SIR WALTER) CASE (1618), Cro. Jac. 495; Hut. 21; 79 E. R. 422.

Annotation:—Mentd. R. v. Corbet (1662), 1 Sid. 72.

178. ——— To pardon murder—Necessary.]—CUSTODES v. RICKABYE (1652), Sty. 375; 82 E. R. 790.

179. ———.]—R. v. PARSONS, No. 174, *ante*.

180. ——— Not necessary.]—R. v. CONEY & OBRIAN (1684), 3 Mod. Rep. 37; 2 Show. 334; 87 E. R. 23; *sub nom.* CONEY & OBRYAN, Skin. 157.

Construction of pardon.]—See Sub-sect. 4,

181. Former necessity for Great Seal.]—RAMSAY v.

MACDONALD (1747), Fost. 61; R. v. GUILLY (1773), Leach, 98; BULLOCK v. DODDS (1819), 2 B. & Ald. 258; GOUGH v. DAVIES (1856), 2 K. & J. 623; R. v. GARSIDE & MOSLEY (1834), 2 Ad. & El. 266; STOKES v. HOLDEN (1836), 1 Keen, 145.

182. Statement of places to which pardon applicable—Under Transportation Act, 1843 (c. 7)—Not necessary.]—BARNETT v. BLAKE (1862), 2 Drew. & Sm. 117; 62 E. R. 566; *sub nom.* BLAKE v. BARNETT, 31 L. J. Ch. 898; 6 L. T. 886; 26 J. P. 692; 8 Jur. N. S. 812; 10 W. R. 767.

Annotations:—Refd. Talbot v. Jeyers (1917), 117 L. T. 430. *Mentd.* Hurst v. Hurst (1882), 21 Ch. D. 278.

183. Conditional pardon—Of death sentence—On condition of transportation.]—R. v. MILLER (1772), 2 Wm. Bl. 797; R. v. MADAN (1780), 1 Leach, 223.

184. ——— On condition of imprisonment—No appeal against.]—R. v. LORD (1908), 52 Sol. Jo. 740; 1 Cr. App. Rep. 110; 72 J. P. Jo. 400, C. C. A.

See, generally, CRIMINAL LAW & PROCEDURE.

Effect of—On property.]—See Nos. 218, 219, *post*.

SUB-SECT. 3.—WHAT MAY BE PARDONED.

185. All sentences of punitive character.

The Chief Justice of a colony wrote two letters to a newspaper in which he discussed questions affecting the sanitary condition of the town. An anonymous letter was published in reply commenting in sarcastic language on the letters & conduct of the Chief Justice. The editor, who was also proprietor & publisher of the paper, refused to give up the name of the author of the letter, or the manuscript of it. The Chief Justice thereupon adjudged him to be guilty of contempt in publishing the letter, & also in refusing to give up the name of the author, & sentenced him to imprisonment during pleasure & to payment of a fine in respect of each act of contempt, & to further imprisonment till they were paid. He was released the next day by order of the Governor of the colony:

Held: the prerogative of the Crown extends to the remission of all sentences of a punitive character, & the Governor of the colony had power, under his commission, to exercise the royal prerogative in that respect. *Re BAHAMA ISLANDS, SPECIAL REFERENCE FROM*, [1893] A. C. 138; *sub nom.* *Re MOSELEY*, 62 L. J. P. C. 79; 68 L. T. 105; 57 J. P. 277, P. C.

Annotation:—Mentd. Seaward v. Paterson, [1897] 1 Ch. 545.

186. Not bankruptcy offences.]—Under Insolvent & Bankrupt Law Consolidation Acts, the Crown has no power to remit punishment. *Re STANTON, Ex p. STANTON* (1851), 21 L. J. Bey. 7; 18 L. T. O. S. 149, L.J.J.; *subsequent proceedings*, 1 De G. M. & G. 224, L. C. & L. J.J.

187. Not offence of public nature—Unless before seizure or information.]—ANON. (1484), Jenk. 164; 145 E. R. 106.

Annotation:—Refd. Weddel v. Thurlow & Harris (1711), Park. 280.

188. ———.]—PARDONS, OF (1609), 12 Co. Rep. 30; 77 E. R. 1311.

189. Suit in Ecclesiastical Court—Pro salute animæ.]—HALL'S CASE (1604), 5 Co. Rep. 51 a; 77 E. R. 132.

Annotation:—Refd. Watt's Case (1614), Cro. Jac. 335.

190. ——— Ex officio—Not after sentence given & costs taxed.]—HALL'S CASE (1604), 5 Co. Rep. 51 a; 77 E. R. 132.

Annotation:—Refd. Watt's Case (1614), Cro. Jac. 353.

191. Not recognisance to keep peace—Before recognisance broken.]—PARDONS, OF (1609), 12 Co. Rep. 30; 77 E. R. 1311.

192. ———.]—CUSTODES *v.* RICKABYE (1652), Sty. 375; 82 E. R. 790.

193. Not nuisance.]—CUSTODES *v.* RICKABYE (1652), Sty. 375; 82 E. R. 790.

194. Impeachment—By House of Lords—Not after impeachment.]—R. *v.* SALISBURY (EARL) (1690), 1 Show. 100; 89 E. R. 476; *sub nom.* SALISBURY'S (EARL) CASE, Carth. 131.

195. ——— By House of Commons—Not before impeachment.]—A pardon under the Great Seal takes away the privilege of a witness in not answering, so far as regards any risk of prosecution at the suit or in the name of the Crown.

Act of Settlement, 1700 (c. 2), s. 3, which enacts that no pardon under the Great Seal shall be pleadable in bar to an impeachment by the Commons in Parliament, renders a pardon under the Great Seal wholly inoperative to prevent impeachment by the House of Commons, & so getting rid of the judgment of the House of Lords; for that purpose a subsequent pardon must be granted by the Crown.—R. *v.* BOYES (1861), 1 B. & S. 311; 30 L. J. Q. B. 301; 5 L. T. 147; 25 J. P. 789; 7 Jur. N. S. 1158; 9 W. R. 690; 9 Cox, C. C. 32; 121 E. R. 730.

*Annotations:—*Consd. Lamb *v.* Munster (1882), 10 Q. B. D. 110. **Mentd.** R. *v.* Hamilton, Kinglake & Lovibond (1870), 22 L. T. 316; *Re* Reynolds, *Ex p.* Reynolds (1882), 20 Ch. D. 294; *Re* Genese, *Ex p.* Gilbert (1886), 3 Morr. 223; *Evans v. Evans*, [1904] P. 378; R. *v.* Christie, [1914] A. C. 515; R. *v.* Cohen (1914), 111 L. T. 77.

196. Not suit in which subject has interest.]—BIGGIN'S CASE (1599), 5 Co. Rep. 50 a; 77 E. R. 130; *sub nom.* PHILLADAY STROUGHBOROUGH *v.* BIGGIN, MOORE, K. B. 571; *sub nom.* SHUCKBOROUGH *v.* BIGGIN, Cro. Eliz. 682.

*Annotations:—*Consd. Ludlam *v.* Lopez (1722), 8 Mod. Rep. 103. **Refd.** Smith *v.* Bowen (1709), 11 Mod. Rep. 254.

197. ———.]—HALL'S CASE (1601), 5 Co. Rep. 51 a; 77 E. R. 132.

*Annotation:—*Refd. Watts's Case (1614), Cro. Jac. 335.

See, also, Nos. 204, 282–232, *post*.

198. Not debt—Due to private person—Before debt paid.]—TOMKIN'S CASE (1629), Het. 57; 121 E. R. 340.

199. ———.]—BARTRAM *v.* DANNETT (1676), Cas. temp. Finch, 253; 23 E. R. 139.

See, also, Nos. 228–232, *post*.

SUB-SECT. 4.—CONSTRUCTION OF PARDON.

200. Effect of exceptions.]—FRANKLIN'S CASE (1593), 5 Co. Rep. 46 b; 77 E. R. 125.

201. ——— Exception of contempts—Contempt in marrying infant ward of court not within exception.]—PHIPPS *v.* ANGLESEA (EARL) (1721), 1 P. Wms. 696; 24 E. R. 576, L. C.

*Annotations:—*Mentd. Lansdowne *v.* Lansdowne (1820), 2 Bl. 60; Noel *v.* Rochfort (1836), 10 Bl. N. S. 483.

202. “All offences”—Præmunire included.]—HETLEY *v.* BOYER (1614), Cro. Jac. 336; 79 E. R. 287.

*Annotations:—*Mentd. Emmerson *v.* Saltmarsh (1837), 7 Ad. & El. 266; Ramsey *v.* Nornabell (1840), 11 Ad. & El. 383.

203. ——— All crimes not capital included.]—ANGELL'S CASE (1673), 1 Mod. Rep. 102; 86 E. R. 764.

204. ——— Suit for dilapidations not included.]—POOL *v.* TRUMBAL (1685), 3 Mod. Rep. 56; 87

E. R. 35; *sub nom.* POWLE *v.* TRUMBALL, 2 Show. 420.

205. ——— Fraud excepted—Whether judgment on penal statute for fraud on revenue included.]—R. *v.* JOHNSON (1688), 3 Mod. Rep. 241; 87 E. R. 157.

206. All felonies before certain day—Special clause not to find sureties for good behaviour—Liability of finding such security for misdemeanours committed after such day not included.]—MINTS' CASE (1640), Cro. Car. 596; 79 E. R. 1113.

207. Murder excepted—Suicide not within exception.]—R. *v.* WARDE (1663), 1 Sid. 150; 1 Lev. 8; 82 E. R. 1025; *sub nom.* R. *v.* WARNER, 1 Keb. 66.

*Annotation:—*Refd. R. *v.* Russell (1832), 1 Mood. C. C. 356.

208. Murder & poisoning excepted—Poison administered before pardon—Death after pardon—Offence within exception.]—NICHOLAS' CASE (1748), Fost. 64.

209. Wound—Offence of wounding & “hitting” included.]—R. *v.* BOCKMAN (1664), 1 Sid. 211; 82 E. R. 1062.

*Annotation:—*Mentd. Anon. (1705), 2 Salk. 546.

SUB-SECT. 5.—EFFECT OF PARDON.

210. On guilt—Not taken away.]
v. WHITE (1625), Palm. 412; Lat. 81; 81 E. R. 1147.

*Annotation:—*Mentd. Lane *v.* Cotton (1701), 1 Com. 100.

211. On punishment.]—VAUGHAN'S CASE (1597), 5 Co. Rep. 49 a; 77 E. R. 128.

*Annotations:—*Mentd. Beecher's Case (1608), 8 Co. Rep. 58a; Whitrong *v.* Blaney (1675), 2 Mod. Rep. 10; Wilkinson *v.* Tiroman (1707), 2 Ld. Raym. 1284.

212. ———.]—SWAYNE *v.* ROGERS (1626), Cro. Car. 32; 79 E. R. 632.

213. On character—Person pardoned entitled to sue for defamation in respect of pardoned offence.]—CUDDINGTON *v.* WILKINS (1615), Hob. 81; Moore, K. B. 872; Owen, 150; 80 E. R. 231; *sub nom.* CUDDINGTON *v.* WILKIN, 1 Brownl. 10.

*Annotations:—*Apld. Searle *v.* Williams (1618), Hob. 288; R. *v.* Reilly (1787), 1 Leach, 454. **Consd.** Leyman *v.* Latimer (1878), 3 Ex. D. 352; Hay *v.* London Tower Division JJ. (1890), 24 Q. B. D. 561. **Refd.** *Re* Barber (1850), 15 L. T. O. S. 500; Alexander *v.* N. E. Ry. (1865), 34 L. J. Q. B. 152; Monson *v.* Tussands, Monson *v.* Tussaud, [1894] 1 Q. B. 671.

214. ———.]—SEARLE *v.* WILLIAMS (1618), Hob. 288; 80 E. R. 433.

*Annotations:—*Consd. Phillips *v.* Bury (1694), Skin. 447; Martin *v.* Mackonochie (1878), 3 Q. B. D. 730. **Refd.** R. *v.* Burrage (1735), 3 P. Wms. 439; Leyman *v.* Latimer (1878), 3 Ex. D. 352.

215. On property—Restoration—Benefice—Not forfeited.]—SEARLE *v.* WILLIAMS (1618), Hob. 288; 80 E. R. 433.

*Annotations:—*Consd. Phillips *v.* Bury (1694), Skin. 447; Martin *v.* Mackonochie (1878), 3 Q. B. D. 730. **Refd.** R. *v.* Burrage (1735), 3 P. Wms. 439; Leyman *v.* Latimer (1878), 3 Ex. D. 352.

216. ——— Not restored.]—SNOW *v.* PHILLIPS (1664), 1 Sid. 220; 1 Keb. 780; 82 E. R. 1069.

*Annotations:—*Mentd. Roe *v.* Gatehouse (1696), 1 Ld. Raym. 145; Handeside *v.* Brown (1753), Dick. 237; Powel *v.* Milbank (1772), 2 Wm. Bl. 851.

217. ——— Advowson—Not restored.]
R. *v.* TURVIL (1675), 2 Mod. Rep. 52; Freem. K. B. 197; 86 E. R. 936.

218. ——— Conditional pardon.]—A convict sentenced to death for felony, which sentence was commuted to transportation for

PART IX. SECT. 2, SUB-SECT. 4.

a. Beneficial construction.]—The question of how far a pardon protects

one to whom a conditional pardon is given & what portion of it should not protect him, ought not to be

treated in a narrow spirit.—**QUEEN-EMPRESS v. GANGA CHARAN** (1888), 1 L. R. 11 All. 79.—**IND.**

Sect. 2.—Pardons and reprieves: Sub-sect. 5. Sects. 3, 4 & 5: Sub-sects. 1, 2 & 3.]

life, received a conditional free pardon in the penal colony:—*Held*: such pardon did not alter the effect of the attainder in vesting his property in the Crown.—*Re* CHURCH'S TRUST (1851), 18 L. T. O. S. 167; 16 Jur. 517.

Annotation:—*Folld. Coombs v. Queen's Proctor* (1852), 2 Rob. Eccl. 547.

219. — Right to after-acquired property—In right of wife—Conditional pardon.]—NEWSOME v. BOWYER (1730), 3 P. Wms. 37; 24 E. R. 959, L. C.

Annotations:—*Consd. Coombs v. Queen's Proctor* (1852), 2 Rob. Eccl. 547. *Reid. Atlee v. Hook* (1854), 2 W. R. 511; *Gough v. Davies* (1856), 2 K. & J. 623.

220. — — — — —.]—GOUGH v. DAVIES, No. 352, *post*.

221. On consequent disability—Discharged.]—BENNET v. EASEDALE (1626), Cro. Car. 55; 79 E. R. 651.

Annotation:—*Consd. Hay v. London Tower Division JJ.* (1890), 24 Q. B. D. 561.

222. — — — — —.]—R. v. GREENVELT (1697), 12 Mod. Rep. 119; 88 E. R. 1206; *sub nom. GROENVELT'S CASE*, 1 Ld. Raym. 213; *sub nom. GROANVELT'S CASE*, 3 Salk. 265.

Annotations:—*Mentd. R. v. Green* (1714), Fortes Rep. 274; *Evans v. Harrison* (1762), Wilm. 130; *R. v. Rogers* (1822), 1 Dow. & Ry. K. B. 156; *Daniell v. Philipps* (1835), 1 Cr. M. & R. 662; *Exp. Bartlett* (1843), 7 Jur. 649; *Wildes v. Russell* (1866), L. R. 1 C. P. 722.

223. — — — — —.]—CLANRICKARD (EARL) v. BOURKE (1717), 6 Bro. Parl. Cas. 4; 1 Com. 237; 2 E. R. 895, H. L.

224. — Prevention of consequences of inchoate forfeiture—Not completely effected by entry.]—A pardon under the sign manual, according to 6 Geo. 4, c. 25, s. 1, has the effect of restoring civil rights so completely as to prevent the consequence of an inchoate forfeiture not completely effected by entry.

A copyholder was attainted of felony & was pardoned & the lord had not entered in pursuance of the forfeiture:—*Held*: the pardon restored the copyholder to his tenement, for which he might maintain ejectment.—*DOE d. EVANS v. EVANS* (1826), 5 B. & C. 584; 8 Dow. & Ry. K. B. 399; 4 L. J. O. S. K. B. 323; 108 E. R. 218.

225. — Solicitor's right to certificate.]—*Re BARBER* (1850), 15 L. T. O. S. 500.

226. — Right to hold licence.]—Upon an application for a licence to sell spirits by retail, it appeared that appct. had been convicted of felony but had received a free pardon under the Royal sign manual:—*Held*: the disqualification imposed on him by Wine & Beerhouse Amendment Act, 1870 (c. 29), s. 14, was removed by the pardon, & the licence might be granted to him.—*HAY v. LONDON (TOWER DIVISION) JJ.* (1890), 24 Q. B. D. 561; 59 L. J. M. C. 79; 62 L. T. 290; 54 J. P. 500; 38 W. R. 414; 6 T. L. R. 169, D. C.

On right to give evidence.]—See EVIDENCE.

227. On other offences—Pardon limited to specific offence.]—Prisoner had been convicted of felony in 1842, sentenced to transportation, sent to the hulks &, in Feb. 1846, discharged with a certificate of a free pardon. He was now indicted for stealing a horse on Feb. 26, 1841:—*Held*: the pardon was not a bar to this indictment, as it was expressly limited to another felony.—*R. v. HARROD* (1846), 2 Car. & Kir. 294; 2 Cox. C. C. 242.

Construction of pardon.]—See Sub-sect. 4, ante.

228. On liability to subject—For costs—Not discharged.]—HALL'S CASE (1604), 5 Co. Rep. 51 a; 77 E. R. 132.

Annotation:—*Reid. Watts's Case* (1614), Cro. Jac. 335.

229. — — — — — Costs awarded by spiritual court.]—BRIKENDEN'S CASE (1625), Cro. Car. 9; 79 E. R. 613.

230. — — — — —.]—R. & CODRINGTON v. RODMAN (1630), Cro. Car. 198; 79 E. R. 774; *sub nom. CUDRINGTON v. REDMAN (OR RODMAN)*, — 227.

Mentd. Lucy v. St. David's (1702), 7 Mod.

231. Discharged.]—WATTS'S CASE (1614), Cro. Jac. 335; 79 E. R. 286.

232. — — — — —.]—MORLEY (LORD) & CHICHESTER'S (BP.) CASE (1627), Cro. Car. 67; 79 E. R. 661.

233. — Penalty—Incurred by officer of local authority interested in contract—Public Health Act, 1875 (c. 55), s. 193.]—A penalty recovered from an officer of a local authority under the above sect. cannot be remitted by the Crown under Remission of Penalties Act, 1859 (c. 32).—*TODD v. ROBINSON* (1884), 12 Q. B. D. 530; 53 L. J. Q. B. 251; 50 L. T. 298; 48 J. P. 692; 32 W. R. 858, D. C.

234. On excommunication—Discharged—Pardon of contempt of spiritual court.]—R. & CODRINGTON v. RODMAN (1630), Cro. Car. 198; 79 E. R. 774; *sub nom. CUDRINGTON v. REDMAN (OR RODMAN)*, W. Jo. 227.

Annotation:—*Mentd. Lucy v. St. David's* (1702), 7 Mod. Rep. 56.

SECT. 3.—GAOLS AND PRISONS.

See PRISONS.

—HOW FAR THE CROWN IS BOUND BY CUSTOM.

235. General rule.]—An information was brought against A. for some of the King's jewels which came to his hands & were detained by him. Deft. pleaded the custom of London that if any goods are pawned there they may be lawfully detained by him to whom they are pawned until the sum lent upon the pawn be paid, & that the jewels were pawned to him for £100 which was not paid:—*Held*: as *nullum tempus nec locus occurrit Regi* the custom did not extend to the King's goods & the King should have judgment for his jewels.

No custom binds the King for his person or goods, as pontage, murage, waifs, strays, toll, lapse, alienation of a villein before seizure; but otherwise of customs which go with the land, for these bind the King, as gavelkind, borough English, etc.—*ANON.* (1457), Jenk. 83; 145 E. R. 59.

See, generally, CUSTOM & USAGES.

SECT. 5.—GENERAL PRIVILEGES AND EXEMPTIONS OF THE CROWN IN LEGAL PROCEEDINGS.

SUB-SECT. 1.—IN GENERAL.

236. Crown not bound—By fiction of law.]—The King is not bound by abeyance, nor by a

PART IX. SECT. 5, SUB-SECT. 1.

1. Crown not bound—By rule that prosecution is precedent to action—In

*case of felonious tort.]—*The rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action

is not concluded, does not apply where the Crown is pltf.—*R. v. REIFFEN-* (1869), 5 P. R. 175.—*CAN.*

— *By estoppel.]—*The aw

common recovery where he has a reversion expectant upon an estate tail, nor by a collateral warranty of his ancestor, without assets. He is not bound by fictions of law.—ANON. (1613), Jenk. 286; 145 E. R. 207.

237. ———.]—SHEFFIELD v. RATCLIFFE, No. 277, *post*.

—— By estoppel or set-off.]—See Sect. 6, sub-sect. 6, *post*.

—— By statutes generally.]—See STATUTES.

—— By Statute of Limitations.]—See LIMITATION OF ACTIONS.

238. Crown cannot be amerced.]—The King & the Queen, on account of the dignity of their persons, shall not be amerced.—BEECHER'S CASE (1608), 8 Co. Rep. 58a; 77 E. R. 559.

Annotations:—Mentd. Cotton v. Westcot (1617), Cro. Jac. 441; Hussey v. More (1617), Cro. Jac. 413; Darov v. Jackson (1622), Palm. 224; Eardley v. Turnock (1622), Cro. Jac. 629; Mason v. Fox (1622), Cro. Jac. 632; Langham's Case (1641), March, 179; Threadneedle v. Linum (1674), Freem. K. B. 179; Coan v. Bowles (1691), 1 Show. 165; Walwin v. Smith (1691), 4 Mod. Rep. 86; Grenville v. College of Physicians (1700), 12 Mod. Rep. 386; Groenvelt v. Burwell (1700), 1 Salk. 200; Warner v. Green (1701), 12 Mod. Rep. 580; Kent v. Kent (1733), 7 Mod. Rep. 187; R. v. York (1832), 3 B. & Ad. 770; Douglas v. R. (1848), 12 Jur. 974; London Corpn. v. R. (1848), 13 Q. B. 30; Ebon v. Neville (1861), 10 W. R. 6; Kemp v. Neville (1861), 10 C. B. N. S. 523.

239. Whether privileges of Crown transferred—By transfer of equity jurisdiction of Exchequer to Court of Chancery.]—*Qu.*: whether the equity jurisdiction of the Exchequer being transferred to the Ct. of Ch. the rights & privileges of the Crown are not also transferred, such as that there is no dismissal in the case of the Crown, but that the judgment should be "let deft. go without a day," analogous to a nonsuit at law, though the Ct. of Ch. Act, 1841 (c. 1), directs the proceedings to be conducted as ch. proceedings.—A.-G. v. ROOSE (1846), 7 L. T. O. S. 175.

240. Waiver of privileges of Crown—Crown consenting to appear—In proceedings in which interested.]—Testator bequeathed a legacy to C. for her absolute use & benefit except as therein-after limited & directed the same with other legacies to females to be invested & the interest therefrom to be for the legatees' separate use, & in case any of the legatees should become bkpt. or assign the interest bequeathed to her the same was to fall into testator's residuary estate except in respect of C. whose legacy is to go to her children according to her appointment & in default to them absolutely. By C.'s marriage settlement her husband had covenanted to settle all after acquired property of his wife. C. died without having become bkpt. or having assigned her interest in the legacy & having by will appointed the same to her children equally. The Comrs. of Inland Revenue insisted that C.'s share did not go to her children directly under the will but that her husband must take out administration to her estate in order to obtain possession of it. By consent the question was raised upon a petition for the opinion of the ct. under the Law of Property Amendment Act, 1859 (c. 35), s. 30:—*Held*: (1) by consent the question, although between the Crown & a subject, might be decided on this petition; (2) under the will the legacy upon C.'s death went directly to her children.—*Re WARE'S TRUSTS* (1871), 41 L. J. Ch. 121; 25 L. T. 737; 20 W. R. 142.

Right of Crown to intervene.]—See Sub-sect. 5, *post*.

is that the Crown is not bound by estoppel.—PETERSON v. R. (1889), 2 Exch. C. R. 67.—CAN.

h. ———.]—R. v. BANK OF MONTREAL (1906), 11 O. L. R. 595; 7 O. W. R.

638.—CAN.

k. ———.]—HENRY v. R. (1905), 9 Exch. C. R. 417; 25 C. L. T. 141.—CAN.

l. Not subject to mandamus—

241. Will of Sovereign—Jurisdiction of court to inquire into.]—The Ct. of Probate has no authority to inquire into the validity or invalidity of the will of a Sovereign of this realm.—*In the Goods of KING GEORGE III. HIS LATE MAJESTY* (1862), 3 Sw. & Tr. 199; 1 New Rep. 69; 32 L. J. P. M. & A. 15; 27 J. P. 137; 8 Jur. N. S. 1134; 11 W. R. 190; 164 E. R. 1250.

SUB-SECT. 2.—HOW FAR THE CROWN IS BOUND BY STATUTE.

See, generally, STATUTES.

How far Crown bound by Statutes of Limitation.]—See LIMITATION OF ACTIONS.

How far Crown bound by other particular Acts.]—See particular titles *passim*.

Statutory liability of Crown as to costs.]—See Sect. 6, sub-sect. 7, C., *post*.

Whether sea regulations binding on ships of His Majesty's navy.]—See SHIPPING & NAVIGATION.

SUB-SECT. 3.—ROYAL PALACES.

242. General rule—Royal palaces & royal palaces also royal residences distinguished—What constitutes a royal residence.]—There is a distinction between a royal palace & a royal palace which is also a royal residence. Hampton Court Palace is a royal Palace but not a royal residence, & therefore is not exempt from execution within it of civil process. The sovereign does not, in fact, reside there, & the circumstances that the chief officials & the chaplain together with the house-keeper & the gardener are all appointed by the Crown & paid out of the civil list, that a pew is always kept in the chapel ready for the royal use, that certain apartments there are known as state apartments, though now used by Her Majesty's permission as picture galleries in which pictures the property of the Crown are exhibited to the free inspection of the public, that a guard of honour is always posted there, that the inmates to whom the sovereign has graciously granted the use of apartments hold such apartments entirely at the pleasure of the Crown, & could be displaced at a moment's notice, & that the grapes grown in the vinery are always kept for the service of Her Majesty's table, do not constitute it a royal residence so as to confer the exemption upon it.

A *fi. fa.* had been levied in some of the apartments in the palace:—*Held*: the sheriff was not liable to an information for intrusion.—A.-G. v. DAKIN (1870), L. R. 4 H. L. 338; 39 L. J. Ex. 113; 23 L. T. 1; 35 J. P. 167; 18 W. R. 1111, H. L.

Annotation:—*Consd.* Combe v. De la Bere (1882), 22 Ch. D. 316.

243. ——— Whether privileges retained after removal of court.]—A palace retains its privileges, though the Court & King remove wholly from it.—ELDERTON'S CASE (1703), 2 Ld. Raym. 978; 6 Mod. Rep. 73; Holt, K. B. 590; 3 Salk. 91, 284; 92 E. R. 152.

Annotations:—*Consd.* Winter v. Miles (1809), 10 East, 578. A.-G. v. Dakin (1870), L. R. 4 H. L. 338. *Refd.* Anon. (1705), 2 Salk. 546. *Mentd.* R. v. Goodall (1754), Say.

244. Actual residence not essential.]—S. obtained in 1815 from George III. a royal warrant to occupy apartments in Holyrood

Where direct relief sought.

will never, in any circumstances, be granted where direct relief is sought against the Crown.—MCQUEEN v. R. (1887), 16 S. C. R. 1.—CAN.

Sect. 5.—General privileges and exemptions of the Crown in legal proceedings: Sub-sects. 3, 4, 5 & 6.]

Palace. In 1820 L., a creditor of S., attempted to force an entry into the palace for the purpose of executing in the apartments which S. occupied a pinding of pictures belonging to her. Being denied admittance he obtained letters of open doors. S. presented a bill of suspension & interdict. No Sovereign was residing in Holyrood at the time when the attempt was made to execute diligence, but the palace was still kept up as a royal residence:—*Held*: (1) Holyrood was still a royal palace; (2) actual residence of the King was not necessary to preserve the privilege to it; (3) an attachment of movables was a violation of that privilege.—**STRATHMORE (EARL & COUNTESS) v. LAING** (1820), 2 State Tr. N. S. 207, H. L.

Annotations:—**Consd.** A.-G. v. Dakin (1870), L. R. 4 H. L. 338; **Combe v. De La Bere** (1882), 22 Ch. D. 316.

245. What palaces privileged—From execution of legal process or arrest—Westminster Palace.]—A. & B. were cited by W. in the palace at Westminster:—*Held*: the palace was a place exempt from all ordinary jurisdiction, as well on account of the king's crown & dignity as on account of the liberty of the Church of Westminster, & specially at the time of the king's own presence there during the session of his Parliament, so that none might serve summonses or citations there & specially on such as were the King's blood, to whom greater reverence was due than to others, & the offending officer should be committed to the Tower of London during the King's pleasure.—**NYERFORD v. WARREN (EARL)** (1293), 3 Co. Inst. 141.

Annotations:—**Consd.** A.-G. v. Dakin (1867), L. R. 2 Exch. 290; **Combe v. De La Bere** (1882), 22 Ch. D. 316.

245a. ————.]—**COMBE v. DE LA BERE** (1882), 22 Ch. D. 316; 48 L. T. 298; 31 W. R. 258, C.A.

246. ———— **Kensington Palace.]—**Kensington Palace being kept in a constant state of preparation to receive the King with his officers servants & guards residing & doing duty there at all times, & some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff for the purpose of executing process against the goods of a person having the use of apartments therein.—**WINTER v. MILES** (1809), 10 East, 578; 103 E. R. 895.

Annotations:—**Consd.** A.-G. v. Dakin (1870), L. R. 4 H. L. 338; **Combe v. De La Bere** (1882), 22 Ch. D. 316. **Refd.** Bell v. Jacobs (1828), 4 Bing. 523.

247. ————.]—An information of intrusion stated that defts. intruded & made entry on a certain messuage or dwelling house situate, etc. & being parcel of the royal palace of Kensington then in the occupation of the Queen in right of her Crown. Defts. pleaded that they committed the trespasses under the authority of a commission of sewers for tax assessed by the said commission:—*Held*: a distress cannot be levied for sewers' rates within the precincts of a royal palace occupied by the Sovereign, & Kensington Palace is within this description. *Semble*: the averment in this information did not sufficiently show the palace to be the residence of the Sovereign.—**A.-G. v. DONALDSON** (1842), 10 M. & W. 117; 11 L. J. Ex. 338; 152 E. R. 406.

Annotations:—**Consd.** A.-G. v. Dakin (1870), L. R. 4 H. L. 338. **Mentd.** *Re Bonham, Ex p. Postmaster General* (1879), 10 Ch. D. 595; **Cooper v. Hawkins** (1903), 73 L. J. K. B. 113.

248. ———— **Holyrood Palace.]—****STRATHMORE (EARL & COUNTESS) v. LAING**, No. 244, ante.

249. ———— **Tower of London—Position of Governor of Tower.]—**The Tower of London as a royal palace is privileged, & arrest within the verge of it is unlawful, but the Governor of the Tower

is not, as such, privileged from arrest *eundo et redeundo*.—**BATSON v. M'LEAN** (1815), 2 Chit. 51.

Annotations:—**Consd.** A.-G. v. Dakin (1870), L. R. 4 H. L. 338. **Refd.** Bell v. Jacobs (1828), 4 Bing. 523.

250. ———— **Not Hampton Court Palace.]—**A.-G. v. DAKIN, No. 242, ante.

251. ———— **From assessment of house duty—Tower of London—House Tax Act, 1808 (c. 55).]**—The Lieutenant-Governor of the Tower of London claimed exemption from house duty in respect of the house occupied by him in the Tower as a servant of Her Majesty. One room therein was furnished as an office by the Comrs. of Works & another was set apart for the use of the deputy-lieutenant. The surveyor contended that the house was liable to assessment as an ordinary dwelling-house. The Comrs. discharged the assessment, considering the Tower to be a royal palace:—*Held*: the Comrs. were right.—*Re WHIMPER* (1862), 11 L. T. 88.

252. Arrest in verge of royal palace—No right of release in person arrested.]—Deft. was arrested upon a peace warrant at the Salopian Coffee House, within that part of the verge declared to be part of the palace by stat. 28 Hen. 8, c. 12, & carried before a justice, by whom he was discharged; & on his return was arrested in a civil action at the suit of pltf. It was contended that this arrest, being made under colour of the peace warrant to elude the franchise, was void:—*Held*: as it appeared to have been a contrivance it was the same as if deft. had been arrested within the verge of the court. But such arrest was not void. The person making the arrest was liable to answer to the person possessed of the franchise which had been violated; but the person arrested was entitled to no action.—**FITZPATRICK v. KELLY** (1782), cited in 3 Term Rep. 740; 100 E. R. 833.

Annotations:—**Consd.** Bell v. Jacobs (1828), 4 Bing. 523. **Mentd.** Carrett v. Smallpage (1808), 9 East, 330.

253. ————.]—An arrest within the verge of the palace is no ground for discharging deft. out of custody.—**SPARKS v. SPINK** (1817), 7 Taunt. 311; 129 E. R. 125.

Annotations:—**Consd.** Combe v. De La Bere (1882), 22 Ch. D. 316. **Refd.** Bell v. Jacobs (1828), 4 Bing. 523.

SUB-SECT. 4.—IMMUNITY FROM ARREST.

In royal palace.]—*See* Nos. 245, 246, 249, ante.

254. General rule—Privilege of Crown not of its servants.]—None of the King's servants in ordinary can be arrested without notice first given to the Lord Chamberlain who cannot privilege any perpetually but in convenient time must either remove such or make them pay their debts. The privilege is the King's, not the parties.—**R. v. MOULTON** (1666), 2 Keb. 3; 84 E. R. 2.

Annotation:—**Refd.** Dyer v. Disney (1847), 16 M. & W. 312.

255. ————.]—**ANON.** (1681), 2 Cas. in Ch. 69; 22 E. R. 850, L. C.

256. ———— **When privilege doubtful—Party not discharged from custody—Writ of privilege.]—**Where the question of privilege from arrest is doubtful the ct. will not, upon motion, discharge the party out of custody, but will leave him to his writ of privilege.—**LUNTLEY v. BATTINE** (1818), 2 B. & Ald. 234; 106 E. R. 353.

Annotations:—**Folld.** Leslie v. Disney (1834), 1 Cr. M. & R. 578. **Distd.** Byrn v. Dildin (1835), 5 Tyr. 357. **Refd.** Tapley v. Battine (1822), 1 Dow. & Ry. K. B. 79. **Mentd.** Geach v. Atkinson (1838), 7 L. J. Ex. 314; **Magnay v. Burt** (1843), 5 Q. B. 381.

256a. ————.]—**LESLIE v. DISNEY** (1834), 1 Cr. M. & R. 578; 3 Dowl. 437; 5 Tyr. 181; 4 L. J. Ex. 15; 149 E. R. 1211.

Annotations:—**Consd.** Byrn v. Dildin (1835), 1 Cr. M. & R. 821. **Refd.** *Re Swan v. Dakins, Ex p. Dakins* (1856), 16 C. B. 77.

257. Whether privilege extends to—Gentlemen of Privy Chamber.]—H. pleaded to the jurisdiction that he was one of the King's Privy Chamber & so ought not to be sued without his consent in any ct. but only by licence of the Lord Chamberlain:—*Held*: plea was bad.—*BARRINGTON v. VENABLES* (1601), 1 Keb. 137; 83 E. R. 860.

258. ———.]—LUNTLEY *v.* BATTINE, No. 256, *ante*.

259. ———.]—The ct. refused to discharge a prisoner in execution for debt claiming privilege from arrest on the ground that he was one of the gentleman of the King's Privy Chamber, it appearing that deft. was not a menial servant, had no stated duties to perform, received no fees in virtue of his office, & had no writ of privilege.—*TAPLEY v. BATTINE* (1822), 1 Dow. & Ry. K. B. 79.

260. ——— Servants of King.]—*R. v. MOULTON*, No. 254, *ante*.

261. ———.]—A servant of the King taken in execution is entitled to be discharged on motion on account of privilege.—*BARTLETT v. HEBBES* (1794), 5 Term Rep. 686; 101 E. R. 382.

Annotation:—*Consd.* Luntley *v.* Battine (1818), 2 B. & Ald. 234.

262. ——— Debt contracted in course of trade publicly carried on.]—A menial servant of His Majesty is not liable to arrest although he publicly carries on trade & the debt is contracted in the course of his trade. *KING v. FOSTER* (1809), 2 Taunt. 167; 127 E. R. 1041.

263. ———.]—A servant in the King's household liable to be called upon to attend the person of His Majesty cannot justify as bail, for his person cannot be taken in execution.—*ANON.* (1821), 1 Dow. & Ry. K. B. 127, n.

264. Warder of the Tower.]—The privilege extended to the King's servants does not apply to a warder of the Tower.—*R. v. FRAMPTON* (1669), 2 Keb. 485; 84 E. R. 304.

265. ——— Yeoman of the Guard.]—It is doubtful whether a yeoman of the guard is privileged from arrest.—*SARD v. FORREST* (1822), 1 B. & C. 139; 2 Dow. & Ry. K. B. 250; 1 L. J. O. S. K. B. 31; 107 E. R. 52.

266. ——— Chaplain to King.]—A chaplain to the King is privileged from arrest. If he be taken on a *ca. sa.* the ct. will discharge him on motion.—*BYRN v. DIBDIN* (1835), 1 Cr. M. & R. 821; 5 Tyr. 357; 4 L. J. Ex. 128; 149 E. R. 1312; *sub nom.* *PAIN v. DIBDIN*, 1 Gale, 58.

267. ——— Priest in ordinary of Chapel Royal.]—A chaplain of one of the Chapels Royal was appointed to the office in the reign of Will. IV. & on the demise of the sovereign not re-appointed. There was evidence that no re-appointment was necessary, & he had acted in that capacity since:—*Held*: he was privileged from arrest.—*HARVEY v. DAKINS* (1849), 3 Exch. 266; 6 Dow. & L. 437; 18 L. J. Ex. 156; 12 L. T. O. S. 406; 154 E. R. 843.

Annotation:—*Refd.* Swan *v.* Dakins (1855), 16 C. B. 77.

268. ——— Privileged from arrest on process of county court in nature of execution—Discharge by habeas corpus.]—A priest in ordinary of Her Majesty's chapels royal is privileged from arrest on process of the county ct. under stat. 9 & 10 Vict. c. 95, s. 99 for non-attendance on a judgment

summons, such process being in the nature of execution, & not merely process of contempt. The proper mode of obtaining his discharge in such case is not by writ of privilege but by *habeas corpus* from one of the superior cts. upon affidavits showing his privilege, or by application to the judge of the county ct.—*SWAN v. DAKINS* (1855), 16 C. B. 77; 24 L. J. C. P. 131; 25 L. T. O. S. 54; 19 J. P. 358; 1 Jur. N. S. 378; 3 W. R. 369; 3 C. L. R. 602; 139 E. R. 684.

Annotations:—*Mentd.* George *v.* Somers (1855), 16 C. B. 539; George *v.* Somers (1855), 11 Exch. 202; Bailey *v.* Plant, [1901] 1 K. B. 31; *R. v.* Birmingham County Court Judge (1902), 71 L. J. K. B. 881.

269. ——— Page of the presence in ordinary.]—A page of the presence in ordinary to the Queen is privileged from arrest.—*REYNOLDS v. POCOCK* (1838), 4 M. & W. 371; 7 Dowl. 4; 8 L. J. Ex. 13; 2 Jur. 924; 150 E. R. 1472.

270. ——— Somerset Herald-at-arms.]—The Somerset Herald-at-arms is one of the Queen's servants in ordinary with fee & bound to attend her whenever required as well as on state ceremonies, & is therefore privileged from arrest.—*DYER v. DISNEY* (1847), 16 M. & W. 312; 4 Dow. & L. 698; 16 L. J. Ex. 182; 153 E. R. 1208.

Annotation:—*Refd.* Swan *v.* Dakins (1855), 16 C. B. 77.

271. ——— Serjeant-at-arms in ordinary.]—The Serjeant-at-arms in ordinary on the Queen is privileged from arrest, it being shown that he has duty to perform by virtue of his office.—*ROBSON v. DOYLE* (1855), 25 L. T. O. S. 115; 3 W. R. 417.

SUB-SECT. 5.—RIGHT TO INTERVENE.

272. In proceedings affecting its right over revenue—Effect of Judicature Act, 1873 (c. 66).]—The prerogative of the Crown to intervene in actions affecting the rights or revenue of the Sovereign has not been affected by Act; & for the determination of such matters the Exch. Div. of the High Ct. has all the powers formerly possessed by the Ct. of Exch.—*A.-G. v. CONSTABLE* (1879), 4 Ex. D. 172; 27 W. R. 661.

Annotation:—*Refd.* Dixon *v.* Board of Trade (1886), 3 T. L. R. 35.

Right of Crown to transfer of action—From one court to another.]—*See* Sect. 6, sub-sect. 2, *post*.

Effect of Crown consenting to question being decided in which interested.]—*See* No. 240, *ante*.

Power of court to add Attorney-General as defendant—Action likely to affect interests of Crown—Procedure by petition of right inapplicable.]—*See* No. 317, *post*.

SUB-SECT. 6. EVIDENCE BY THE SOVEREIGN.

273. Letter under royal sign manual.]—In the case between A. & C. in Ct. of Ch. concerning a promise supposed by pltf. to be made to him of assurance of land upon the marriage of his lady, being daughter & heir apparent to C. & his lady, the King by his letters under his signet manual certified to the L.C. the manner & substance of the promise as it was made to his Majesty in

is to defend it.—*A.-G. v. CARDEN* (1759), 1 How. E. E. 4.—*IR.*

o. ———.]—Where parties claim under two different grants, each reserving a rent, but of different amounts, inasmuch as the rights of the Crown are concerned, the A.-G. ought to be before the ct.—*HOVENDEN v. ANNESLEY* (1805), 2 Sch. & Lef. 607.—*IR.*

PART IX. SECT. 5, SUB-SECT. 5.

m. In proceedings affecting Crown rights—To stay action.]—It is a prerogative right of the Crown to stop a suit between subjects in the subject-matter of which it is alleged that the Crown is or may be interested, & in respect of which suit has been brought in behalf of the Crown to have its interest declared.—*A.-G. FOR BRITISH*

COLUMBIA & NEW VANCOUVER COAL MINING & LAND CO., LTD. v. ESQUIMALT & NANAIMO RY. CO. (1899), 7 B. C. R. 221.—*CAN.*

n. ——— May stop all other business.]—A.-G. may in any case in the Exchequer, in which the King is actually concerned, stop all other business not only for himself to move, but also to call on a motion where he

Sect. 5.—General privileges and exemptions of the Crown in legal proceedings: Sub-sects. 6, 7 & 8.
Sect. 6: Sub-sect. 1.]

regard whereof his Majesty gave to A. £18,000 in lieu of £1000 *per annum* in land which he had promised:—*Held*: this certificate would be allowed upon the hearing for proof.—**ABIGNYE v. CLIFTON** (1611), Hob. 213; 80 E. R. 360.

Annotation:—*Refd.* **Omicund v. Barker** (1744), Willes, 538.

274. Certificate from Sovereign.]—L. was committed to the Fleet for disobeying a decree made in the Ct. of Requests, & having suits depending in the Ct. of Common Pleas he prayed a writ of *habeas corpus*, which was granted, & upon the return of the writ the cause of his commitment appeared to be for a contempt for not performing the decree & no other cause appeared in the return. It was shown that the decree was made upon a bill adjudging that L. had promised the King to pay £200 *per annum* to M. to compromise certain disputes then pending. This he denied, but upon a certificate of the King that he had made such a promise the Ct. of Requests made the decree:—*Held*: L. could not be delivered.—**LEA (SIR HENRY) & HENRY LEAS' CASE** (1612), Godb. 198; 78 E. R. 120.

SUB-SECT. 7.—EXECUTION AND DISTRESS.

On goods in royal palaces.]—See Sub-sect. 3, *ante*.

275. No distress levied on land of Crown.]—**ANON.** (1459), Jenk. 112; 145 E. R. 78.

SUB-SECT. 8.—LACHES AND PRESCRIPTION.

See, generally, LIMITATION OF ACTIONS; STATUTES.

276. General rule.]—**ANON.**, No. 235, *ante*.

277. —.]—It is the duty of a judge to watch over the ancient rights of the Crown.

Although fictions may take place among common persons yet the King is not to be answered, bound, or defeated by fictions. *Vigilantibus non dormientibus jura subveniunt* is a rule for the subject, but *nullum tempus occurrit regi* is the King's plea, except it be in some trifle as usurpation, & death upon his lapse, or the like.—**SHEFFIELD v. RATCLIFFE** (1615), Hob. 334; 80 E. R. 475, Ex. Ch.
Annotations:—*Refd.* **Stone v. Newman** (1635), Cro. Car. 427; **Thomas v. Sorrell** (1672), 3 Keb. 143; **The Bankers Case** (1695), Skin. 601; **A.-G. v. Chitty** (1744), Park. 37; **R. v. Cotton** (1751), Park. 112; *Re De Keyser's Royal Hotel, De Keyser's Royal Hotel v. R.*, [1919] 2 Ch. 197.
Mentd. **Payne v. Parker** (1662), O. Bridg. 18; **Machil v. Clark** (1702), 2 Salk. 619; **Thornby v. Fleetwood** (1720), 1 Stra. 318; **Brassey v. Dawson** (1733), Cunn. 65; **St. Nicholas v. St. Peters in Ipswich** (1736), Lee *temp.* Hard. 323; **Wolferstan v. Lincoln (Bp.) & Whitehead** (1763), 2 Wils. 174; **Giles v. Grover** (1832), 9 Bing. 128.

PART IX. SECT. 5, SUB-SECT. 7.

p. No distress levied on chattels of Crown.]—The King's chattels cannot be distrained for tithe composition.—**ORDNANCE OFFICERS v. WARBURTON** (1831), 2 Hud. & B. 692; 4 Ir. L. Rec. 1st ser. 180.—**IR.**

q. No lien on goods of Crown.]—The goods of the Sovereign cannot be detained under a claim of lien.—**R. v. FRASER** (1877), 2 R. & C. 431.—**CAN.**

r. —.]—Crown property is not in *commercio*, & therefore, no lien can attach to it, for a debt due by the Crown, which, being in presumption of law at all times solvent, can never be bound to give security.—**DUSHAULT v. FORTIER** (1893), Q. R. 4 S. C. 304.

—**CAN.**

s. —.]—*Re* LAND TITLES ACT, [1918] 3 W. W. R. 13.—**CAN.**

PART IX. SECT. 5, SUB-SECT. 8.

276 i. General rule.]—The law is that no laches can be imputed to the Crown.—**PETERSON v. R.** (1889), 2 Exch. C. R. 67.—**CAN.**

276 ii. —.]—**BURROUGHS v. R.** (1891), 2 Exch. C. R. 293.—**CAN.**

276 iii. —.]—**HENRY v. R.** (1905), 9 Exch. C. R. 417; 25 C. L. T. 141.—**CAN.**

276 iv. —.]—**R. v. BANK OF MONTREAL** (1906), 11 O. L. R. 595; 7 O. W. R. 638.—**CAN.**

278. — Sult against executor of debtor.]—If the King's debtor dies he may pursue his remedy against his exor. at any time.—**A.-G. v. WHITE** (1733), 2 Com. 433; 92 E. R. 1146.

Annotation:—*Refd.* **R. v. Curtis** (1750), Park. 95.

279. — In matters of public revenue.]—If the acting comrs. of land tax, assessed taxes, etc. refuse unless indemnified to proceed to make a re-assessment on the parish to which the deficiency applies in execution of the powers entrusted to them by the Land Tax Act, 1797 (c. 5), s. 18, the House Tax Act, 1803 (c. 161), s. 56, & 46 Geo. 3 (c. 65), s. 189, where *insuper* has been set on the parish whose collector is a defaulter:—*Held*: (1) they will be ordered to do so by rule to show cause in the nature of a mandamus; (2) the Crown is not limited to any time within which to make such an application.—*Re* **WOOTTON (INHABITANTS)** (1818), 6 Price, 103; 146 E. R. 754.

280. — Appeal after delay.]—Leave to appeal against a decision pronounced in 1819 & in which no step had been taken for two years previous to the application refused. *Semble*: the Crown has no greater right than the subject to be let in to appeal in a general case in which its interests are concerned.—**LAING v. INGHAM** (1839), 3 Moo. P. C. C. 26; 13 E. R. 11, P. C.

281. — Delay or laches not imputable to Attorney-General.]—A co. & its lessees had been indicted at common law for a nuisance, & the lessees found guilty but had entered an appeal. Upon an information filed against the co. & its lessees for an injunction to restrain & abate the nuisance the co. insisted upon their right to use certain water as flowing into their canal although polluted & a public nuisance:—*Held*: the ct. conceiving that the decision at law was correct the fact of an appeal being lodged was no bar to the ct. granting an injunction. Delay or laches may not be imputed to the A.-G. suing on behalf of the public where it might be against an individual in a similar case.—**A.-G. v. BRADFORD CANAL PROPRIETORS** (1866), L. R. 2 Eq. 71; 15 L. T. 9; 14 W. R. 579.

Annotation:—*Refd.* **A.-G. v. Wimbledon House Estate Co.**, [1904] 2 Ch. 34.

Whether Crown bound by Statutes of Limitation.]—See LIMITATION OF ACTIONS.

282. Whether Crown bound by laches of servants.]—A fee farm due to the King out of the lands of the D. & being in arrear for divers years was omitted out of the charge by the connivance or negligence of the clerk who ought to have put it in charge, & so continued until Stat. 21 Jac. 1, c. 35:—*Held*: it was not excepted out of the pardon given by the Stat.—**DUNBARR'S (VISCOUNT) CASE** (1634), Cro. Car. 349; 79 E. R. 906.

Annotation:—*Refd.* **A.-G. v. Chitty** (1744), Park. 37.

283. —.]—The Crown is not bound by the

276 v. —.]—**FAY** (1878), 4 L. R. 1r.

276 vi. —.]—**R. v. WELLINGTON CORPN.** (1896), 15 N. Z. L. R. 72.—**N.Z.**

a. — Suit against surety of Crown officer.]—**BLACK v. R.** (1899), 29 S. C. R. 693.—**CAN.**

b. — Claim for royalties on cut timber.]—A. held licenses from the Crown to cut timber on Dominion lands. Three of such licenses were issued Jan. 28, 1892, & each provided for a royalty of 5 per cent. on timber cut thereunder. Another license was issued Aug. 8 in the same year, & provided that if the timber was burnt then the royalty should be 2½ per cent.

laches of its officers even where the liberty of the subject is concerned. A debtor to the Crown was taken in execution under an extent, & having been taken by the sheriff out of prison by order of the Comrs. of Excise to a neighbouring ct. to give evidence & thence reconveyed to prison without the intervention of a writ of *habeas corpus*:—*Held*: the debtor was in lawful custody on the ground that the Crown's right was not compromised by the negligence of its officers.—*R. v. RENTON* (1848), 2 Exch. 216; 17 L. J. Ex. 204; 11 L. T. O. S. 130; 13 J. P. 697.

SECT. 6.—LEGAL PROCEEDINGS BY AND AGAINST THE CROWN AND CROWN SERVANTS.

SUB-SECT. 1.—LIABILITY OF THE CROWN AND CROWN SERVANTS TO BE SUED.

284. Whether action lies against Crown.]—I am of opinion that the rule that no action lies against the Crown at the suit of the subject is part only of the wider principle that the King cannot, against his will, be made to submit to the jurisdiction of the King's cts. (HILL, J.).—*THE MOGILEFF* (1921), 38 T. L. R. 71.

285. — Quare impedit.]—*Quare impedit* must be brought against patron & incumbent, but when the King is patron, against the incumbent only (FROWICK, C.J.).—*ANON.* (1504), Keil. 53; 72 E. R. 211.

286. — King in possession of land.]—When the King is legally in possession of land, there is no remedy against him except (1) petition of right, (2) *monstrans de droit*, or *amoveas manus* which are of the same effect; when the King's patent can be construed two ways, the best for the King shall always be taken.—*ANON.* (1515), Keil. 178; 72 E. R. 354.

Annotations:—As to (2) *Reid*. The Bankers Case (1695), Skin. 601. Generally, *Reid*. *Re Hornbee* (1691), Freem. K. B. 331.

See, further, CROWN PRACTICE.

287. — To obtain equitable relief—Suit for redemption of mortgage.]—In a bill to redeem a mtge., the question was, whether pltf. could have any remedy against the King, to have a redemption:—*Held*: pltf. ought to be relieved against the King.—*PAWLETT v. A.-G.* (1667), Hard. 465; 145 E. R. 550.

Annotations:—*Reid*. *Reeve v. A.-G.* (1741), 2 Atk. 223; *Burgess v. Wheate* (1759), 1 Eden, 177; *de Bode v. R.* (1851), 6 State Tr. N. S. 237; *Dyson v. A.-G.*, [1911] 1 K. B. 410; *Esquimalt & Nanaimo Ry. v. Wilson*, [1920] A. C. 358. *Mentd.* *R. v. Mildmay* (1833), 5 B. & Ad. 254; *Downe v. Morris* (1844), 3 Hare, 394.

instead of 5 per cent. A. obtained other licenses containing similar provisions as to "burnt timber," & cut timber under such licenses, but, owing to mistake and inadvertence, the returns furnished by him did not show that a portion of the material cut was "burnt timber." Royalties were paid upon the basis of there being no burned timber cut, & the Crown claimed for damages for timber cut by A. in trespass on vacant lands; in effect claiming the difference between the royalty for which he was liable under his licenses & the dues he would have been liable for had the timber in question been cut under a permit to cut the same on Dominion lands:—*Held*: the Crown was not estopped by the laches of its officers from claiming as damages a larger sum than already paid as royalties.—*GENELIE v. R.* (1907), 10 Exch. C. R. 427.—CAN.

PART IX. SECT. 6, SUB-SECT. 1.

a. Whether action lies against

*Crown—To obtain equitable relief—Suit on oral promise to grant land.]—*D. filed a petition to obtain specific performance of an alleged agreement made with him by the Crown for a lease of L. with covenant for renewal under Orders in Council:—*Held*: petitioners had no rights legally enforceable under the Orders in Council inasmuch as the Crown was not bound by promises, as to Crown lands, of the Sovereign or any of his officers, though acted upon or partly performed, but only by grants under seal or conveyances exactly conformable to Acts of Parliament authorising them.—*DALLIMORE v. R.* (1866), 3 W. W. & A'B. 18.—AUS.

d. — — — — —.]—*PHERSON v. R.* (1869), 6 W. W. & A'B. 131.—AUS

e. — — — — —.]—*NASH v. R.* (1870), 1 V. R. (Eq.) 118.—AUS.

f. — — — — —.]—*MELBOURNE CORPN. v. R.* (1871), 2 V. R. 183.—AUS.

288. — Suit to have will established & estate sold—After escheat of estate.]—F. seised in fee of an estate devised it to his wife for life, & after her death, to H. to sell, & pay debts & legacies, & the residue to pltf's. H. who had a bare power, was dead & for want of heirs to F. the estate escheated to the Crown. The bill was brought against the A.-G. on behalf of the Crown, to have the will established & estate sold:—*Held*: it could not be decreed in Ch., but that the Ct. of Exchequer might decree it as a ct. of revenue.—*REEVE v. A.-G.* (1741), 2 Atk. 223; 26 E. R. 538. *Annotation*:—*Reid*. *Dyson v. A.-G.*, [1911] 1 K. B. 410.

289. — Suit for discovery & declaration for settled account.]—An information having been filed by the A.-G. against A., for an account of his dealings & transactions with the government as an army agent, A. pleaded a settled account. This plea having been overruled, A. filed a cross bill against the A.-G. & the Secretary of War:—*Held*: (1) Pltf. entitled to discovery; (2) pltf. entitled to a perpetual *quietus* from all proceedings by defts.—*DEARE v. A.-G.* (1835), 1 Y. & C. Ex. 197; 160 E. R. 80, Ex. Ch.

Annotations:—Generally, *Reid*. *Dyson v. A.-G.*, [1911] 1 K. B. 410; *Eastern Trust Co. v. McKenzie, Mann*, [1915] A. C. 750; *Esquimalt & Nanaimo Ry. v. Wilson*, [1920] A. C. 358.

See, generally, DISCOVERY, INSPECTION & INTERROGATORIES.

290. — Suit for sale of mortgaged property.]—The title-deeds of a leasehold estate were deposited with bankers, by way of equitable mtge., for securing the balance of a running account. The party making the deposit was subsequently convicted of felony. A bill was filed by the bankers, claiming to be equitable mtgees. by virtue of the deposit, against the A.-G. for a sale of the property:—*Held*: (1) the ct. had no jurisdiction, the legal estate being in the Crown, to decree a sale of the estate; (2) nor any power to compel a conveyance by the Crown of the legal estate; (3) pltf's., as equitable mtgees. declared entitled to hold possession of the property, until the Crown should think fit to redeem.—*HODGE v. A.-G.* (1838), 3 Y. & C. Ex. 342; 160 E. R. 734.

Annotations:—Generally, *Consd.* *Dyson v. A.-G.*, [1911] 1 K. B. 410. *Reid*. *Burghes v. A.-G.*, [1911] 2 Ch. 139

291. — For negligence of servants or agents—The King can do no wrong.]—Certain workmen, employed under the immediate direction of the Royal Comrs. of Woods & Forests in the reign of Will. IV., by their negligent conduct occasioned a fire to break out in a part of the Royal Palace of Westminster, whereby the effects of C., the Speaker, were burnt & damaged:

g. — — — — — *Suit to restrain grant of lease.]—*A petition will not lie against the Crown at the suit of the holder of a mining claim to restrain the issue to other parties of a mining lease of the land occupied as such claim.—*CITY OF MELBOURNE GOLD MINING CO. REGISTERED v. R.* (1867), 4 W. W. & A'B. 148.—AUS.

(PRESIDENT OF SHIRE OF) *v. R.* (1884), 10 V. L. R. 255.—AUS.

i. — *For negligence of servants or agents—The King can do no wrong.]—**GIBSON v. YOUNG* (1900), 21 N. S. W. L. R. 7.—AUS.

291 ii. — — — — —.]—The maxim "Crown can do no wrong" applies to alleged tortious acts of the officers of a public department.—*MUSKOKA MILL CO. v. R.* (1881), 28 Gr. 563.—CAN.

291 iii. — — — — —.]—A petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its

Sect. 6.—Legal proceedings by and against the Crown and Crown servants: Sub-sects. 1 & 2.]

—**Held:** a petition of right would not lie at the instance of C. against the succeeding Sovereign for compensation for the injury sustained.

Semble: neither would such a petition lie against the Sovereign in whose reign the injury was sustained, for the Crown, not being liable for personal negligence, cannot be held liable for that of a servant or agent.—**CANTERBURY (VISCOUNT) v. A.-G.** (1843), 1 Ph. 306; 4 State Tr. N. S. 767; 12 L. J. Ch. 281; 7 Jur. 224; 41 E. R. 648, L. C.

Annotations:—**Consd.** *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178. **Refd.** *Tobin v. R.* (1864), 16 C. B. N. S. 310; *Thomas v. R.* (1874), L. R. 10 Q. B. 31. **Mentd.** *Filliter v. Phippard* (1847), 11 Q. B. 347; *Vaughan v. Taff Vale Ry.* (1858), 3 H. & N. 743; *Feather v. R.* (1865), 35 L. J. Q. B. 200; *Grill v. General Iron Screw Collier Co.* (1866), 35 L. J. C. P. 321.

See, further, CROWN PRACTICE; PUBLIC AUTHORITIES & PUBLIC OFFICERS.

— **For Act of State.]—See PUBLIC AUTHORITIES & PUBLIC OFFICERS.**

292. — Immediate & sole object of action being to affect rights of Crown.]—(1) The ct. has jurisdiction to maintain an action against the A.-G. as representing the Crown, although the immediate

& sole object of the action is to effect the rights of the Crown in favour of pltf. (2) A declaratory judgment can, under R. S. C. Ord. 25, r. 5, be made against the A.-G. as deft. representing the Crown, & a pltf. is not bound in such a case to proceed by petition of right.—**DYSON v. A.-G.**, [1911] 1 K. B. 410; 81 L. J. K. B. 217; 105 L. T. 753; 27 T. L. R. 143; 55 Sol. Jo. 188, C. A.

Annotations:—**As to** (1) **Refd.** *Bombay & Persia Steam Navigation Co. v. Maclay*, [1920] 3 K. B. 402. **As to** (2) **Distd.** *Smeeton v. A.-G.*, [1920] 1 Ch. 85. **Refd.** *Eastern Trust Co. v. McKenzie, Mann*, [1915] A.-G. 750; *Gresham Life Assce. Soc. v. A.-G.*, [1916] 1 Ch. 228; *Hosier v. Derby*, [1918] 2 K. B. 671; *Markwald v. A.-G.*, [1920] 1 Ch. 348. **Generally, Consd.** *Esquimalt & Nanaimo Ry. v. Wilson*, [1920] A. C. 358. **Refd.** *Electrical Development Co. of Ontario v. A.-G. for Ontario & Hydro-Electric Power Commission of Ontario*, [1919] A. C. 687. **Mentd.** *Thornhill v. Weeks*, [1913] 1 Ch. 438; *Re Williams, Ex p. Official Receiver*, [1913] 2 K. B. 88; *In the Estate of Hall, Hall v. Knight & Baxter*, [1914] 1 P. 1; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Re Clay, Clay v. Booth, Re Deed of Indemnity*, [1919] 1 Ch. 66.

— **To obtain declaratory judgment.]—See JUDGMENTS & ORDERS.**

— **Whether Crown can be party to interpleader issue.]—See INTERPLEADER.**

— **In respect of King's ships.]—See ADMIRALTY, Vol. I., p. 109, Nos. 127–134.**

servants to the property of an individual using a public work.—*R. v. McFarlane* (1882), 7 S. C. R. 216.—**CAN.**

291 iv. ——The Crown cannot be prejudiced by the alleged negligence of a Minister.—*R. v. Chiesley* (1884), 23 N. S. R. 552.—**CAN.**

291 v. ——*Lavoie v. R.* (1892), 3 Exch. C. R. 96.—**CAN.**

291 vi. ——Prior to 1887, a petition of right would not lie for damages or loss resulting from an injury occasioned by the negligence of the Crown's servants or agents, the subject's remedy being limited to a submission of his claim to official arbitrators.—*CITY OF QUEBEC v. R.* (1892), 3 Exch. C. R. 164.—**CAN.**

291 vii. ——*GRAHAM v. QUEEN VICTORIA NIAGARA FALLS PARK COMRS.* (1896), 28 O. R. 1.—**CAN.**

291 viii. ——*Re BINNETTE* (1910), 12 W. L. R. 730.—**CAN.**

291 ix. ——A charge of personal negligence cannot be imputed to the King, & if it occurred, the law affords no remedy.—*MOORE v. R.* (1917), 16 Exch. C. R. 264.—**CAN.**

291 x. ——*BONNEAU v. R.* (1918), 18 Exch. C. R. 135; 42 D. L. R. 490.—**CAN.**

291 xi. ——*R. v. ROYAL BANK OF CANADA* (1920), 1 W. W. R. 198; 50 D. L. R. 293; 30 Man. L. R. 104.—**CAN.**

291 xii. ——*PARSONS v. BOARD OF WORKS* (1888), 7 Nfld. L. R. 348.—**NFLD.**

291 xiii. ——An action of damages for negligence will not lie against the Crown, the Crown not being liable for the wrongful acts of its servants.—*MACGREGOR v. LORD ADVOCATE* (1921), 58 Sc. L. R. 558.—**SCOT.**

i. — Effect of statute.]—By 39 Vict. No. 38, the Legislature meant to extend the rights of the subject by allowing action to be brought against Govt. in cases arising *ex delicto* from the wrongful acts of its officers.—*BOWMAN v. FARNELL* (1886), 7 N. S. W. L. R. 1; 2 N. S. W. W. N. 53.—**AUS.**

J. FARNELL v. BOWMAN (1887), 12 App. Cas. 643, P. C.—AUS.****

k. ——Under Judiciary Act, 1903, the Commonwealth is responsible for the tortious acts of its servants in every case in which the gist of the cause of action is an infringement of a legal right, if the act complained of is not justified by law, & the person doing it is not exercising an independent discretion imposed upon him by statute, but is performing a merely ministerial duty.—*BAUME v. COMMONWEALTH* (1906), 4 C. L. R. 97.—**AUS.**

l. ——Under 50 & 51 Vict. c. 16, s. 16, the Crown is liable for an injury resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties & employment.—*BRADY v. R.* (1891), 2 Exch. C. R. 273.—**CAN.**

m. ——*BURROUGHS v. R.* (1891), 2 Exch. C. R. 293.—**CAN.**

GILCHRIST v. R. (1891), 2 Exch. C. R. 300.—**CAN.**

o. ——*LAVOIE v. R.* (1892), 3 Exch. C. R. 96.—**CAN.**

p. ——*MORIN v. R.* (1892), 20 S. C. R. 515.—**CAN.**

q. ——*CITY OF QUEBEC v. R.* (1892), 3 Exch. C. R. 164; 24 S. C. R. 420.—**CAN.**

r. ——*ARCHIBALD v. R.* (1893), 3 Exch. C. R. 251; 23 S. C. R. 147.—**CAN.**

s. ——*LEPROHON v. R.* (1894), 4 Exch. C. R. 100.—**CAN.**

t. ——*R. v. FILION* (1894), 24 S. C. R. 422.—**CAN.**

u. ——*CONNELL v. R.* (1896), 5 Exch. C. R. 74.—**CAN.**

v. ——*MCKAY'S SONS v. R.* (1896), 6 Exch. C. R. 1.—**CAN.**

w. ——*ALLIANCE ASSURANCE CO. v. R.* (1898), 6 Exch. C. R. 76.—**CAN.**

COLPITTS v. R. (1899), 6 Exch. C. R. 254.—**CAN.**

y. ——*GRENIER v. R.* (1899), 6 Exch. C. R. 276.—**CAN.**

z. ——*McHUGH v. R.* (1900), 6 Exch. C. R. 374.—**CAN.**

a. ——*ALGOMA CENTRAL RY. CO. v. R.*, [1903] A. C. 478; 32 S. C. R. 277.—**CAN.**

b. ——*LETOURNEUX v. R.* (1903), 33 S. C. R. 335.—**CAN.**

c. ——*GAGNON v. R.* (1904), 9 Exch. C. R. 189; 25 C. L. T. 56.—**CAN.**

d. ——*BRITISH & FOREIGN MARINE INSURANCE CO. v. R.* (1905), 9 Exch. C. R. 478; 25 C. L. T. 146.—**CAN.**

e. ——*NICHOLLS CHEMICAL CO. v. R.* (1905), 9 Exch. C. R. 272; 25 C. L. T. 82.—**CAN.**

f. ——The effect of 50 & 51 Vict. c. 16 is not to extend the Crown's liability so as to enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject in like circumstances would not be liable.—*RYDER v. R.* (1905), 36 S. C. R. 462.—**CAN.**

g. ——*& Co. v. R.* (1906), 10 Exch. C. R. 343; 26 C. L. T. 780.—**CAN.**

h. ——*PAUL v. R.* (1906), 38 S. C. R. 126.—**CAN.**

PRICE v. R. (1906), 10 Exch. C. R. 105; 26 C. L. T. 462.—**CAN.**

bb. ——*ALASKA FEATHER & DOWN CO. v. R.* (1907), 11 Exch. C. R. 204.—**CAN.**

cc. ——*R. v. ARMSTRONG*, [1907] A. C. 500; 40 S. C. R. 229.—**CAN.**

dd. ——*SEDGEWICK v. R.* (1907), 11 Exch. C. R. 84; 27 C. L. T. 670.—**CAN.**

ee. ——Under 50 & 51 V. c. 16, s. 16, an action in tort will lie against the Crown, represented by the Govt. of Canada, in case of death by negligence of servants of the Crown.—*R. v. DESROSIERS* (1908), 41 S. C. R. 71; 6 E. L. R. 119.—**CAN.**

293. Duty of Executive—When Crown cannot be sued—To ascertain law by application to court.]—Where the Crown cannot be sued, either by petition of right, or through an appointed officer, it is the duty of the Executive, in cases of doubt, to ascertain the law by application to the ct. in order to act in accordance with it.—*EASTERN TRUST CO. v. MCKENZIE, MANN & CO., LTD.*, [1915] A. C. 750; 84 L. J. P. C. 152; 113 L. T. 346, P. C.

Right to sue Crown servants & agents.]—See AGENCY, Vol. I., pp. 654–657; PUBLIC AUTHORITIES & PUBLIC OFFICERS.

Liability of judges—For acts done in official capacity.]—See LIBEL & SLANDER; PUBLIC AUTHORITIES & PUBLIC OFFICERS.

Liability of magistrates.]—See LIBEL & SLANDER; MAGISTRATES; PUBLIC AUTHORITIES & PUBLIC OFFICERS.

Right to sue superior naval or military officer.]—See PUBLIC AUTHORITIES & PUBLIC OFFICERS; ROYAL FORCES.

SUB-SECT. 2.—CHOICE OF FORUM AND VENUE.

294. General rule.]—Where the King can have an action at common law, it is in his election in

i. ———— *RYAN v. R.* (1908), 11 Exch. C. R. 267.—CAN.

j. ———— *VIGER v. R.* (1908), 11 Exch. C. R. 328; 5 E. L. R. 53.—CAN.

k. ———— *HAMILTON v. R.* (1911), 14 Exch. C. R. 1; 9 E. L. R. 435.—CAN.

l. ———— *DIONNE v. R.* (1914), 18 Exch. C. R. 88.—CAN.

m. ———— *COURTEAU v. R.* (1915), 17 Exch. C. R. 352.—CAN.

n. ———— *DESPINS v. R.* (1916), 16 Exch. C. R. 256.—CAN.

o. ———— *GIRARD v. R.* (1916), 16 Exch. C. R. 95; 34 D. L. R. 509.—CAN.

p. ———— *DUNNETT v. R.* (1917), 17 Exch. C. R. 357.—CAN.

q. ———— *HOPWOOD v. R.* (1917), 16 Exch. C. R. 419; 39 D. L. R. 95.—CAN.

r. ———— *JACOB v. R.* (1917), 16 Exch. C. R. 349; 33 D. L. R. 203.—CAN.

s. ———— *KEEGAN v. R.* (1917), 16 Exch. C. R. 412; 39 D. L. R. 27.—CAN.

t. ———— *MCNEIL v. R.* (1917), 16 Exch. C. R. 355.—CAN.

u. ———— *NEW BRUNSWICK RY. CO. v. R.* (1917), 16 Exch. C. R. 358; 37 D. L. R. 366.—CAN.

v. ———— *DESMARAIS v. R.* (1918), 18 Exch. C. R. 289; 44 D. L. R. 692.—CAN.

w. ———— *v. R.* (1918), 17 Exch. C. R. 371.—CAN.

x. ———— *THIBAUT v. R.* (1918), 17 Exch. C. R. 366.—CAN.

y. ———— *MCCANN v. R.* (1919), 19 Exch. C. R. 203; 49 D. L. R. 179.—CAN.

z. ———— *R. v. WILLIAMS* (1884), 9 A. C. 418;

1 N. Z. L. R. 222.—N.Z.

a. ———— *HANKINS v. R.* (1905), 25 N. Z. L. R. 787.—N.Z.

b. ———— *ALLARD v. COLONIAL GOVERNMENT* (1907), 28 N. L. R. 422.—S. AF.

c. ———— *Pltf. was induced by fraudulent misrepresentations of a clerk in the telegraphic service to make over-payments for telegrams received by him:—Held: pltf. could not recover by way of actio doli inasmuch as, under Crown Liabilities Act, 1888, the tortious acts of govt. servants could create no liability on the part of govt.—DIAMOND FIELDS ADVERTISER, LTD. v. COLONIAL GOVERNMENT* (1909), 3 Buch. A. C. 6 (Supp.).—S. AF.

d. ———— *KHARWA v. MINISTER OF INTERIOR* (1912), 33 N. L. R. 441.—S. AF.

e. ———— *DE VILLIERS v. MINISTER OF JUSTICE.* [1916] T. P. D. 463.—S. AF.

f. ———— *Waiver of immunity.]—Under a Proclamation, Sept. 23, 1799, it has been held that the Crown could set aside its prerogative as to immunity from being sued.—FRASER v. QUEEN'S ADVOCATE* (1868), *Pereira's Laws of Ceylon*, 43.—IND.

g. ———— *In respect of King's ships.]—H.M. steam-tug "Champlain" came in collision with a steam barge, & the sustained injuries:—Held: there could be no recovery against the Crown for damages suffered in consequence of negligence of its officers or servants, as the injury had not been sustained within 50 & 51 Vict. c. 16, s. 16.—PAUL v. R.* (1906), 38 S. C. R. 126.—CAN.

h. ———— *Wrongful seizure of ship by Crown's servants.]—Damages cannot be recovered against the Crown for the wrongful act of a Customs officer in seizing a vessel for a supposed infraction of the customs law.—JULIEN v. R.* (1896), 5 Exch. C. R. 238.—CAN.

aa. ———— *In respect of negligence of compulsory pilot.]—Govt. is not liable for the negligence of a licensed pilot in the navigation of a ship of which he is in charge, though pilotage compulsory.—AKT. RANNOCKBURN v.*

which of his cts. he will sue, whether in the court of Conscience; or at common law.—WALWIN v. BROWN (1461), Y. B. 39 Hen. 6, fo. 26, pl. 36.

295. ———— *It is a prerogative of the King that he may sue in any court he pleases. If he can so sue, a fortiori he may defend in any court he elects.—BROWNLOE v. MICHELL* (1616), 1 Roll. Rep. 288; 81 E. R. 490.

Annotation:—Reid. Bradlaugh v. Clarke (1883), 8 App. Cas. 354.

296. ———— *It is the Crown's prerogative to try personal actions where it pleases.—R. v. WEBB* (1669), 1 Sid. 412; 2 Keb. 386; 1 Mod. Rep. 2; 1 Vent. 17; 82 E. R. 1187.

Annotations:—Consd. A.-G. v. Churchill (1841), 9 Dowl. 772. *Reid. A.-G. v. Parsons* (1836), 2 M. & W. 23; *Dixon v. Farrer* (1886), 35 W. R. 95.

297. ———— *Place of imprisonment of debtor.]—The King, by his prerogative, hath a right to sue in what ct. he pleases, & to imprison his debtor in the gaol for the county or liberty where he is arrested.—SANDYS v. SPIVEY* (1743), Barnes, 388; 94 E. R. 968.

Annotation:—Reid. Hodgson v. Temple (1814), 1 Marsh. 166.

298. Right to choose venue—In information of intrusion.]—In an information of intrusion, the Crown has not the right, as of its prerogative, to lay the venue in any county, or to issue the

WILLIAMS (1912), 12 S. R. N. S. W. 665; 29 N. S. W. W. N. 177.—AUS.

bb. ———— *FOWLES v. & AUSTRALIAN S.S. CO., LTD.* (1913), 17 C. L. R. 149.—AUS.

cc. ———— *In respect of refusal of clearance.]—LACHARIASSEN v. COMMONWEALTH* (1917), 24 C. L. R. 166.—AUS.

dd. ———— *BIOM v. COMMONWEALTH* (1917), 17 S. R. N. S. W. 469; 34 N. S. W. W. N. 165.—AUS.

ee. ———— *In respect of wrong lights at lighthouse causing wreck of ship—Crown Suits Act, 1898.]—CITY OF YORK CO., LTD. v. R.* (1902), 4 W. A. L. R. 63.—AUS.

ff. ———— *In respect of wrongful arrest by constable.]—Under Crown Redress Act, 1891, it is not competent to bring an action against Govt. for wrongful arrest by a constable in the intended performance of his duties as an officer of the peace.—ENEVER v. R.* (1906), 3 C. L. R. 969.—AUS.

gg. *Whether Act giving right to sue Government retrospective.]—A. had, prior to the coming into force of Commonwealth Act, No. 21 of 1902, sustained injuries through the negligence of the servants of the Commonwealth:—Held: no action lay against the Commonwealth in respect of such injuries, even after the Act came into force.—GYTON v. OUTTRIM* (1904), 29 V. L. R. 646.—AUS.

hh. ———— *50 & 51 Vict. c. 16 is not retrospective.—R. v. MARTIN* (1891), 20 S. C. R. 240.—CAN.

PART IX. SECT. 6, SUB-SECT. 2.

294 i. General rule.]—The Crown may, when proceeding in relation to property to which the Sovereign is entitled in right of the Crown, choose its own forum: *aliter*, where the Crown claims no beneficial interest.—A.-G. v. MACDONALD (1890), 6 Man. L. R. 372.—CAN.

294 ii. ———— *Where the Crown is in the situation of pltf., the selection of the venue is part of the prerogative.—R. v. LINNEY* (1838), *Craw. & D. Abr. C.* 122.—IR.

298 i. Right to choose venue—In information of intrusion.]—In an information for an intrusion, the venue may be laid in any district.—A.-G. v. DOCKSTADER (1837), 5 O. S. 341.—CAN.

Sect. 6.—Legal proceedings by and against the Crown and Crown servants: Sub-sects. 2, 3

venire facias juratores into a different county from that in which the venue is laid.—*A.-G. v. CHURCHILL (LORD)* (1841), 8 M. & W. 171; 9 Dowl. 772; 10 L. J. Ex. 314; 5 Jur. 803; 151 E. R. 997.

Annotations :—*Consd. A.-G. to Prince of Wales v. Crossman* (1866), L. R. 1 Exch. 381. *Refd. Hilton v. Granville* (1847), 2 New Pract. Cas. 262; *Dixon v. Farrer* (1886), 17 Q. B. D. 658.

299. — In transitory action.]—Information was filed by the A.-G. to the Prince of Wales to recover dues payable in D. to the Prince as Duke of C. & the venue was laid in M. On an application by deft. to change the venue to D., it appeared that the witnesses to facts resided there; but the records of the office of the Duchy in London would have to be produced at the trial:—*Held*: the Crown had a right to allege an interest in the suit, & the application must be dismissed.

Semble: (1) such a suit is in the nature of a transitory action, & the Crown filing the information, would be entitled to lay & keep the venue where it pleased; (2) the Prince of Wales suing as Duke of C. would have the same right.—*A.-G. TO PRINCE OF WALES v. CROSSMAN* (1866), L. R. 1 Exch. 381; 4 H. & C. 568; 35 L. J. Ex. 215; 14 L. T. 856; 12 Jur. N. S. 712; 14 W. R. 996.

Annotation :—*As to* (1) *Refd. Dixon v. Farrer* (1886), 17 Q. B. D. 658.

300. Right to change venue—Certiorari.]—*Certiorari* which ought not to be granted in case of a common person may be granted in case of the King.—*ANON.* (1618), Poph. 144; 79 E. R. 1244.

301. — In local actions.]—The Crown has no prerogative right to change the venue in a local action where it comes in on the ground of being interested in the questions raised by deft.

The A.-G. has the general right of reply on behalf of the Crown when a motion is made in which it is directly interested, as a question of prerogative.—*HILTON v. GRANVILLE (LORD)* (1847), 2 New Pract. Cas. 262; 9 L. T. O. S. 171.

302. — Under Crown Suits Act, 1865 (c. 104), s. 46—Waiver of right to trial at bar.]—(1) By above Act where in any cause in which the A.-G. is entitled on behalf of the Crown to demand as of right a trial at bar, he states to the ct. that he waives that right, the ct. on the application of the A.-G. shall change the venue to any county he may select.

(2) The right of the Crown to a trial at bar or a change of venue in an action between private persons where the Crown is interested, is not taken away by the Judicature Acts & Rules. The interest necessary to support such a right need not relate to the property of the Sovereign or the state, but arises where a servant of the Crown is sued for acts done by him in his official capacity.—*DIXON v. FARRER* (1886), 18 Q. B. D. 43; 56 L. J. Q. B. 53; 55 L. T. 578; 35 W. R. 95; 3 T. L. R. 35; 6 Asp. M. L. C. 52, C. A.

Annotations :—*Generally, Refd. Graham v. Public Works & Buildings Comrs.*, [1901] 2 K. B. 781; *Public Works Comrs. v. Pontypridd Masonic Hall Co.*, [1920] 2 K. B. 233.

299 i. — In transitory action.]—The right of the Crown to have the venue laid wherever it pleases does not extend to all actions which are not real, but only to such as are transitory.—*WINDEYER v. RIDDELL & FLOOD* (1846), 1 Legge, 295.—*AUS.*

301 i. Right to change venue—In local actions.]—*R. v. CAMPBELL* (1901), 8 B. C. R. 208.—*CAN.*

s. — From inferior court to

superior court.]—*PRICE v. BAYARD* (1861), 10 N. B. R. (5 All.) 234.—*CAN.*

304 i. Right to choose court—Selection of division in High Court.]—An action was brought in Ch. Div. against S. for damages for fraudulent breach of duty in inducing Govt. to make excessive payments for horses purchased & for fraudulently misrepresenting the prices at which they were purchased, etc. There were five other

303. From county court to superior court—
Though amount claimed under £5.]—The Crown has a right to remove a plaintiff to which one of its servants is *ex officio* a party, into the superior ct., although the amount claimed is under £5.—*MOUNTJOY v. WOOD* (1856), 1 H. & N. 58; 2 Jur. N. S. 452; 156 E. R. 1117; *sub nom. Re GLOUCESTER COUNTY COURT PLAINT, MOUNTJOY v. WOOD*, 27 L. T. O. S. 82.

304. Right to choose court—Selection of division in High Court—Discretion of Attorney-General.]—An action was brought in the Ch. Div. by the A.-G. at the relation of a corp., together with the corp. as plffs., to restrain an alleged public nuisance, & for damages. Upon application by defts. to have the action transferred to the Q. B. Div.:—*Held*: (1) the ct. ought not to interfere with the discretion of the A.-G. to select his own ct., unless an extremely strong case was made against the propriety of his choice, (2) the application must be refused.—*A.-G. v. WILSON* (1900), 70 L. J. Ch. 234; 83 L. T. 646; 49 W. R. 195, C. A.

305. Right to transfer of action—To Court of Exchequer—Unaffected by Judicature Acts.]—The Judicature Acts do not alter either the prerogative right of the Crown to remove into the Exchequer all causes affecting Crown property, or the practice regulating such removal.—*A.-G. v. CONSTABLE* (1879), 4 Ex. D. 172; 27 W. R. 661.

Annotation :—*Refd. Dixon v. Farrer* (1886), 17 Q. B. D. 658.

306. — Action of trespass between party & party—Rights of Crown incidentally involved.]—An action of trespass between party & party having been removed into the Exch. Ct. on the motion of the A.-G., on the ground that the rights of the Crown were affected by the issues raised in it, a motion was made on behalf of the Crown to stay the proceedings in it until after the trial of an information filed by the A.-G., on behalf of the Crown against plff.:—*Held*: the Crown had no right, by prerogative or otherwise, to have the rule made absolute.

Semble: The ct. would grant the rule in its discretion, on the merits, as being the most convenient course.—*HALLETT v. VISNE* (1846), 6 L. T. O. S. 435; 10 J. P. 328.

307. — Whether proceedings stayed pending hearing of information.]—*HALLETT v. VISNE*, No. 306, *ante*.

308. — To revenue side of High Court—Appeal from county court decision in action of trespass—Stay pending hearing of information by Attorney-General.]—In an action of trespass in a county ct. against tenants of the Crown, a question affecting the rights of the Crown over certain land was involved. Judgment was given for plff. for damages & an injunction, against which defts. appealed. The A.-G. then filed an information against plff. praying for a declaration of the rights of the Crown in the matter:—*Held*: (1) the Crown was entitled to an order for the transfer of the county ct. appeal to the revenue side of the Q. B. Div. & for a stay of proceedings therein until after the hearing of the information.—*STANLEY (LORD) v. WILD & SON*, [1900] 1 Q. B. 256; 69

defts. against whom damages were claimed for conspiracy in assisting in the fraudulent acts. Two defts. moved to transfer the action to K.B. Div.:—*Held*: without deciding the question of a prerogative right in the Crown to choose in which ct. it will proceed, the action could be more conveniently tried in Ch. Div.—*SECRETARY OF STATE FOR WAR v. STUDDERT*, [1901] 1 I. R. 346.—*IR.*

L. J. Q. B. 318; 82 L. T. 14; 48 W. R. 242; 16 T. L. R. 99; 44 Sol. Jo. 145, C. A.

309. ——— **Claim for damages for injury to oyster beds—Right of Crown as owner of foreshore affected.]**—A statement of claim alleged that pltf. was in possession of an oyster fishery & beds in the estuary of a river & that defts., being the harbour comrs. of the estuary, wrongfully caused certain vessels to anchor upon the oyster beds, whereby the oysters were damaged. The A.-G. claimed to have the action removed to the Revenue side of the K. B. Div. upon the suggestion that the rights of the Crown as the owner of the foreshore might be thereby affected:—*Held*: although pltf. did not claim to be in possession under any title & defts. did not justify their acts under the authority of the Crown, the Crown was entitled to have the action removed.—*ULMANN v. COWES HARBOUR COMRS.*, [1909] 2 K. B. 1; 78 L. J. K. B. 877; *sub nom.* A.-G. v. NEWPORT CORPN., *Re ULLMANN v. COWES HARBOUR COMRS.*, 100 L. T. 436.

309a. ——— **Replevin action.]**—*CHURTON v. WILKIN* (1884), Bitt. Rep. in Ch. 134.

SUB-SECT. 3.—PLEADINGS.

310. Right to traverse defendant's case—Action quare impedit—Unless title only a bare suggestion.]—In a *quare impedit* action though an ordinary pltf. must recover on the strength of his own title & not by destroying deft.'s title, yet where the King is pltf. & he or his predecessor has prevented before, he may desert his own title & traverse deft.'s case, except where his own title appears to be no more than a bare suggestion.—*R. v. WORCESTER* (BP.) (1669), Vaugh. 53; 1 Mod. Rep. 276; 124 E. R. 967; *sub nom.* *R. v. JERVICE*, T. Jo. 8; *sub nom.* *R. v. GERVAISE*, Freem. K. B. 7. *Annotations*:—*Refd.* *R. v. Roberts* (1744), 2 Stra. 1208; *R. v. Cotton* (1751), Park. 112; *Ex p. Duplessis* (1754), 2 Ves. Sen. 538; *Wolferstan v. Lincoln* (1763), 2 Wils. 174; *Lyell v. Kennedy* (1883), 8 App. Cas. 217. *Mentd.* *R. v. Hornby* (1694), 5 Mod. Rep. 29; *R. v. Landaff* (1735), 2 Stra. 1006.

311. Right to waive pleadings—& plead de novo.]—The King when party to a suit may by his prerogative waive any of his pleadings & plead *de novo*.—*HEREFORD (EARL) v. SYLY* (1697), 1 Ld. Raym. 211; 91 E. R. 1037.

312. Right to amend—Information for breach of covenant to repair—Crown lease.]—The A.-G. applied for a rule to amend an information, against deft. for breach of a covenant to repair, contained in a Crown lease:—*Held*: the A.-G. entitled to the rule absolute in the first instance, on payment of costs.—*A.-G. v. WRAY* (1843), 1 L. T. O. S. 147.

SUB-SECT. 4.—INTERLOCUTORY PROCEEDINGS.

313. Action for interim injunction—Whether Crown bound to give undertaking as to damages.]—The ct. will not, in favour of the Crown, depart from established practice; therefore, in the case of an action by the Crown to restrain defts. from proceeding to construct certain tramways, the ct. refused to grant an interim injunction against defts. unless the Crown would consent to be bound in the usual undertaking in damages.—

SECRETARY OF STATE FOR WAR v. CHUBB (1880), 43 L. T. 83.

Annotations:—*Distd. A.-G. v. Albany Hotel Co.*, [1896] 2 Ch. 696. *N.F. Secretary of State for War v. Cope*, [1919] 2 Ch. 339.

314. ——— **—.]**—This was an action brought by the A.-G. on behalf of the Crown against the assignee of a lease of Crown property for an injunction to restrain him from selling intoxicating liquors by retail in breach of a covenant contained in the lease. The ct. held on the facts that the Crown was entitled to the injunction, & deft. asked for the usual undertaking as to damages. The A.-G. refused to give any undertaking:—*Held*: the Crown, suing by the A.-G., never gives such an undertaking, & as a general rule, is entitled to an injunction without giving any undertaking.

Semble: cases might arise in which the ct. ought to refuse to grant an interlocutory injunction in favour of the Crown on the ground of the hardship to deft. caused by the absence of any undertaking.—*A.-G. v. ALBANY HOTEL CO.*, [1896] 2 Ch. 696; 65 L. J. Ch. 885; 75 L. T. 105; 12 T. L. R. 631, C. A.

Annotation:—*Refd.* *Secretary of State for War v. Cope*, [1919] 2 Ch. 339.

315. ——— **Action by Secretary of State for War.]**—The settled rule of the ct. that in actions by the A.-G. on behalf of the Crown an undertaking in damages will not be imposed when granting an interlocutory injunction, also applies where the Secretary of State for War sues in respect of property vested in him or under his control or disposition, on behalf of the Crown.—*SECRETARY OF STATE FOR WAR v. COPE*, [1919] 2 Ch. 339; 88 L. J. Ch. 522; 121 L. T. 547; 35 T. L. R. 666; 63 Sol. Jo. 725; 36 R. P. C. 273.

316. ——— **To restrain action—When rights of Crown involved.]**—The Queen, as lady of a manor, granted to two licensees, in pursuance of certain manorial rights, power to enter the lands comprised in the manor & search for & carry away minerals, making to the copyholder & terre tenant respectively a customary compensation for surface damage. The licensees entered without the consent of either copyholder or terre tenant & began operations; whereupon the terre tenant commenced an action of trespass against them. The A.-G. on behalf of the Queen & licensees, filed an information & bill against copyholder & terre tenant, praying that the rights of the Crown within the manor should be declared, & the action of trespass restrained:—*Held*: (1) the rights of the Sovereign being involved in the proceedings in the action, the Sovereign was entitled *jure coronæ* to be actor in any litigation affecting those rights; (2) the injunction must issue.—*A.-G. v. BARKER* (1872), L. R. 7 Exch. 177; 41 L. J. Ex. 57; 26 L. T. 34; 20 W. R. 509.

Annotations:—*Consd.* *A.-G. v. Constable* (1879), 4 Ex. D. 172; *Stanley v. Wild*, [1900] 1 Q. B. 256. *Refd.* *Dixon v. Farrer* (1886), 17 Q. B. D. 658; *A.-G. v. Newport Corpn.*, *Re Ullmann v. Cowes Harbour Comrs.* (1909), 100 L. T. 436.

See DISCOVERY, INSPECTION & INTERROGATORIES.

317. Addition of Attorney-General—Action affecting rights of Crown—Petition of right not applicable.]—In cases where procedure by petition

PART IX. SECT. 6, SUB-SECT. 3.

t. Default in pleading by Crown.]—Where A.-G. is deft. & does not answer, the proper course is to obtain an order that he answer in a week, or that the bill be taken *pro confesso*.—*SHRA v. FELLOWES* (1859), 1 Ch. Ch. 30.—CAN.

a. Right to amend—At any time.]

—Under Petition of Right Act, s. 11, it is not meant to restrict the royal prerogative & the Crown may amend its pleadings at any time.—*CANADIAN DOMESTIC ENGINEERING CO. LTD. v. R.*, [1919] 2 W. W. R. 762.—CAN.

PART IX. SECT. 6, SUB-SECT. 4.

b. Action for interim injunction—

To restrain payment of money.]—An interlocutory injunction against the Crown restraining the payment by it of moneys, the right to which is *sub judice* & held *in medio* by order of ct., is invalid.—*EASTERN TRUST CO. v. MACKENZIE, MANN & CO. LTD.*, [1915] A. C. 750; 84 L. J. P. C. 152; 113 L. T. 346; 31 W. L. R. 248, P. C.—CAN.

Sect. 6.—Legal proceedings by and against the Crown and Crown servants: Sub-sects. 4 & 5, A., B., C.

of right is not applicable, the ct. can nevertheless direct that the A.-G., as representing the interests of the Crown, be added as a deft. to the proceedings if they concern the interests of the Crown.—*ESQUIMAULT & NANAIMO RY. CO. v. WILSON*, [1920] A. C. 358; 89 L. J. P. C. 27; 122 L. T. 563; 36 T. L. R. 40, P. C.

Annotation:—Refd. Re Chamberlain's Settlement, [1921] 2 Ch. 533.

SUB-SECT. 5.—THE HEARING.

A. Trial at Bar.

318. Right of Crown to—Not affected by Judicature Acts—Interest requisite to support right.]—*DIXON v. FARRER*, No. 302, *ante*.

319. —.]—Trial at bar was granted to the A.-G. because the King defended the case.—*BELLAMONT'S (LORD) CASE* (1700), 2 Salk. 625; 91 E. R. 529.

Annotations:—Consd. Dixon v. Farrer (1886), 18 Q. B. D. 43. *Refd. Mostyn v. Fabrigas* (1774), 1 Cowp. 161.

320. —.]—The A.-G. may of right have an information exhibited by him, tried at bar.—*R. v. JOHNSON* (1725), 1 Stra. 644; 93 E. R. 754.

321. — Ore tenus.]—(1) The Crown may forbid the issuing of a writ of *nisi prius* in any action in which the King has an interest. A suggestion *ore tenus* by the A.-G. that the Crown is interested in a suit depending between subject & subject, is a sufficient ground for ordering a trial at bar.

(2) The estate of the Duchy of Cornwall is of a very peculiar nature. It is an estate vested in the Duke of Cornwall & when there is no Duke it is vested in the Crown. Whether the Duchy be vested in the Crown or in the Duke the Crown has a peculiar interest in it at all times.

(3) An ancient extent of Crown lands found in the proper office & purporting to have been taken by a steward of the King's lands & following in its construction the directions of Stat. 1 of 4 Edw. 1 will be presumed to have been taken under competent authority, although the commission cannot be found.

(4) An enrolment in the office of the Duchy of a lease purporting to be granted by the King *vacante ducatu*, is primary evidence of such lease.

(5) An enrolment in the Duchy office of a lease purporting to be granted by the Duke is primary evidence of such lease.

(6) Whether there be or be not a Duke there is an officer called the auditor of the Duchy who is one of the officers appointed to manage that property, whether in the hands of the Duke or the Crown.

(7) The conventional tenants within the assessionable manors of the Duchy have a perpetual indefeasible right to them & their customary heirs & surrenderees, to renew their estate from seven years to seven years.

(8) In order to entitle a tenant of this description to minerals the burden is cast upon him to prove that he has a right to take them, & unless the tenant can show the right to be in him the right must remain where by law it would be vested, namely in the lord.—*ROWE v. BRENTON* (1828), 3 Man. & Ry. K. B. 133; 8 B. & C. 737;

2 State Tr. N. S. 251; 5 L. J. O. S. K. B. 137; Concanen's Rep. 1; 108 E. R. 1217.

Annotations:—As to (1) *Consd. Dixon v. Farrer* (1886), 18 Q. B. D. 43. *Refd. Re Gorham v. Exeter, Ex p. Exeter* (1850), 10 C. B. 102; *Jessop v. Jessop* (1861), 30 L. J. P. M. & A. 193. *As to* (3) *Consd. Evans v. Taylor* (1838), 7 Ad. & El. 617; *Mercer v. Denne*, [1905] 2 Ch. 538. *Refd. Doe d. William IV. v. Roberts* (1844), 13 M. & W. 520. *As to* (7) *Refd. Anglesey v. Hatherton* (1842), 10 M. & W. 218; *Doe d. Dand v. Thompson* (1845), 7 Q. B. 897. *As to* (8) *Refd. Anglesey v. Hatherton* (1842), 10 M. & W. 218. *Generally, Refd. Rogers v. Brenton* (1847), 10 Q. B. 26; *Shaw v. Beek* (1853), 8 Exch. 392. *Mentd. Whittingham v. Bloxham* (1831), 4 C. & P. 597; *R. v. Richmond Manor* (1841), 5 Jur. 605; A.-G. to Prince of Wales v. Crossman (1866), L. R. 1 Exch. 381; *Sutton Harbour Improvement Co. v. Plymouth Town Grdns.* (1890), 63 L. T. 772.

322. —.]—A trial at bar will be granted on the *ex officio* application of the A.-G., where the interest of the King as Duke of Lancaster may come into question.—*BROWN v. GRANVILLE (LORD)* (1835), 1 Har. & W. 270.

Annotation:—Refd. Dixon v. Farrer (1886), 17 Q. B. D. 658.

323. —.]—The Crown may forbid the awarding of a writ of *nisi prius* in a suit between subject & subject, in which the Crown has an interest. The statement that the Crown is interested, & that the A.-G. does not assent to the issuing of a writ of *nisi prius*, but requires a trial at bar, may be made by the A.-G. *ore tenus*.—*PADDOCK v. FORRESTER* (1840), 1 Man. & G. 583; 8 Dowl. 834; 4 State Tr. N. S. 557; 1 Scott, N. R. 391; 9 L. J. C. P. 342; 133 E. R. 465.

Annotations:—Consd. Dixon v. Farrer (1886), 18 Q. B. D. 43. *Refd. Re Gorham v. Exeter, Ex p. Exeter* (1850), 10 C. B. 102.

Waiver of right—Right of Crown to change of venue on.]—*See* No. 302, *ante*.

324. Criminal prosecution at expense of private prosecutor—Not triable at bar—Unless authorised by Crown to prosecute.]—Criminal prosecution carried on at the expense of a private prosecutor is not triable *de jure* at bar, but it is otherwise where there is an authority from the King to prosecute.—*R. v. HALES* (1728), 2 Stra. 816; 1 Barn. K. B. 88; 93 E. R. 868.

Annotation:—Consd. Dixon v. Farrer (1886), 17 Q. B. D. 658.

B. Right to begin and reply.

325. Right to begin—In Court of Exchequer.]—The A.-G., in the Queen's business, has pre-audience in the Ct. of the Exchequer over the postman & tubman.—*R. v. EXETER (BP.)* (1840), 7 M. & W. 188; 10 L. J. Ex. 92; 5 Jur. 102; 151 E. R. 733.

326. — In revenue cases.]—The Inland Revenue Comrs. stated a special case for the opinion of the ct. as to the stamp duty chargeable upon a deed:—*Held*: (1) counsel for the Crown was not entitled to begin; (2) counsel for the Crown had the right to a general reply; (3) (*per* POLLOCK, C.B.). In the Exch. the Crown had the right to a general reply in all cases where the Crown had an interest.—*CHANDOS (MARQUIS) v. INLAND REVENUE COMRS.* (1851), 6 Exch. 464; 20 L. J. Ex. 269; 17 L. T. O. S. 128; 155 E. R. 624.

Annotations:—As to (1) *Folld. Eglington's Trustees v. I. R. Comrs.* (1865), 3 H. & C. 880, n.; *Re De Lancey's Succession* (1869), 21 L. T. 58. *As to* (2) *Folld. Truman, Hanbury, Buxton v. I. R. Comrs.*, [1912] 3 K. B. 377; *Generally, Mentd. Mortimore v. I. R. Comrs.* (1864), 2 H. & C. 838; *Christie v. I. R. Comrs.* (1866), 15 L. T. 282.

327. —.]—*EGLINTON'S (EARL) TRUSTEES v. INLAND REVENUE COMRS.* (1865), 3 H. & C. 880, n.; 12 L. T. 707; 159 E. R. 781.

PART IX. SECT. 6, SUB-SECT. 5.—A.

319 i. Right of Crown to.]—The prerogative right of the Crown to a trial at bar is in force.—*WINDEYER v. RIDDELL & FLOOD* (1816), 1 Legge, 295.—*AUS.*

d. — Information of intrusion.]—In an information of intrusion A.-G. moved for a trial at bar, insisting upon it as a matter of right:—*Held*: A.-G. entitled.—*A.-G. v. WALSH* (1832), Hayes & Jo. 65.—*IR.*

PART IX. SECT. 6, SUB-SECT. 5.—B.

e. Right of reply.]—No matter with which side a motion originates, the law officers of the Crown have a right to reply.—*R. v. TYRRELL* (1843), 1 Cox, C. C. 369.—*IR.*

328. Right of reply—General rule.]—HILTON v. GRANVILLE (LORD), No. 301, ante.

329. ———.]—Semble: the A.-G. has no right to the general reply, as representing the Crown in civil cases.—**BURON v. DENMAN (1848)**, 3 New Pract. Cas. 62; 6 State Tr. N. S. 525; 10 L. T. O. S. 523.

Annotations:—**Mentd.** **Houlden v. Smith (1850)**, 19 L. J. Q. B. 170; **Santos v. Illidge (1859)**, 28 L. J. C. P. 317; Secretary of State for India v. **Kamachee Boye Sahaba (1859)**, 13 Moo. P. C. C. 22; **Scott v. Seymour (1862)**, 8 Jur. N. S. 568; **Feather v. R. (1865)**, 6 B. & S. 257; **London Corp'n. v. Cox (1867)**, L. R. 2 H. L. 239; **Phillips v. Eyre (1870)**, L. R. 6 Q. B. 1; **Mill v. Hawker (1874)**, L. R. 9 Exch. 309; **Doss v. Secretary of State for India in Council (1875)**, L. R. 19 Eq. 509; **Rustomjee v. R. (1876)**, 24 W. R. 428; **Dixon v. Farrer (1886)**, 18 Q. B. D. 43; **Francis Times v. Carr (1900)**, 82 L. T. 698; **Johnstone v. Pedlar, [1921] 2 A. C. 262.**

330. ———.]—CHANDOS (MARQUIS) v. INLAND REVENUE COMRS., No. 326, ante.

331. ——— In House of Lords appeals.]—LORD ADVOCATE v. DUNGLAS (LORD), DUNGLAS (LORD) v. OFFICERS OF STATE FOR SCOTLAND, No. 857, post.

332. ——— In revenue cases.]—CHANDOS (MARQUIS) v. INLAND REVENUE COMRS., No. 326, ante.

333. ——— Showing cause against mandamus.]—Qu.: whether the A.-G., showing cause against a rule for a mandamus, has a right of reply.—**R. v. TREASURY LORDS COMRS., Ex p. BROUGHAM (LORD) (1851)**, 16 Q. B. 357; 16 L. T. O. S. 484; 117 E. R. 916; *sub nom.* **R. v. TREASURY LORDS COMRS., Re QUEEN DOWAGER'S ANNUITY**, 20 L. J. Q. B. 305; 15 Jur. 767.

Annotation:—**Mentd.** **Ex p. Napier (1852)**, 18 Q. B. 692; **R. v. Ambergate, Nottingham & Boston & Eastern Junction Ry. (1852)**, 17 Q. B. 957; **R. v. Treasury Lords Comrs. (1872)**, L. R. 7 Q. B. 387; **R. v. Income Tax Special Purposes Comrs. (1888)**, 21 Q. B. D. 313; **R. v. Joint Stock Cos. Registrar (1888)**, 21 Q. B. D. 131; **R. v. Lambourn Valley Ry. (1888)**, 22 Q. B. D. 463; **R. v. Incorporated Law Soc., [1895] 2 Q. B. 456.**

334. ——— Whether confined to Attorney-General of England in person.]—Where the A.-G. of County Palatine appeared, the ct. declined to concede the right of reply & intimated it would confine the right to the A.-G. of England in person.—**R. v. CHRISTIE (1858)**, 1 F. & F. 75.

See, further, CRIMINAL LAW & PROCEDURE.

Position of Attorney-General when acting as counsel generally.]—See Part VI., Sect. 9, ante.

C. Choice of Issue.

335. Right to choose which issue to proceed on—Several issues joined.]—The King may try either issue first, where several are joined.—R. v. HARE (1720), 1 Stra. 266; 93 E. R. 513.

Annotations:—**Mentd.** **Shuttleworth v. Pilkington (1740)**, 2 Stra. 1155; **R. v. Betts & Stocker (1850)**, 19 L. J. Q. B. 531.

PART IX. SECT. 6, SUB-SECT. 6.

337 i. Whether estoppel.]—The doctrine of estoppel cannot be invoked against the Crown.—HUMPHREY v. R. (1891), 2 Exch. C. R. 386; 20 S. C. R. 591.—CAN.

337 ii. ———.]—R. v. & MANUFACTURING CO. (1897), B C. R. 288.—CAN.

337 iii. ———.]—Where a person is in possession of land under a good title, but, through the mutual mistake of himself & another person claiming title thereto, he accepts a lease from the latter of the lands in dispute, he is not thereby estopped from setting up his own title in an action by the lessor to obtain possession of the land. In such case the Crown, being the lessor, is in no better position in respect of the doctrine of estoppel than a subject.—**R. v. HALL (1898)**, 6 Exch. C. R. 145.—CAN.

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337 iv. ———.]—The Crown is not estopped by any statement of facts or by any conclusions or opinions stated in any departmental report by any of its officers or servants.—ROBERT v. R. (1902), 9 Exch. C. R. 21.—CAN.

337 v. ———.]—The Crown is not bound by estoppels though it can take advantage of them.—R. v. ROYAL BANK OF CANADA (1920), 1 W. W. R. 198; 50 D. L. R. 293; 30 Man. L. R. 104.—CAN.

k. ——— Right to bastard's estate—Non-assertion of claim by Crown.]—M., widow & administratrix of a bastard who had died intestate & without issue, received a letter in 1841 from the Lords Commissioners of the Treasury stating that they did not deem it expedient to take any steps for the assertion of the rights of the Crown with regard to her late husband's estate. Previous to this, M. had

D. Withdrawal of Proceedings.

336. Right to withdraw record.]—In an information at the suit of the Crown, notice of trial was given in Trinity Term 1838, but afterwards countermanded. Defts. in Hilary Term 1842, obtained a rule to set down the cause for trial at the sittings after Easter Term. The A.-G. contended that the rule must be discharged as the Crown had the power to withdraw the record at any time:—Held: the rule must be discharged.—**R. v. RAY (1842)**, 9 M. & W. 760; 2 Dowl. N. S. 232; 11 L. J. Ex. 317; 152 E. R. 322.

SUB-SECT. 6.—DEFENCES AVAILABLE AGAINST THE CROWN.

337. Not estoppel.]—(1) The Crown has a prerogative as old as the beginning of law, to have its debts satisfied, in preference to subjects.

(2) Although the Crown's debt is less than one due to a subject, & although the debtor is able to pay both, still the Crown will have priority.

(3) The land which a debtor to the Crown has in his power will be extended.

(4) The King is not bound by estoppels.—**COKE'S CASE (1623)**, Godb. 289; Benl. 108, 117; 78 E. R. 169; *sub nom.* **COOK'S CASE**, 2 Roll. Rep. 291.

Annotations:—**As to (1) & (2) Refd.** **Giles v. Grover (1832)**, 9 Bing. 128. **As to (3) Consd.** **A.-G. v. Sands (1670)**, 2 Freem. Ch. 129; **R. v. Smith (1810)**, Wight. 34. **Refd.** **Sheffield v. Ratcliffe (1615)**, Hob. 334; **R. v. Cotton (1751)**, Park. 112; **R. v. Lambie (1824)**, M'Cle. 402; **Ellis v. R. (1851)**, 15 Jur. 917. **Generally, Mentd.** **Scot v. Bell (1672)**, 3 Keb. 82.

338. ——— By deed—Estoppel in fact binding.]—Deft. bought the site of a house & garden on a manor to which Assessionable Manors Act, 1844 (c. 105), applied. She built a wall round the garden, & made substantial structural alterations to the house. The alterations were made openly, & the mineral agent of the Duchy was aware that they were being made. Deft. was also the owner of certain garden land adjoining two cottages in the same manor. Upon an information by the A.-G. to the Prince of Wales, claiming declarations of title to the lands & the buildings thereon, & an injunction restraining deft. from asserting any title to them:—Held: (1) inasmuch as deft. had made the alterations & additions to the house supposing it to be her own, & the agent for the Duchy, although he knew that she was making them, did not intervene, deft. had a good defence on equitable grounds to the claim of the duchy; (2) such a defence although based upon estoppel was binding upon the Crown; (3) the Crown is bound by estoppel in fact though not by estoppel

obtained possession of that estate, & two months before receipt of the letter she had contracted a second marriage. No settlement was made upon this marriage, & since the marriage, M.'s second husband had had exclusive management of the property. In execution of a decree against the husband, his right, title, & interest in & to a portion of the property were put up for sale & purchased by pltf. Pltf.'s right to possession was disputed by M. In a suit by pltf. to establish her rights over the property:—Held: the Crown would be estopped by the line adopted by the Commissioners of the Treasury in 1841 from asserting its claim.—**TOOLSEEMONEY DOSSEE v. CORNELIUS (1873)**, 11 B. L. R. 144.—IND.

l. ———.]—NEWFOUNDLAND STEAM WHALING CO. LTD. v. NEWFOUNDLAND GOVERNMENT (1903), 8 Nfld. L. R. 608.—NFLD.

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Sect. 6.—Legal proceedings by and against the Crown and Crown servants: Sub-sects. 6 & 7, A. & B.]

by deed.—A.-G. TO PRINCE OF WALES *v.* COLLOM, [1916] 2 K. B. 193; 85 L. J. K. B. 1484; 114 L. T. 1121; 32 T. L. R. 448.

339. Not set-off.]—Where the Crown was pltf. in an action in the exchequer:—*Held*: debts. could not set off against the Crown.—*R. v. COPLAND* (1799), Cited Hughes' Report of *R. v. BEBB*, App. VIII. 204.

340. Equitable defence.]—In an action of ejectment by the Crown deft. may set up any equitable defence which would be good against a private pltf.—A.-G. FOR TRINIDAD & TOBAGO *v.* BOURNE, [1895] A. C. 83, P. C.

Annotation:—*Refd.* A.-G. to Prince of Wales *v.* Collom, [1916] 2 K. B. 193.

Not fictions of Law.]—See Sect. 5, sub-sect. 1, *ante*.

Laches & prescription.]—See Sect. 5, sub-sect. 8, *ante*.

SUB-SECT. 7.—COSTS.

A. In General.

341. Statement of general rule—Crown suing without relator.]—A proprietor of a feu described in the feu charter as bounded by the seashore enclosed a portion of the sands which it was proved the public had immemorially used for purposes of enjoyment & otherwise:—*Held*: (1) the feuar being a wrongdoer the officers of state on behalf of the Crown, irrespective of the question as to

m. — *By matter of record.*
The doctrine of *res judicata* may be invoked against the Crown.—*R. v. ST. LOUIS* (1897), 5 Exch. C. R. 330.—CAN.

action was brought by A.-G. against an electric railway co., to restrain it from erecting gas works in a city, & for abatement of what was alleged to be a public nuisance. Pltf. alleged that three bye-laws of the city prohibited the erection of the works. Defts. denied the validity of the bye-laws, & set up that, by virtue of the powers derived from another co., they were not subject to the bye-laws. At the trial, defts. sought to amend by alleging that the question of their having these powers was *res judicata* because of a judgment of the Judicial Committee of the Privy Council in a former action brought against defts.:—*Held*: A.-G. was not a party to the former action; & not bound by the proceedings in the former action.—A.-G. FOR MANITOBA *v.* WINNIPEG ELECTRIC RY. CO. (1912), 21 W. L. R. 908; 5 D. L. R. 823; 2 W. W. R. 854.—CAN.

339 i. Whether set-off.]—An information was filed by the Crown against deft. for entering upon lands of the Dominion & cutting & converting to their own use timber & for money owing to the Crown for dues in respect thereof. Defts. claimed to set off sums due to them from the Crown under contracts of a greater amount than the sum claimed in the information:—*Held*: as the claim against the Crown arose out of the same contracts between the parties & as the dealings between the parties were so continuous & inseparable that the claims on one side could not properly be investigated apart from those of the other, the rule against pleading a set-off against the Crown did not apply.—*R. v. WHITEHEAD* (1884), 1 Exch. C. R. 134.—CAN.

339 ii. —.]—The subject may set off a claim on contract in a suit by the Crown, & the ct. may give judgment for the balance found to be due.

—*APPU v. QUEEN'S ADVOCATE* (1884), 53 L. J. P. C. 72.—IND.

o. Whether counterclaim — Founded on substantive cause of action.]—A substantive cause of action cannot be pleaded as an incidental demand or counterclaim to an information by the Crown.—*R. v. MONTREAL WOOLLEN MILLS CO.* (1895), 4 Exch. C. R. 348.—CAN.

p. —.]—In an action by the Crown under Crown Suits Act, 1881, deft. cannot counterclaim.—*R. v. SCOTT* (1892), 11 N. Z. L. R. 638.—N.Z.

340 i. Whether equitable defence.]—As the Crown's power of disposition of Crown lands is fettered by statute, no equity, such as might arise in the case of a private owner of land, can be set up against the Crown, by reason of any acts of ministers of the Crown.—A.-G. *v.* SYDNEY MUNICIPAL COUNCIL (1919), 20 S. R. N. S. W. 46.—AUS.

340 ii. — Breach of trust by advisers of Crown.]—In an action by the Crown against Road Trustees to recover interest upon debentures purchased from them by the govt. of the late Province of Canada, with trust funds held by them belonging to the Common School Fund, defts. pleaded that the Crown was estopped from recovery inasmuch as, at the time of their purchase, the advisers of the Crown were aware that these debentures were being issued in breach of a trust & with the intention of misapplying the proceeds towards payment of interest upon other debentures due by them in violation of a statutory prohibition:—*Held*: as there was statutory authority for the issue of the debentures in question, knowledge of any such breach of trust or misapplication by the advisers of the Crown could not be set up as a defence.—*QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES v. R.* (1906), 38 S. C. R. 62.—CAN.

r. Whether *jus tertii*.]—In a suit by the Crown claiming lands as an escheat, which are admittedly in the

the right of property, were entitled to an interdict; (2) where the Crown sues without the intervention of a relator the rule is that costs can neither be given to nor against the Crown.—*SMITH v. STAIR (EARL)* (1849), 2 H. L. Cas. 807; 9 E. R. 1300; *sub nom.* *SMITH v. H.M.'s OFFICERS OF STATE FOR SCOTLAND*, 13 Jur. 713, H. L.

Annotations:—As to (2) *Refd.* A.-G. *v.* London Corpn. (1850), 14 L. T. O. S. 501; *R. v. Canterbury*, [1902] 2 K. B. 503.

342. Application of rule—In courts of Equity.]—A charity information was filed under Stat. 59 Geo. 3 (c. 91), without a relator:—*Held*: the ct. has jurisdiction to order deft. to pay the A.-G. his costs.

It is said that although this result may not have been in the contemplation of the legislature it is the necessary consequence of a general principle that the Crown can neither pay nor receive costs. I find no such general principle in cts. of Equity (LEACH, V.C.).—A.-G. *v.* ASHBURNHAM (EARL) (1823), 1 Sim. & St. 394; 57 E. R. 157.

Annotations:—*Consd.* *Perkins v. Bradley* (1842), 1 Hare, 219; A.-G. *v.* Hanmer (1858), 27 L. J. Ch. 837; *The Leda* (1863), 32 L. J. P. M. & A. 58. *Refd.* *Kane v. Maule*, *Kane v. Reynolds* (1854), 2 Sm. & G. 331.

343. —.]—The principle of the rule that the A.-G. never receives or pays costs will for the future be modified thus, that the A.-G. is not to receive costs in a contest in which he could have been called upon to pay costs, had he been a private individual, but the rule is not to be without exception. There is no general rigid inflexible rule in equity, whatever may be the case at

possession of the parties claiming as heirs, the onus is on the Crown to show that the last proprietor died without heirs. It is open to deft. in such suit to set up *jus tertii* to bar the claim of the Crown.—*GIRIDHARI LALL ROY v. BENGAL GOVERNMENT* (1868), 1 B. L. R. P. C. 44; 10 W. R. 31.—IND.

PART IX. SECT. 6, SUB-SECT. 7.—A.

a. Statement of general rule.]—The rule that the Crown neither claims nor pays costs is favoured by the ct. as most consistent with the dignity of the Crown & the practice of the ct. —*UNITED STATES v. DENISON* (1870), 2 Ch. Ch. 263.—CAN.

t. —.]—*R. v. ROYAL BANK OF CANADA* (1911), 17 W. L. R. 508.—CAN.

a. —.]—*SINCLAIR v. R.* (1872), 2 C. A. 215.—N.Z.

b. — Discretion of court.]—In actions brought by the Crown under Crown Remedies & Liabilities Act, 1890, Pt. I., costs may be given against as well as to the Crown.—*APFLECK v. R.* (1906), 3 C. L. R. 608.—AUS.

c. —.]—Costs may be given for or against the Crown.—*LOVITT v. A.-G. OF NOVA SCOTIA* (1903), 33 S. C. R. 350.—CAN.

d. —.]—*R. v. BELFAST CORPN.*, [1910] 2 I. R. 143.—IR.

e. —.]—Exchequer Court (Scot.) Act, 1856, s. 24, allows costs to be given for or against the Crown, & applies as well to all causes presently depending as to those which shall come to depend.—*ALEXANDER v. SCOTLAND (OFFICERS OF STATE)* (1868), L. R. 1 Sc. & Div. 276.—SCOT.

f. — Crown to be treated exactly as a subject.]—The Crown engaged in litigation in Ct. of Session is to be treated in a matter of expenses exactly as a subject is treated, & a reclaiming note by the Crown, taken on the question of expenses only, is competent.—*MACLEOD'S FACTOR v. BUSFIELD* (1914), 52 Sc. L. R. 13.—SCOT.

common law, that the Crown never receives because it never pays costs; but whatever may be the case as to the general costs of a cause those of a particular application must be governed by the general rule & practice of the ct. in such cases between common parties.

Defts. answer was excepted to by plff., the A.-G. suing on behalf of the Crown, & the master allowed the exceptions with costs to be paid by defts., who without any complaint as to the order to pay costs took exceptions to the report & paid the usual deposit, & the ct. overruled the exceptions:—*Held*: defts. must pay the A.-G. his costs.—A.-G. v. LONDON CORPN. (1850), 2 H. & Tw. 1; 2 Mac. & G. 247; 19 L. J. Ch. 314; 14 L. T. O. S. 501; 14 Jur. 205; 47 E. R. 1572, L. C.

Annotations:—*Consd.* A.-G. v. Hammer (1858), 27 L. J. Ch. 837. *Reid.* Smith v. Stair (1849), 2 H. L. Cas. 807. *Mentd.* Flitcroft v. Fletcher (1856), 25 L. J. Ex. 94; Horton v. Bott (1857), 2 H. & N. 249; London Gas Light Co. v. Chelsea Vestry (1859), 6 C. B. N. S. 411; Ingilby v. Shaffo (1863), 33 Beav. 31; Stoate v. Rew (1863), 14 C. B. N. S. 209; Goodman v. Holroyd (1864), 15 C. B. N. S. 839; Towne v. Cocks (1874), L. R. 9 Exch. 45; Saunders v. Jones (1877), 7 Ch. D. 435; Bewicke v. Graham (1880), 50 L. J. Q. B. 396; Marriott v. Chamberlain (1886), 54 L. T. 714; A.-G. v. Newcastle-upon-Tyne Corpn., [1897] 2 Q. B. 384; Emmerson v. Maddison, [1906] A. C. 569; A.-G. v. Storoy (1912), 107 L. T. 430.

344. In proceedings under Summary Jurisdiction Acts—Appeal under Summary Jurisdiction Act, 1857 (c. 43).—The ct. may make an order for costs for or against the Crown in an appeal against an order of justices under the above Act.

Where upon an appeal against a conviction upon the information of an officer of excise prosecuting for the Crown by order of the Commrs. of Inland Revenue the ct. had held the conviction right, & given the costs of the appeal to resp.:—*Held*: such order was right, & a rule *nisi* to amend a rule of ct. by striking out so much of it as ordered & costs of the appeal to be paid by applt. was discharged.—MOORE v. SMITH (1859), 1 E. & E. 597; 28 L. J. M. C. 126; 32 L. T. O. S. 314; 23 J. P. 133; 5 Jur. N. S. 892; 7 W. R. 206; 120 E. R. 1034.

Annotations:—*Consd.* Walsh v. R. (1888), 16 Cox, C. C. 435. *Expld.* Bain v. A.-G., [1892] P. 217. *Consd.* R. v. Canterbury, [1902] 2 K. B. 503; Thomas v. Pritchard, [1903] 1 K. B. 209. *Reid.* R. v. Woods (1902), 66 J. P. 311.

345. Prosecution under excise laws.—By virtue of the Summary Jurisdiction Acts, 1848 (c. 43), s. 18, 1879 (c. 49), s. 53, a ct. of summary jurisdiction has power to give costs for or against the Crown in proceedings taken by the Crown under any of the stats. relating to His Majesty's revenue under control of the Comrs. of Inland Revenue.—THOMAS v. PRITCHARD, [1903] 1 K. B. 209; 72 L. J. K. B. 23; 87 L. T. 688; 67 J. P. 71; 51 W. R. 58; 19 T. L. R. 10; 47 Sol. Jo. 32; 20 Cox, C. C. 376.

346. In Judicial Committee of Privy Council.—The Judicial Committee will henceforth adhere to the practice of the House of Lords under which the Crown neither pays nor receives costs unless the case is governed by some local stat., or there are exceptional circumstances to justify a departure from the ordinary rule.—JOHNSON v. R., [1904] A. C. 817; 73 L. J. P. C. 113; 91 L. T. 234; 53 W. R. 207; 20 T. L. R. 697, P. C.

Annotations:—*Consd.* Vaithinatha Pillai v. King-Emperor (1913), 29 T. L. R. 709; The Zamora, [1916] 2 A. C. 77. *Reid.* A.-G. v. Till (1909), 5 Tax Cas. 440.

344.1. Application of rule—In proceedings under Summary Jurisdiction Acts.—In proceedings before JJ. there is no jurisdiction to award costs against the Crown where a police officer is complainant.—KAVANNAH v. HERBIG (1907), 9 W. A. L. R. 121.—AUS.

PART IX. SECT. 6, SUB-SECT. 7.—B. h. Whether Crown entitled to costs—Appearance in suit out of courtesy or for form's sake.—Where the Crown is made a party in consequence of the discharge of an international duty, & out of courtesy or for form's

347. Criminal cases.—The Judicial Committee allowed an appeal from a conviction for murder on the ground that a body of wholly inadmissible evidence had been admitted in the Indian ct., & that, when admitted, it was used to the grave prejudice of the accused:—*Held*: the rule that the Crown neither pays nor receives costs unless the case is governed by some local stat. or there are exceptional circumstances justifying a departure from the ordinary rule applies to criminal as well as to civil cases.—VAITHINATHA PILLAI v. KING-EMPEROR (1913), L. R. 40 Ind. App. 193; 29 T. L. R. 709, P. C. *Annotation*:—*Mentd.* Arnold v. King-Emperor, [1914] A. C. 644.

348. In action for declaration.—A life assurance society having been assessed for income tax on an income basis for the financial year 1914–15 brought an action against the A.-G. & the Board of Inland Revenue alleging that, by an agreement of 1912, the surveyor of taxes on behalf of the Board had agreed to assess them for the five years, 1911–12 to 1915–16 on a profit basis & at an agreed figure of profit based on the previous quinquennial valuation, & asking for a declaration that the agreement was binding, & an injunction to restrain the Board from enforcing the recent assessment:—*Held*: This was one of those cases in which the Crown neither pays nor receives costs.—GRESHAM LIFE ASSURANCE SOCIETY v. A.-G., [1916] 1 Ch. 228; 85 L. J. Ch. 201; 114 L. T. 399; 7 Tax Cas. 36.

—**In Admiralty proceedings.**—See ADMIRALTY, Vol. I., pp. 156, 205, Nos. 648, 1260–1262.

—**In charity proceedings.**—See CHARITIES, Vol. VIII., pp. 408–409, Nos. 2452–2460, p. 413, Nos. 2530–2532.

—**On petitions of right.**—See CROWN PRACTICE.

—**In prize proceedings.**—See PRIZE LAW & JURISDICTION.

—**In proceedings on revenue side & Crown side of King's Bench Division.**—See CROWN PRACTICE.

—**In legitimacy suits.**—See BASTARDY, Vol. III., p. 370, Nos. 119, 120.

B. Right of the Crown to receive Costs.

349. Whether Crown entitled to costs—Unsuccessful claim—To interest in goods of felon convict.—The A.-G. on behalf of the Crown, deft. in a suit, claimed an interest in the goods of a felon convict, the subject of the suit, against purchasers for value, & failed in that claim:—*Held*: he was not entitled to his costs out of the fund as a matter of course.—PERKINS v. BRADLEY (1842), 1 Hare, 219; 6 Jur. 254; 66 E. R. 1013.

Annotations:—*Folld.* Cash v. Belcher (1842), 1 Hare, 310. *Mentd.* Fuller v. Benett (1843), 2 Hare, 394; Esquimalt & Nanaimo Ry. v. Wilson, [1920] A. C. 358.

350. For legacy duty.—The Crown made a claim for legacy duty out of a fund in ct. which was about to be distributed & required a case to be sent for the opinion of a ct. of law:—*Held*: (1) legacy duty was not payable; (2) having failed to substantiate its claim the Crown was not entitled to costs.—HOBSON v. NEALE (1853), 17 Beav. 178; 1 Eq. Rep. 165; 22 L. J. Ex. 175; 51 E. R. 1001.

Annotation:—*As to* (1) *Reid.* Armytage v. Wilkinson (1878); 3 App. Cas. 355.

sake, having no substantial interest in the question at issue, & no interests have suffered or loss accrued by the Crown disclaiming or not appearing, the ct. will certainly not order costs to be paid to A.-G.—UNITED STATES v. DENISON (1870), 2 Ch. Ch. 263.—CAN.

Sect. 6.—Legal proceedings by and against the Crown and Crown servants: Sub-sect. 7, B. & C.]

351. To devise in trust for alien.]—Testator, who died in 1827 without issue, by his will dated in 1826 devised real estate in England to trustees upon trust to convey the same to the heir-at-law now in America his heirs & assigns for ever. In 1763 testator's eldest brother, A., emigrated to Philadelphia where he resided until his death in 1815. A. left an eldest son B., who was born in Philadelphia in 1773, & resided there until his death in 1833. B. left an eldest son C., who was born in Philadelphia in 1806, & had always resided there. R., who would have been entitled in case of an intestacy, & if C. were an alien, filed a bill against the trustees of the will & the A.-G., as representing the Crown, for a conveyance of the estate to him by the trustees:—*Held*: (1) the words heir-at-law were used in a popular sense, & the expression heir-at-law of my heir-at-law now in America described C.; (2) C. was an alien, & the devise in trust for him therefore failed; (3) the devise did not enure the benefit of the Crown; (4) the Crown being an unsuccessful claimant would be ordered to pay its own costs.—*RITSON v. STORRY* (1855), 3 Sm. & G. 230; 3 Eq. Rep. 1039; 25 L. T. O. S. 315; 1 Jur. N. S. 771; 3 W. R. 627; 65 E. R. 637; *affd.* (1856), 2 Jur. N. S. 410, L. J.J.

Annotations:—As to (2) & (3) *Dbtd.* Barrow v. Wadkin (1857), 24 Beav. 1. *Consd.* Sharp v. St. Sauveur (1871), 7 Ch. App. 343.

352. To after-acquired property of felon.]—Transportation Act, 1824 (c. 84), s. 26, protects felons who have received a remission of their sentences in the enjoyment of all property acquired by them since their conviction & not merely such property as has been acquired by their own industry. A convicted felon who had received a conditional free pardon became entitled as one of the next of kin of a testator to a share in personal property:—*Held*: (1) he was entitled to hold it against the Crown; (2) as the A.-G. pressed the claim of the Crown & failed he was not entitled to his costs of appearance.—*GOUGH v. DAVIES* (1856), 2 K. & J. 623; 25 L. J. Ch. 677; 27 L. T. O. S. 181, 260; 20 J. P. 515; 4 W. R. 618, 757; 69 E. R. 931.

Annotation:—As to (1) *Consd.* Talbot v. Jevers (1917), 117 L. T. 430.

353. Appearance in suit to have rights of parties under will ascertained.]—Testator devised freeholds & leaseholds to four persons, intending them to hold the same in trust for an alien, & shortly afterwards informed three of them of his intent, & those three at his request wrote letters to him acknowledging the intended trust. After his death a suit was instituted by two of the devisees against the other two, the alien, testator's next of kin, & the A.-G. as representing the Crown, to have the rights of the parties declared:—*Held*:

354 i. When Crown not liable to pay costs.]—The ct. will not allow costs to the Crown in cases in which, if unsuccessful, the Crown would not be liable for costs.—*R. v. GREAT NORTHERN RY. CO.*, [1908] 2 I. R. 32.—*IR.*

k. Action on bond to Crown—33 Hen. 8, c. 39, s. 54.]—In an action on a bond to the Crown given on taking out a *certiorari* the Crown is entitled to costs under above Act.—*R. v. CARTER* (1880), 1 R. & G. 307.—*CAN.*

l. ——In an action by the Crown upon customs export bonds, debts applied for an order to bring in a third party, & it appeared that such

bonds were given by debts personally, & did not indicate that the person against whom the third party order was sought was in any way liable to the Crown in respect of the bonds:—*Held*: (1) the ct. had no jurisdiction to try the issue of indemnity between debts, & such proposed third party; (2) the application should be dismissed with costs to the Crown in any event.—*R. v. FINLAYSON* (1897), 5 Exch. C. R. 387.—*CAN.*

m. Informations of intrusion—*Default judgments.*—In cases of judgment by default either for non-appearance or for want of pleading to informations of intrusion no costs are to be allowed to the Crown.—*R. v. KILROE* (1897), 6 Exch. C. R.

(1) no declaration would be made except that the lands were not subject to any trust; (2) the A.-G. should not have his costs, though all the other parties had costs as between solr. & client.—*BURNEY v. MACDONALD* (1845), 15 Sim. 6; 6 L. T. O. S. 1; 9 Jur. 588; 60 E. R. 518.

Annotations:—As to (1) *Consd.* Barrow v. Wadkin (1857), 24 Beav. 1; Sharp v. St. Sauveur (1871), 7 Ch. App. 343; *Refd.* *Re Stead*, Witham v. Andrew, [1900] 1 Ch. 237.

354. When Crown not liable to pay costs.]—*A.-G. v. LONDON CORPN.*, No. 343, *ante.*

355. When Crown liable to pay costs.]—*A.-G. v. LONDON CORPN.*, No. 343, *ante.*

356. Suit instituted for protection of public right.]—*SMITH v. STAIR (EARL)*, No. 341, *ante.*

357. Information for penalties under Stage Carriages Act, 1832 (c. 120)—Crown solicitor paid by fixed salary.]—In an information under sect. 101 of the above Act which gives full costs of suit & all other reasonable charges & expenses, the Crown in case of success is entitled to the ordinary costs as between subject & subject, although the Crown solicitor who conducts the prosecution receives a certain fixed yearly salary from the Crown for his services.

In a count of an information by the Excise, for twenty penalties the Crown recovered a verdict for one penalty only, & in another count deft. was charged with the wilful omission of an entry & the Crown had a verdict:—*Held*: (1) the Crown was only entitled to the costs of the witnesses necessary to prove the single penalty; (2) the Crown was entitled to the costs of all such witnesses as were reasonably necessary to prove that the omission was wilful.—*A.-G. v. SHILLIBEER* (1849), 4 Exch. 606; 7 Dow. & L. 236; 19 L. J. Ex. 115; 11 L. T. O. S. 273; 14 J. P. 7; 154 E. R. 1356.

Annotation:—*Generally*, *Mentd.* Lord Advocate v. Stewart (1899), 63 J. P. 473.

358. Suit by next of kin to recover estate—After revocation of administration to Crown.]—An intestate was supposed to have no next of kin, & the Solr. of the Treasury obtained letters of administration on behalf of the Crown & recovered the estate, but afterwards a person proved to be next of kin procured letters of administration & a revocation of the administration which had been granted on behalf of the Crown, & then instituted a suit to recover the estate, which was ordered to be paid over to pltf.:—*Held*: the Crown was not entitled to the costs of this suit.—*KANE v. REYNOLDS* (1854), 4 De G. M. & G. 565; 3 Eq. Rep. 101; 24 L. J. Ch. 321; 24 L. T. O. S. 137; 1 Jur. N. S. 148; 3 W. R. 85; 65 E. R. 423, L. C.; *affg.* *S. C. sub nom.* *KANE v. MAULE*, *KANE v. REYNOLDS*, 2 Sm. & G. 331.

Annotations:—*Consd.* *A.-G. v. Hammer* (1858), 27 L. J. Ch. 837. *Refd.* *The Leda* (1863), Brown, & Lush. 19. *Mentd.* *Edgar v. Reynolds* (1858), 4 Jur. N. S. 399.

359. Unsuccessful appeal—By Crown.]—Where, in a suit against the Crown, pltf. succeeds

80.—*CAN.*

n. Unsuccessful application for certiorari.]—An unsuccessful applct. for a writ of *certiorari* may be condemned in costs.—*R. v. JONES* (1911), 16 B. C. R. 117.—*CAN.*

o. Where plaintiff's right to seashore not admitted until established at trial.]—In an action against A.-G. & other debts, to establish pltf.'s right to the seashore, A.-G. did not actively contest pltf.'s claim, but did not admit the same until their right had been established by evidence at the trial:—*Held*: A.-G. was not entitled to be paid his costs of action by pltf.:—*KILMOREY (EARL) v. A.-G.* (1892), 29 L. R. Ir. 320.—*IR.*

& the Crown appeals & fails, it can have no costs of such appeal.

Where a pltf. succeeds in establishing his title as next of kin to an intestate against the Crown as administrator, the costs of the suit must come out of the estate, the Crown, as in the case of an ordinary administrator, not paying any costs.—PARTINGTON v. REYNOLDS (1858), 6 W. R. 615.

360. — Suit in respect of felon's reversionary interest—Out of general fund.]—A fund was settled on A. for life, with remainder to B. & others. B. mtged. his reversionary share to C., & was afterwards convicted of felony. A suit was instituted for the administration of the fund to which C. and the A.-G. were made defts.:—*Held*: the A.-G. was not entitled to his costs out of the general fund.—KITCHENER v. KITCHENER (1849), 18 L. J. Ch. 152; 13 L. T. O. S. 43; 13 Jur. 761.

361. — Petition for transfer of Consols—Standing to account of National Debt Commissioners.]—*Ex p.* SANFORD, [1867] W. N. 77.

362. — — — — —.]—*Re* STEEL, [1867] W. N. 282.

363. — — — Question for decision one of novelty & difficulty.]—A charity held annually a festival consisting of a dinner followed by a concert. The donations & subscriptions procured at the festival were devoted exclusively to the funds of the charity, & the expenses of the festival were borne by the stewards & persons participating in it. Stewards not attending the festival contributed the sum of one guinea, & no question arose with regard to that contribution. Stewards & other persons attending the festival contributed a further guinea each, & in respect of the guineas so paid the Crown claimed entertainments duty under the Finance (New Duties) Act, 1916, s. 1 (1). It was conceded by the Crown that the dinner apart from the concert was not an entertainment within the meaning of the Act. The dinner was the main part of the proceedings, the concert being a subsidiary & separate, but at the same time, important, part:—*Held*: the concert must be regarded as an essential part of the festival & as a part separate & distinct from the dinner, & the expenditure upon the concert could not be looked upon as negligible, & as the guinea was a lump sum paid in expectation that it would secure admission to a concert, & it did in fact secure such admission, entertainments duty was payable.

One question only remains, that of costs. The rule prevails in these cases that the successful party, be it Crown or deft., receives costs, but I think here the proper order is that there should be no costs for these proceedings. The question for decision under the above Act is one of novelty & of some difficulty, & those who represented the Crown expressed themselves desirous of obtaining a decision upon it as a possible guide in other

cases which have arisen or may arise (ROCHE, J.).—*A.-G. v. McLEOD*, [1918] 1 K. B. 13; 87 L. J. K. B. 89; 117 L. T. 631; 34 T. L. R. 29; 62 Sol. Jo. 105; 15 L. G. R. 881.

See, also, Nos. 342, 343, 345, *ante*.

C. Liability of the Crown to pay Costs.

364. Liability of Crown for costs.]—*R. v. JES*, No. 125, *ante*.

365. — Suit on bond for duty on post-horses—Farmer of duty real party.]—In a suit by the Crown upon a bond under Stat. 30, Geo. 3 (c. 23) the ct. cannot give costs against the Crown, although the farmer of the duties is the real party.—*R. v. CORUM* (1792), 1 Anst. 50; 145 E. R. 797.

Annotation:—*Apld.* *R. v. Bingham* (1831), 1 Cr. & J. 379.

366. — Action improperly instituted.]—LORD ADVOCATE v. DUNGLAS (LORD), No. 857, *post*.

367. — Under Crown Suits Act, 1855 (c. 90)—Attorney-General or Lord Advocate not a party.]

—On an appeal against an acquittal by justices in petty sessions of one P. on an information against him by an officer of excise on behalf of the Crown for having kept used & employed a stage carriage without having a license *contra formam statuti*, the quarter sessions dismissed the appeal with costs against the officer of excise:—*Held*: so much of the order of sessions as awarded costs was in excess of jurisdiction, inasmuch as the Crown & not the officer was the real party, & the Crown not being named is not bound by the Quarter Sessions Act, 1849 (c. 45), s. 5, & the Crown Suits Act, 1855 (c. 90), s. 2 only applies to the informations etc. mentioned in s. 1, to which the A.-G. or the Lord Advocate must be a party.—*R. v. BEADLE* (1857), 7 E. & B. 492; 26 L. J. M. C. 111; 29 L. T. O. S. 76; 21 J. P. 679; 3 Jur. N. S. 862; 5 W. R. 498; 119 E. R. 1329.

Annotations:—*Distd.* *Moore v. Smith* (1859), 1 E. & E. 597.

Consd. *The Leda* (1863), Brown. & Lush. 19; *R. v. Canterbury*, [1902] 2 K. B. 503. *Distd.* *Thomas v. Pritchard*, [1903] 1 K. B. 209.

368. — — — — —.]—A cause of damage arising out of collision was instituted on behalf of the Queen in her office of Admt., & also on behalf of the commander & crew. Her Majesty's vessel was found to blame:—*Held*: (1) the Crown should not be condemned in costs; (2) the commander & crew should pay the whole of the costs; (3) the Crown Suits Act, 1855 (c. 90), authorising costs to be given to or against the Crown, applied only to actions to which the A.-G. or the Lord Advocate is a party.—*THE LEDA* (1863), Brown. & Lush. 19; 1 New Rep. 291; 32 L. J. P. M. & A. 58; 7 L. T. 864; 9 Jur. N. S. 208; 11 W. R. 302; 1 Mar. L. C. 298.

Annotations:—*As to* (1) *Consd.* *The Broadmayne*, [1916] P. 64. *Generally. Mentd.* *Mersey Docks & Harbour Board v. Turner, The Zeta*, [1893] A. C. 468.

369. — — — — —.]—The Crown, being lord of the manor of E., by letters patent dated Feb.,

PART IX. SECT. 6, SUB-SECT. 7.—C.

366 i. Liability of Crown for costs—Action improperly instituted.]—Where appeal is allowed from conviction obtained on information laid by chief of police, no costs should be allowed, as such chief of police is "an officer, servant or agent of & acting for the Crown," within Crown Costs Act, 1911.—*MATSON v. LEASK*, [1919] 2 W. W. R. 59.—CAN.

p. — In action in nature of information.]—In an action in nature of an information filed by A.-G., costs will not be allowed to deft. against Crown.—*R. v. MAINWARING* (1839), 5 O. S. 670.—CAN.

q. — Upon interlocutory proceedings.]—A.-G. is never made to pay

costs, even upon interlocutory proceedings.—*GIBSON v. CLENCH* (1877), 1 Ch. Ch. 69.—CAN.

r. — In proceedings on a sci. fa.]—In proceeding on a sci. fa. on a recognisance, costs cannot be given against the Crown.—*R. v. HOBART* (1848), 11 I. Eq. R. 397.—IR.

367 i. — Under Crown Suits Act, 1855—Attorney-General not a party.]—Costs cannot be given against the Crown except where A.-G. is a party *eo nomine*.—*Re GALVIN*, [1897] 1 I. R. 520.—IR.

367 ii. — — — — —.]—*ESTATE*, [1901] 1 I. R. 1.—IR.

367 iii. — — — — —.]—*Re MADDEN'S ESTATE*, [1902] 1 I. R. 63.—IR.

367 iv. — — — — —.]—SECRETARY OF STATE FOR WAR *BOOTH*, [1901] 2 I. R. 692.—IR.

s. — Crown suing as parens patrie.]—In an action by A.-G. at the relation of a private individual, the Crown sues as *parens patrie*, & the only object of inserting the name of the relator in the proceedings is to make him responsible for costs.—*A.-G. v. RUFFNER* (1906), 12 B. C. R. 299.—CAN.

t. — In proceedings under Real Property Act, 1897.]—Costs will be given against the Crown when it fails in proceedings taken under above Act.—*R. v. FAWCETT* (1900), 13 Man. L. R. 205; 20 C. L. T. 287.—CAN.

Sect. 6.—Legal proceedings by and against the Crown and Crown servants: Sub-sect. 7, C., D. & E. Sect. 7.]

1636 granted to certain persons in fee, under whom deft. as their successor in title claimed to hold the property, all those coals & coalmines found or to be found beneath the commons, waste lands, or marsh grounds, *infra communias, terras vastas, sive mariscos*, within the lordship of E., with full liberty, power & authority to dig, search for & sink pits, & to open the said mines in all places convenient within the commons, waste lands & marsh grounds, for getting of coal within the lordship:—*Held*: (1) under the words *infra communias, terras vastas, sive mariscos* the coals under the foreshore, or land between high & low water mark, passed to the grantees; (2) The word waste is a sufficient description of the soil between high & low water mark.

(3) A suit was instituted by way of information by the A.-G. claiming on behalf of the Crown, certain property held by defts. under an alleged grant by the Crown as lord of the manor. The right of defts. was established:—*Held*: though it could not be disputed that the law officer of the Crown had he sued as a private individual must have paid costs, yet costs could not be given against the Crown except in cases falling within the Crown Suits Act, 1855 (c. 90).—*A.-G. v. HANMER* (1859), 4 De G. & J. 205; 28 L. J. Ch. 511; 33 L. T. O. S. 176; 5 Jur. N. S. 693; 7 W. R. 483; 45 E. R. 80, L. J.J.

Annotations:—As to (1) *Refd.* *Ecroyd v. Coulthard*, [1898] 2 Ch. 358. As to (3) *Folld.* *Lantour v. A.-G.* (1865), 5 New Rep. 231. *Refd.* *The Leda* (1863), Brown. & Lush. 19.

370. Plaintiff establishing title as next of kin to intestate—Against Crown as administrator.]—*PARTINGTON v. REYNOLDS*, No. 359, *ante*.

371. — Dismissal of demurrer to bill for specific performance against Crown.]—Pltf. on the faith of regulations issued by the Colonial Office spent considerable sums of money in a colony, & in promoting the emigration of various people to that colony, but did not observe the regulations accurately as to the proportion of male & female emigrants. A considerable tract of land was allotted to him in accordance with the regulations but his claim to a still larger extent was refused by the Colonial Office. A bill was filed by permission of the L. C. many years subsequently for the purpose of enforcing his claim:—*Held*: on demurrer (1) pltf. was entitled to have the bill answered; (2) no costs should be given on either side.—*LAUTOUR v. A.-G.* (1865), 5 New Rep. 231; 13 W. R. 305, L. J.J.

372. — In probate action.]—The Queen's Proctor unsuccessfully contested the validity of a will, & the parties moved to condemn him in costs:—*Held*: the ct. had no power to condemn the Crown in costs.—*ATKINSON v. QUEEN'S PROCTOR* (1871), L. R. 2 P. & D. 255; 40 L. J. P. & M. 49; 25 L. T. 164; 35 J. P. 600; 19 W. R. 786.

373. — Unsuccessful claim—To income tax

deducted from annuities.]—Applt. co. carried on the ordinary business of a life insurance co. including the granting of annuities & had a very large annual income from interest dividends & rents, from which income tax was deducted at the source. The income from interest dividends & rents was amply sufficient to pay the annuities in full. The co. also had an income from premiums, but if the income from interest dividends & rents had been deducted from the co.'s revenue the trading of the co. would have resulted in a deficit. No formal appropriation of the income from interest dividends & rents was made in the books, nor was any particular fund specially charged with the payment of the annuities. In paying their annuities the co. deducted the amount of income tax due in respect thereof & retained the amount of the tax so deducted:—*Held*: (1) the co. were entitled to retain for their own benefit the whole of the income tax deducted from the annuities under the Customs and Inland Revenue Act, 1888 (c. 8), s. 24 (3); (2) the claim to the tax having failed the Crown was liable for costs in the ct. below & at the present hearing in the same manner as if the action had been between subjects.—*EDINBURGH LIFE ASSURANCE CO. v. LORD ADVOCATE*, [1910] A. C. 143; 79 L. J. P. C. 41; 101 L. T. 826; 26 T. L. R. 146; 54 Sol. Jo. 133; 5 Tax Cas. 472, H. L.

Annotation:—As to (1) *Consd.* *Sugden v. Leeds Corpn.*, [1914] A. C. 483.

— Payment out of purchase-money of land compulsorily taken by Crown.]—See *COMPULSORY PURCHASE OF LAND & COMPENSATION*, p. 254, Nos. 1596, 1597, *ante*.

See, also, Nos. 344, 345, *ante*.

D. Taxation and Recovery of Costs.

374. What counsels' fees allowed—Case in which court would allow to private individual fees to three counsel.]—The interests in respect of which the A.-G. was made a party to a suit were of such a description that the Ct. would in the case of a private individual have allowed fees to three counsel upon the taxation of costs:—*Held*: fees to two counsel besides the A.-G. would be allowed.—*COCKBURN v. RAPHAEL* (1843), 12 L. J. Ch. 263; 7 Jur. 246, L. C.

375. Two defendants charged in one information—Under Customs Consolidation Act, 1853 (c. 107), s. 263.]—At the trial of two defts. charged in one information a verdict was taken by consent for a penalty of £1000 against one deft. & for £200 against the other, but the judgment was entered on the *postea* generally for a penalty of £1200 against both:—*Held*: the remembrancer was right in taxing the costs of the Crown against both defts. without distinction under sects. 263 & 267 of the above Act.—*A.-G. v. ROBERTS & ELLIS* (1855), 19 J. P. 744; 1 Jur. N. S. 1024; 4 W. R. 7.

376. Treasury Solicitor acting for private individual by direction of Crown—Costs awarded to.]—On a rule for a mandamus to deft. in a matter in which the Crown had an interest, the Treasury

PART IX. SECT. 6, SUB-SECT. 7.—D.

a. What counsels' fees allowed—Costs of drafting & copying pleadings.]—In suits where the Queen is a party & entitled to costs, a retaining fee of 25s. is allowed to A.-G.; & for all papers properly termed "pleadings," a higher rate per folio is allowed for drafting & copying than in suits between subjects.—*A.-G. v. TWENTY CASES OF SPIRITS* (1856), 8 N. B. R. (3 All.) 404.—CAN.

Counsel for Crown paid

by fixed salary.]—As the statutes of Canada defining the duties & salaries of A.-G. & his deputy deny additional compensation for services rendered by them in connection with litigation affecting the Crown, it is improper to allow counsel fees or solicitor's fees in respect of services rendered in such capacities by these officers on the taxation of costs awarded in favour of Crown.—*HAMBURG-AMERICAN PACKET CO. v. R.* (1907), 39 S. C. R. 621.—CAN.

c.

—Fees were claimed

by the Crown for services rendered by Solicitor-General, who appeared for it. Defender objected that such fees were not proper charges against him, on the ground that the fees claimed had not actually been, & would not be, paid, counsel for the Crown being paid by salary:—*Held*: the Crown, if successful, is entitled to recover costs as between subject and subject, notwithstanding counsel for the Crown receives a fixed yearly salary for his services.—*LORD ADVOCATE v. STEWART* (No. 2) (1899), 63 J. P. 473.—SCOT.

Solr. was directed to appear for deft., & he accordingly became the solr. on the record. The rule was discharged with costs. Objection was taken on taxation that deft. was not entitled to recover costs:—*Held*: the Treasury Solr. was entitled to act, by direction of the Crown, for a subject in any matter in which the Crown has an interest, even though he has not a solr's. certificate, & deft. was therefore represented by a duly qualified solr. & was entitled to recover his costs from the prosecutor.—*R. v. CANTERBURY (ARCHBP.)*, [1903] 1 K. B. 289; 72 L. J. K. B. 188; 88 L. T. 150; 51 W. R. 277; 19 T. L. R. 92, C. A.

Annotation:—*Consd.* *Adams v. London Motor Builders*, [1921] 1 K. B. 495.

See, further, CROWN PRACTICE; SOLICITORS.

377. Dismissal of prosecution on payment of costs—Costs paid to clerk of justices—Right of Crown to costs after deduction of court fees.—Proceedings were taken before justices by an Inland Revenue officer, who was not represented by a solr. against three persons for keeping dogs without having licences therefor. The justices dismissed the informations but ordered each of the three defts. to pay a sum as costs which was in excess of the ct. fee. No application was made at the time for costs by the Inland Revenue officer. The sums so ordered to be paid as costs were paid to the clerk to the justices, who claimed to retain them on behalf of the County Treasurer:—*Held*: the Crown was entitled to the costs paid by defts. in excess of the ct. fees.—*A.-G. v. CLARK*, [1909] 2 K. B. 7; 78 L. J. K. B. 371; 100 L. T. 606; 73 J. P. 243; 25 T. L. R. 318.

E. Security for Costs.

378. On appeal by Crown to House of Lords.—*LORD ADVOCATE v. DUNGLAS (LORD)*, *DUNGLAS (LORD) v. OFFICERS OF STATE FOR SCOTLAND*, No. 857, *post*.

SECT. 7.—MARTIAL LAW.

379. Transitory—Variable by general commanding.—Martial law is a transitory law variable by the General as occasion & circumstances require.—*ANON.* (1704), 6 Mod. Rep. 180; 87 E. R. 935.

380. Must not be enforced wantonly & without due regard to humanity.—Deft. the sheriff of Tipperary was engaged in suppressing an insurrection in Ireland; having received information that pltf. was the secretary of a revolutionary assocn. he arrested him & ordered him to be flogged, although pltf. had offered to surrender. In an action brought by pltf. no charge having been brought against him, deft. contended that by the severity of his system of dealing with the rebels that he had gained useful information & restored

order in the district:—*Held*: pltf. entitled to damages.

The jury are not to imagine that the legislature by enabling magistrates to justify under the Indemnity Bill, has released them from the feelings of humanity, or permitted them wantonly to exercise power, even though it be to put down rebellion (*CHAMBERLAIN, J.*).—*WRIGHT v. FITZGERALD* (1799), 27 State Tr. 759.

381. In time of war—Jurisdiction of civil courts over actions of military authorities ousted.—The members of the provisional govt. of a recently conquered country seized the property of a native of the conquered country, who had been refused the benefit of the articles of capitulation of a fortress, of which he was governor, but who had been permitted to reside under military surveillance in his own house in the city in which the seizure was made, & which was at a distance from the scene of actual hostilities:—*Held*: the seizure must be regarded in the light of a hostile seizure, & a municipal ct. had no jurisdiction on the subject.

Semble: The circumstances, that at the time of the seizure the city where it was made had been for some months previously in the undisturbed possession of the provisional govt.; & that cts. of justice under the authority of that govt. were sitting in it for the administration of justice, do not alter the character of the transaction.—*ELPHINSTONE v. BEDREECHUND* (1830), 1 Knapp, 316; 12 E. R. 340; *sub nom.* *BEDREECHUND v. ELPHINSTONE*, 2 State Tr. N. S. 379, P. C.

Annotations:—*Folld. Ex p. Marais*, [1902] A. C. 109. *Mentd.* Secretary of State for India *v. Kamachee Boye Sahaba* (1859), 13 Moo. P. C. C. 22.

382. ————]—Where martial law actually prevails the ordinary cts. have no jurisdiction over the action of the military authorities, & the mere fact that some of the ordinary cts. are open is not sufficient to constitute a time of peace, & thereby to exclude the operation of martial law.—*Ex p. MARAIS*, [1902] A. C. 109; 71 L. J. P. C. 42; 85 L. T. 734; 50 W. R. 273; 18 T. L. R. 185, P. C.

Annotations:—*Consd.* *R. v. Egan, R. v. Higgins* (1921), 65 Sol. Jo. 782. *Reid.* *Mgomini, Mzinelwa & Wanda v. Governor & A.-G. for Natal* (1906), 22 T. L. R. 413; *Clifford & O'Sullivan*, [1921] 2 A. C. 570.

383. ———— **What amounts to—Effect of some civil courts continuing to sit.**—*ELPHINSTONE v. BEDREECHUND*, No. 381, *ante*.

384. ————]—*Ex p. MARAIS*, No. 382, *ante*.

385. In times of civil disturbances & insurrection—Application to trial & punishment of civilians.—Defts. were charged with murder, in that they had illegally caused a civilian to be tried by court martial & condemned to death.

It is hardly conceivable that such persons as

PART IX. SECT. 6, SUB-SECT. 7.—E.

378 i. On appeal by Crown.—Rules requiring security to be given on an appeal to the Ct. of Appeal are not applicable to the Crown in a case between Crown & subject.—*R. v. BANNATYNE (W. M.) & Co.* (1901), 20 N. Z. L. R. 232.—N.Z.

PART IX. SECT. 7.

d. Whether application necessary.—K. B. Div. may when its jurisdiction is involved decide whether a state of war exists which justifies the application of martial law.—*R. (GARDE) v. STRICKLAND*, [1921] 2 I. R. 317.—IR.

e. Whether proclamation necessary.—When a state of facts exists which justifies the imposition of martial law, the forces of the Crown, without any proclamation, may be

employed in executing it.—*R. (RONAYNE & MULCAHY) v. STRICKLAND*, [1921] 2 I. R. 333.—IR.

f. In times of civil disturbances & insurrection—Jurisdiction of civil courts over actions of military authorities ousted.—Civil cts. have no jurisdiction *durante bello* to interfere with the decision of a military ct. sitting in a martial law area, even where a capital sentence has been pronounced, & is about to be executed for an offence not punishable capitally under ordinary criminal law.—*R. v. ALLEN*, [1921] 2 I. R. 241.—IR.

g. ————]—*R. (GARDE) v. STRICKLAND*, [1921] 2 I. R. 317.—IR.

h. ————]—*R. (RONAYNE & MULCAHY) v. STRICKLAND*, [1921] 2 I. R. 333.—IR.

k. ———— **Action stayed until necessity of martial law ceases.**—While a state of war exists, an action for damages for alleged wrongful destruction of property by military forces in a martial law area cannot be tried; but pltf. has a right to have his case proceeded with so soon as a state of war no longer prevails, & such action should be stayed until further order.—*HIGGINS v. WILLIS*, [1921] 2 I. R. 386.—IR.

l. ————]—Where, in consequence of invasion of a colony & of rebellion, military operations had become necessary:—*Held*: the proclamation of martial law interrupted & suspended the functions of the civil courts in the proclaimed districts.—*Re FOURIE* (1900), 17 S. C. 173.—S. AF.

Sect. 7.—Martial law. Parts X., XI. & XII. Sects. 1 & 2: Sub-sect. 1, A

Lord Coke & Sir William Blackstone, when writing on the laws of England, & when they came to speak of martial law, would have been wholly silent as to the power of applying it to the trial & punishment of civilians in times of civil disturbance & insurrection, if any power of so applying it had in their opinion existed (COCKBURN, L.C.J.).—*R. v. NELSON & BRAND* (1867), Cockburn's Charge 59.

386. Strictly limited to necessity.]—Deft. was charged with having, while governor of Jamaica, illegally proclaimed martial law.

It has not been settled what is the Crown's prerogative as to enforcing martial law; but it is by no means an unbounded, wild & tyrannical prerogative; & if martial law exists at all, it must be strictly limited to necessity (BLACKBURN, J.).—*R. v. EYRE* (1868), L. R. 3 Q. B. 487; 37 L. J. M. C. 159; 18 L. T. 511; 32 J. P. 518; 11 Cox, C. C. 162; Finlason's Report at p. 74.
Annotation:—Refd. Ex p. Marais (1901), 71 L. J. P. C. 42.

Part X.—The Crown in relation to the Royal Forces.

See ROYAL FORCES.

Part XI.—The Crown in relation to the Colonies.

See DEPENDENCIES, COLONIES & BRITISH POSSESSIONS.

Part XII.—The Crown in Foreign Relations.

SECT. 1. — IN GENERAL.

Jurisdiction of Admiralty over ships of foreign Sovereigns.]—*See ADMIRALTY*, Vol. I., p. 110, Nos. 135–146.

Actions by & against foreign Sovereigns.]—*See ACTION*, Vol. I., pp. 45–50.

387. Validity of acts of recognised foreign government—English courts will not inquire into—Whether recognition de jure or de facto material.]—The cts. of this country will not inquire into the validity of the acts of a foreign govt. which has been recognised by the Govt. of this country. In this respect it is all one whether the foreign govt. has been recognised as a govt. *de jure* or *de facto*.

The Russian Socialist Federal Soviet Republic passed a decree in June, 1918, declaring all mechanical sawmills of a certain capital value & all wood working establishments belonging to private or limited cos. to be the property of the Republic. In 1919 agents of the Republic seized pltf.'s mill & stock in Russia. In August, 1920, agents of the Republic purported to sell a quantity of the stock to defts., who imported it into England. In April, 1921, the Secretary of State for Foreign Affairs stated that His Majesty's Govt. recognised the Soviet Govt. as the *de facto* Govt. of Russia; that a govt. known as the Provisional Govt. came into power in March, 1917, & was recognised by His Majesty's Govt., & remained in session until December, 1917, & was then dispersed by the Soviet authorities:—*Held*: (1) the Govt. of this country had recognised the Soviet Govt. as the *de facto* Govt. of Russia existing at a date before the decree of June, 1918; (2) the validity of that decree & the sale of the stock to defts. could not be impugned.—*AKSIONAIRNOYE OBSHESTVO A. M. LUTHER v. SAGOR (JAMES) & Co.*, [1921] 3 K. B. 532; 90 L. J. K. B. 1202; 125 L. T. 705; 37 T. L. R. 777; 65 Sol. Jo. 604, C. A.

Annotation:—Refd. Fenton Textile Assn. v. Krassin (1921), 38 T. L. R. 259.

Recognition of foreign judgments.]—*See CONFLICT OF LAWS*, pp. 428–432, 444–472, *ante*.

Acts of state of foreign governments.]—*See PUBLIC AUTHORITIES & PUBLIC OFFICERS.*

388. Raising loans for foreign Power—When foreign Power not recognised—Illegal.]—Raising loans for a foreign Power not recognised by the Govt. is illegal.—*TOMPSON v. BARCLAY* (1831), Coop. Pr. Cas. 501; 9 L. J. O. S. Ch. 215; 47 E. R. 619, L. C.

Annotations:—Consd. Aksionairnoye Obschestvo A. M. Luther v. Sagor, [1921] 1 K. B. 456. *Mentd. British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

389. ——— To assist in prosecution of war against foreign friendly Power Illegal.]—It is illegal for a person residing in this country, to raise money by way of loan, to assist subjects of a foreign State to prosecute a war against a govt. in amity with our own.—*DE WUTZ v. HENDRICKS* (1821), 2 Bing. 314; 9 Moore, C. P. 586; 2 State Tr. N. S. 125; 130 E. R. 326; *sub nom. DE WITTS v. HENDRICKS*, 3 L. J. O. S. C. P. 3.

Annotations:—Consd. Thompson v. Barclay (1831), 9 L. J. O. S. Ch. 215. *Refd. Yrisarri v. Clement* (1826), 2 C. & P. 223.

SECT. 2 — AMBASSADORS AND OTHER DIPLOMATIC PERSONS.

SUB-SECT. 1.—PRIVILEGES OF PUBLIC MINISTERS AND THEIR ENTOURAGE.

A. Ministers personally.

390. General rule—Civil process.]—By the law of nations, neither an ambassador, nor any of his train or *comites*, can be prosecuted for any debt or contract in the cts. of that kingdom wherein he is sent to reside.—*MATTUEOF'S CASE* (1709), 10 Mod. Rep. 4; 88 E. R. 598.

391. ———.]—The public minister of a foreign State, accredited to & received by the Sovereign of this country, having no real property in England, & having done nothing to disentitle him to the general privileges of such public minister, cannot, while he remains such public minister, be sued against his will, in this country, in a civil action; although such action may arise out of commercial transactions by him here, & although neither his person nor his goods be touched by the suit.—*MAGDALENA STEAM NAVIGATION Co. v. MARTIN* (1859), 2 E. & E. 94; 28

L. J. Q. B. 310; 34 L. T. O. S. 30; 5 Jur. N. S. 1260; 7 W. R. 598; 121 E. R. 36.

Annotations:—**Consd.** The Charkieh (1873), L. R. 4 A. & E. 59. **Apld.** Parkinson v. Potter (1885), 16 Q. B. D. 152; New Chile Gold Mining Co. v. Blanco (1888), 4 T. L. R. 346. **Consd.** Musurus Bey v. Gadban, [1894] 2 Q. B. 352; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139. **Refd.** The Parlement Belge (1879), 4 P. D. 129; *Re* Suarez, Suarez v. Suarez, [1918] 1 Ch. 176.

392. ———.]—(1) A foreign ambassador cannot be impleaded before an English tribunal.

(2) The Ct. of Ch. will restrain a third party from handing over to him a fund the right to which is in dispute notwithstanding his title thereto may be absolute in law.—**GLADSTONE v. MUSURUS BEY** (1862), 1 Hem. & M. 495; 1 New Rep. 178; 32 L. J. Ch. 155; 7 L. T. 477; 9 Jur. N. S. 71; 11 W. R. 180; 71 E. R. 216.

Annotations:—*As to* (1) **Refd.** Smith v. Woguelin (1869), L. R. 8 Eq. 198; The Parlement Belge (1880), 5 P. D. 197; Musurus Bey v. Gadban (1894), 71 L. T. 51. *As to* (2) **Distd.** Twycross v. Dreyfus (1877), 5 Ch. D. 605. **Refd.** Larivière v. Morgan (1872), 7 Ch. App. 554, n. *Generally*, **Consd.** The Charkieh (1873), L. R. 4 A. & E. 59.

393. ——— **Criminal process.**]—*Nolle prosequi* was granted on an indictment of an ambassador for an attempt to assassinate.—**R. v. GUERCHY** (1765), 1 Wm. Bl. 545; 96 E. R. 315.

394. ——— **Ambassador's person or property.**]—As a consequence of the absolute independence of every sovereign authority & the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its cts. any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.—**THE PARLEMENT BELGE** (1880), 5 P. D. 197; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. L. C. 234, C. A.

Annotations:—**Consd.** & **Apld.** Mighell v. Johore, [1894] 1 Q. B. 119. **Consd.** Musurus Bey v. Gadban, [1894] 2 Q. B. 352. **Apld.** The Jasey, [1906] P. 270; The Gagara, [1919] P. 95; The Porto Alexandre, [1920] P. 30. **Refd.** Stronsberg v. Costa Rica Republic (1880), 44 L. T. 199; The Newbattle (1885), 10 P. D. 33; Chalmers v. Scoponich (1892), 66 L. T. 318; South African Republic v. La Compagnie Franco-Belge Du Chemin De Fer Du Nord, [1898] 1 Ch. 190; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139; The Broadmayne, [1916] P. 64; The Crimdon (1918), 35 T. L. R. 81; *Re* Suarez, Suarez v. Suarez, [1918] 1 Ch. 176. **Mentd.** The Longford (1889), 14 P. D. 34; The Dictator, [1892] P. 304; Morgan v. Castlegate S.S. Co., The Castlegate, [1893] A. C. 38; S.S. Utopia v. S.S. Primula, The Utopia, [1893] A. C. 492; The Ripon City, [1897] P. 226; The Burns, [1907] P. 137.

395. **Who is privileged as ambassador—Councillor of legation—Acting as chargé d'affaires in absence of ambassador.**]—(1) A councillor of legation of a foreign sovereign, who has the charge of the executive of the said legation, subject to the directions of the minister plenipotentiary, & who acts as chargé d'affaires in the absence of such minister, is a public minister of a foreign prince within the meaning of Diplomatic Privileges Act, 1708 (c. 12), & entitled as such to the privileges of an ambassador.

(2) An ambassador who voluntarily appears to an action brought against him in this country & who thus submits to the jurisdiction of the ct. is not entitled to have the proceedings set aside, or the action stayed against him, on the ground of his being privileged as an ambassador from suit.

(3) A foreign ambassador does not lose his privilege of exemption from suit by trading in this country, although his domestic servants

do under the limitation in the above Act.—**TAYLOR v. BEST** (1854), 14 C. B. 487; 8 State Tr. N. S. 317; 23 L. J. C. P. 89; 22 L. T. O. S. 287; 18 Jur. 402; 2 W. R. 259; 2 C. L. R. 1717; 139 E. R. 201.

Annotations:—*As to* (1) **Refd.** Magdalena Steam Navigation Co. v. Martin (1859), 2 E. & E. 94; A.-G. v. Kent (1862), 1 H. & C. 12; New Chile Gold Mining Co. v. Blanco (1888), 4 T. L. R. 346; Musurus Bey v. Gadban, [1894] 2 Q. B. 352. *As to* (2) **Distd.** Parkinson v. Potter (1885), 16 Q. B. D. 152. **Consd.** *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139. **Foldd.** *Re* Suarez, Suarez v. Suarez, [1918] 1 Ch. 176. *As to* (3) **Consd.** The Porto Alexandre, [1920] P. 30. *Generally*, **Consd.** The Charkieh (1873), L. R. 4 A. & E. 59. **Mentd.** Johnson v. Goslett (1856), 18 C. B. 728; Garrard v. Guibillei (1862), 11 C. B. N. S. 616.

396. **Not official agent under trade agreement.**]—In an action for the price of goods sold & delivered deft. applied that the service of the writ upon him should be set aside on the ground that he was the authorised representative of a foreign state & was entitled as such to immunity from civil process. By the Trade Agreement of March 16, 1921, between his Majesty's Govt. & the Russian Socialistic Federative Soviet Republic, deft. had been recognised & received by the British Govt. only as the Soviet Govt.'s official agent, appointed under & for the purposes of that agreement, which provided that official agents thereunder should be immune from arrest & search, but did not provide for immunity from civil process:—**Held**: that as deft. had not been recognised by any competent authority in this country in any capacity other than that of official agent under the agreement, his status was insufficient to carry with it the immunity accorded to accredited & recognised representatives of foreign states.—**FENTON TEXTILE ASSOCN., LTD. v. KRASSIN** (1921), 38 T. L. R. 259, C. A.

397. **Nature of privilege—Personal to minister—Exemption from customs duty—Ceases when goods transferred to unprivileged person.**]—Foreign wine had, by permission of the Treasury, in accordance with the usual practice, been admitted into England for the private use of the ambassador of a foreign state without payment of the customs duty. The ambassador, upon his retirement left the wine in his cellar, & his agent instructed deft. to sell it. Deft. sold it without any condition as to payment of the duties by the purchasers & received the price & paid it over to the ambassador's agent. Deft. afterwards paid the excise duty, & obtained leave to pay reduced customs duty, but did not pay it:—**Held**: the liability to customs duty which could not be enforced against the goods in the hands of the ambassador, could be enforced when they passed into the hands of a person who had no privilege.—**A.-G. v. THORNTON** (1824), M'Cle. 600; 13 Price, 805; 2 State Tr. N. S. 129; 147 E. R. 1161.

398. ——— **Ceases on death—Personalty not exempted from payment of legacy duty.**]—The privilege of exemption from taxation & from the operation of the civil & criminal law, accorded to an ambassador, is a personal privilege founded on the sacredness of his person & the rule of international law, by which, though actually resident here, he is looked upon as being *extra territoriam* & residing within his own country; but no analogy arises, from such exemption, during his life, to exempt his personal property from legacy duty after his death.—**A.-G. v. KENT** (1862), 1 H. & C. 12; 31 L. J. Ex. 391; 6 L. T. 864; 10 W. R. 722; 158 E. R. 782.

Annotations:—**Refd.** *Re* Capdevielle (1864), 11 L. T. 89. **Mentd.** A.-G. v. Rowe (1862), 1 H. & C. 31.

See, further, ESTATE & OTHER LEATH DUTIES.

Sect. 2.—Ambassadors and other diplomatic persons : Sub-sect. 1, A., B., C. & D. (a) & (b).]

399. Extent of privilege.]—TAYLOR *v.* BEST, No. 395, *ante*.

400. — Title to fund in dispute—Injunction restraining third party from handing over fund to ambassador.]—GLADSTONE *v.* MUSURUS BEY, No. 392, *ante*.

401. — Immunity after recall—Till time necessary to wind up official business & prepare for return—Though successor appointed meanwhile.]—The immunity of a foreign ambassador from process in the country extends for such a reasonable period after the presentation of his letters of recall as is necessary for him to wind up his official business & prepare for his return home; he is not deprived of his immunity if his successor is appointed during that period. The Limitation Act, 1623 (c. 16), does not begin to run against the creditors of an ambassador of a foreign state while he is in this country & duly accredited during the period above referred to.—MUSURUS BEY *v.* GADBAN, [1894] 2 Q. B. 352; 63 L. J. Q. B. 621; 71 L. T. 51; 42 W. R. 545; 10 T. L. R. 493; 38 Sol. Jo. 511; 9 R. 519, C. A.

*Annotations:—*Consd. *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139; *Re* Suarez, Suarez *v.* Suarez, [1918] 1 Ch. 176.

402. — Legal process against minister—Null & void.]—(1) Both under the common law & under Diplomatic Privileges Act, 1708 (c. 12), a diplomatic agent accredited to the Crown by a foreign state is absolutely privileged from being sued in the English cts. & any writ issued against him is absolutely null & void.

(2) A secretary of legation is within the privilege.—*Re* REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LTD., [1914] 1 Ch. 139; 83 L. J. Ch. 226; 109 L. T. 711; 30 T. L. R. 78; 58 Sol. Jo. 173.

*Annotation:—*Consd. *Re* Suarez, Suarez *v.* Suarez, [1917] 2 Ch. 131.

403. British subject accredited by one foreign State to another—Immunity of.]—P. was a rebel & traitor to Henry VIII. & fled to Rome, Henry & the Pope being then at enmity. The Pope sent P. as ambassador to the French king, with whom Henry was at amity, whereupon Henry demanded his rebel of the French king. *Sed non prevaluit.*—POLE'S CASE (*temp.* 1509–1547), 4 Co. Inst. 153.

*Annotation:—*Refd. Magdalena Steam Navigation Co. *v.* Martin (1859), 2 E. & E. 94.

404. Foreign minister accredited to foreign country—Service on—Resident outside jurisdiction—Cause of action arising outside jurisdiction.]—NEW CHILE GOLD MINING CO. *v.* BLANCO (1888), 4 T. L. R. 346, D. C.

Forfeiture of privilege.]—See Sub-sect. 3, *post*.

Waiver of privilege.]—See Sub-sect. 4, *post*.

Actions by & against foreign Sovereigns & Governments.]—See ACTION, Vol. I., p. 45, *et seq.*

B. Families of Ministers.

405. Brother — Not within privilege.]—The brother of a Portuguese ambassador having been concerned in a riot & murder in London, was arrested & arraigned in the Upper Bench before a special commission of oyer & terminer, & tried by a jury of six denizens & six aliens. He pleaded that he was not only the ambassador's brother, but that he had a commission to himself to be ambassador when his brother should be absent, & that by the law of nations he was privileged:—

Held: by the common law, the civil law & the law of nations the proceedings in the case were justified.—DON PANTALEON SA, PRIVILEGE OF AMBASSADOR'S CASE (1654), 5 State Tr. 462.

*Annotation:—*Refd. Taylor *v.* Best (1854), 14 C. B. 487.

406. Wife—Residing at embassy—Not ordinarily resident within the jurisdiction—Service of writ out of jurisdiction.]—The wife of an ambassador to this country who resides with her husband at the embassy is not ordinarily resident within the jurisdiction within the meaning of Ord. 11, r. 1 (c), so as to entitle a pltf. in proceedings against her, after she has left this country, to serve notice of the writ upon her out of the jurisdiction.—GHIKIS *v.* MUSURUS (1909), 25 T. L. R. 225.

C. Suites of Ministers.

407. General rule.]—MATTUEOF'S CASE, No. 390, *ante*.

408. Agent attached to embassy & acting under control of minister—Within privilege.]—An injunction was obtained *ex parte* against a deft., who was an agent of the Queen of Spain sent to this country for the purpose of discharging claims due from that sovereign's govt. & entirely subject to the control of the Spanish ambassador in this country:—*Held:* the injunction must be dissolved, the ct. considering deft. was not subject to the jurisdiction.—SERVICE *v.* CASTANEDA (1845), 2 Coll. 56; 1 New Pract. Cas. 17; 14 L. J. Ch. 315; 5 L. T. O. S. 143; 9 Jur. 524; 63 E. R. 635.

409. Attaché—Not liable for rates.]—A lease of a dwelling-house contained a covenant by the lessee to pay all rates, taxes, assessments, & impositions on the demised premises. The lessee assigned the same to an *attaché* of a foreign embassy who occupied them as his residence:—*Held:* payment of rates was not enforceable against an *attaché* of a foreign embassy.—PARKINSON *v.* POTTER (1885), 16 Q. B. D. 152; 55 L. J. Q. B. 153; 53 L. T. 818; 50 J. P. 470; 34 W. R. 215; 2 T. L. R. 184, D. C.

*Annotation:—*Refd. *Re* Suarez, Suarez *v.* Suarez, [1918] 1 Ch. 176.

410. Honorary attaché — Appointment not obtained bonâ fide—Liability to civil process.]—Debtor was a British subject who up to 1890 had carried on business in London. In 1891 he was appointed by the Persian Ambassador an honorary *attaché* of the embassy, having previously been Consul-General for Persia in London, & his name was sent in to the Foreign Office as a member of the ambassador's suite. His appointment had in no way been recognised by the British Govt. In 1891 a judgment was obtained against him, by consent, in an action commenced in 1890 in respect of transactions connected with the business he carried on. A petition in bkpcy was presented against him in 1891, founded upon the judgment, & debtor claimed immunity from all civil process as a member of the Persian Embassy:—*Held:* debtor was not entitled to the privilege claimed, his appointment having been obtained for the purpose of protecting him against his creditors, & having been inadvertently made by the Persian Ambassador.—*Re* CLOETE, *Ex p.* CLOETE (1891), 8 Morr. 195; 65 L. T. 102; 55 J. P. 758; 7 T. L. R. 565, C. A.

411. British subject accredited by foreign government—When privileged.]—A British subject, accredited to Great Britain by a foreign govt.

PART XII. SECT. 2, SUB-SECT. 1.—A.

399 i. Extent of privilege.—
*dor's goods.]—*Captured articles belonging to an ambassador which had been

shipped in the name of an enemy's consignee restored. Where captors refused to consent to restitution, the ct. directed an appeal to be entered on behalf of the claimant, & intimated

that, upon an application, it would deliver the property to his agent upon bail.—THE AMANDA (1813), Stewart, 442.—CAN.

as a member of its embassy, is, unless he has been received by the British govt. upon the express condition that he shall be subject thereto, exempt from the local jurisdiction of his own country.—*MACARTNEY v. GARBUTT* (1890), 24 Q. B. D. 368; 62 L. T. 656; 54 J. P. 437; 38 W. R. 559; 6 T. L. R. 214.

Annotation :—*Distd. Re Cloete, Ex p. Cloete* (1891), 65 L. T. 102.

412. Secretary of legation—Within privilege.]—*Re REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LTD., No. 402, ante.*

— **Acting as chargé d'affaires in absence of ambassador.]—***See No. 395, ante.*

— **Waiver of privilege by.]—***See Sub-sect. 4, post.*

D. Servants of Ministers.

(a) In General.

413. Privilege of ambassador not of servant.]—

(1) The privilege of freedom from arrest of an ambassador's servant is the privilege of the ambassador & not of the servant.

(2) Although an ambassador's servant may be privileged as to his person, it does not follow that all his goods are privileged also, so as to enable the sheriff to apply to set aside a *fi. fa.* issued against him.

(3) In order to exonerate a sheriff from returning a *fi. fa.* on the ground that deft. is privileged as domestic servant of a foreign minister under Diplomatic Privileges Act, 1708 (c. 12), s. 5, his acts of attendance on & actual *bond fide* service of the ambassador must be clearly shown.

(4) On an application by the sheriff to quash a rule to return a writ of *fi. fa.*, it is not sufficient to show that defts. name is in the list transmitted by the Secretary of State to the sheriff's office, of persons privileged as attached to an embassy in pursuance of the above Act, but it must be clearly shown that deft. is in the actual & *bond fide* service of the ambassador.

(5) *Semble* : a chorister *bond fide* hired & paid by an ambassador to assist in the Roman Catholic ritual in his chapel for himself & suite & attending there to do that service is within the above Act.—*FISHER v. BEGREZ* (1833), 2 Cr. & M. 240; 2 Dowl. 279; 1 Tyr. 35; 149 E. R. 750.

Annotations :—*As to* (1) *Consd. Parkinson v. Potter* (1885), 16 Q. B. D. 152; *Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139. *Reid. Leslie v. Disney* (1834), 1 Cr. M. & R. 578. *As to* (2) & (3) *Expld. Parkinson v. Potter* (1885), 16 Q. B. D. 152. *Reid. Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139.

414. Servants must be *bond fide* menial & domestic.]—There is no privilege to servants of ambassadors unless *bond fide* menial & domestic.—*POITIER v. CROZA* (1749), 1 Wm. Bl. 48; 96 E. R. 26.

Annotation :—*Consd. Parkinson v. Potter* (1885), 16 Q. B. D. 152.

415. "Domestic servant"—Distinguished from menial servant.]—Deft. moved to be discharged upon the Act of Parliament as a domestic or menial servant of Baron H., envoy from the Duke of M., & obtained a rule *nisi*. The words of the envoy's certificate produced by deft. were menial servant only, which was not within the Act, the words of the Act being domestic servant :—*Held* : the rule must be discharged.—*TOMS v. HAMMOND* (1733), Barnes, 370; 94 E. R. 959.

Annotation :—*Reid. Carolino's Case* (1744), 1 Wils. 78.

416. — Nature of service must be shown—By person claiming exemption as.]—(1) To be a privileged servant within Diplomatic Privileges Act, 1708 (c. 12), the party need not actually live in the ambassador's house.

(2) It is not enough that he is registered in the secretary's office as a servant.

(3) When he comes for the benefit of the Act, he must show the nature of his service.

(4) *Qu.* : whether a servant, who, as an infant was a trader but exercised no trade since attaining full age was excluded from privilege under the above Act.—*WIGMORE v. ALVAREZ* (1731), Fitz-G. 200; 94 E. R. 719; *sub nom. WIDMORE v. ALVAREZ*, cited in 2 Stra. 797.

Annotation :—*As to* (1) (2) & (3) *Reid. Lockwood v. Coysgarne* (1765), 3 Burr. 1676.

417. — Necessity of proof that servant not a trader.]—Diplomatic Privileges Act, 1708 (c. 12), does not extend to any servant who is a merchant, or trader, & the affidavit on which deft. moves, should show that he is no trader.—*CRUTCHFIELD v. LOCKMAN* (1734), Cunn. 97; 94 E. R. 1086.

418. — Cannot become bail.]—The domestic servant of a foreign ambassador cannot become bail.—*LOCK'S CASE* (1831), 1 Dowl. 124.

— **Forfeiture of privileges by trading.]—***See Sub-sect. 3, post.*

— **Whether residence in house of minister essential.]—***See Sub-sect. 1, D. (c), post.*

— **Whether actual service necessary.]—***See Sub-sect. 1, D. (b), post.*

419. Wife of secretary—Not privileged.]—

Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband & wife, the ct. refused to quash the writ, though the husband swore that before & at the time of the arrest, he was in the actual employment of the ambassador, & in daily attendance upon him in writing dispatches & other official documents.—*ENGLISH v. CABALLERO* (1823), 3 Dow. & Ry. K. B. 25.

420. Extent of privilege—Distrain on goods of servants—Not living in house of ambassador—Goods not necessary for convenience of ambassador.]—*NOVELLO v. TOOGOOD*, No. 435, *post*.

421. — —.]—*FISHER v. BEGREZ*, No. 413, *ante*.

(b) Necessity for actual Service.

422. General rule—Mere retainer insufficient.]—

A person who is only retained as the servant of an ambassador is not protected from arrest.—*CROSSE v. TALBOT* (1724), 8 Mod. Rep. 288; 88 E. R. 205.

Annotation :—*Consd. Taylor v. Best* (1854), 14 C. B. 487.

423. — Defendant must swear to actual service in capacity employed.]—On a rule to show cause why deft. should not be discharged out of custody for being a servant to an ambassador :—*Held* : deft. should have sworn that he actually served in the capacity he was hired, & the rule was discharged.—*BALL v. FITZGERALD* (1730), 1 Barn. K. B. 401; 94 E. R. 270.

Annotation :—*Reid. Carolino's Case* (1744), 1 Wils. 78.

424. — —.]—Privilege from a foreign minister is not allowed, unless deft. swear to the nature of his employment, & to the actual performance of it.—*FONTAINIER v. HEYL* (1765), 3 Burr. 1731; 97 E. R. 1070.

425. — Defendant must be in service at time of arrest.]—On showing cause why deft. should not be discharged out of custody as a domestic servant to R. Minister from the Prince Bishop of L., he swore himself to be *bond fide* English secretary to R. and to have been *bond fide* hired by him as such & to have *bond fide* received wages as they became due :—*Held* : as he had not shown he was in service at the time of arrest he was not entitled to privilege.

The process of the law shall not indeed take a person out of the service of a public minister, but

Sect. 2.—Ambassadors and other diplomatic persons : Sub-sect. 1, D. (b), (c) & (d) ; sub-sect. 2, A. & B. ; sub-sect. 3.]

on the other hand a public minister cannot take a person out of the custody of the law by afterwards taking him into his service (ASTON, J.).—HEATHFIELD v. CHILTON (1767), 4 Burr. 2015 ; 98 E. R. 50.

Annotations :—Refd. The Charkieh (1873), L. R. 4 A. & E. 59. Mentd. West Rand Central Gold Mining Co. v. R., [1905] 2 K. B. 391.

426. — Appointment must be *bonâ fide*—Not colourable.]—It is not a sufficient justification to the sheriff for refusing to execute process, that the individual against whose person or goods it issues has the appointment of domestic servant to a foreign minister at our ct. & that notice of this has been stuck up at the sheriff's office, unless the appointment be *bonâ fide* ; and in an action against the sheriff for a false return, pltf. may show that the appointment was merely colourable.—DELVALLE v. PLOMER (1811), 3 Camp. 47.

Annotation :—Mentd. Lloyd v. Harrison (1865), 6 B. & S. 36.

427. — Acts of attendance & actual *bonâ fide* service—Must be shown.]—FISHER v. BEGREZ, No. 113, *ante*.

428. English secretary — Actually exercising office.]—Deft. was secretary to the resident from Venice, but yet was taken in execution. Upon affidavit from the resident that he was so, & that his name was entered in the Duke of N.'s office, though it was not transmitted over to the Sheriff of M. at the time he was arrested, & upon affidavit that he really exercised the office, the ct. discharged him.—WARD v. PURCEL (1728), 1 Barn. K. B. 79 ; 94 E. R. 54 ; *subsequent proceedings*, 1 Barn. K. B. 80.

Annotation :—Refd. Carolino's Case (1744), 1 Wils. 78.

429. — — — — Actual *bonâ fide* service sufficient proof.]—It is not to be expected that every particular act of the service should be particularly specified : it is enough, if an actual *bonâ fide* service be proved, & if such service be sufficiently proved by affidavit, we must not, upon bare suspicion only, suppose it to have been merely colourable & collusive (LORD MANSFIELD).—TRIQUET v. BATH (1761), 3 Burr. 1478 ; 1 Wm. Bl. 471 ; 97 E. R. 936.

Annotations :—Refd. Viveash v. Becker (1814), 3 M. & S. 284 ; Taylor v. Best (1854), 14 C. B. 487 ; Re Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139 ; Re Suarez, Suarez v. Suarez, [1918] 1 Ch. 176. Mentd. The Charkieh (1873), L. R. 4 A. & E. 59 ; R. v. Keyn (1876), 2 Ex. D. 63 ; West Rand Central Gold Mining Co. v. R., [1905] 2 K. B. 391.

430. — Also purser of warship.]—Protection of an ambassador, to his English secretary was disallowed, because it appeared he was a purser of a ship of war.—DARLING v. ATKINS (1770), 3 Wils. 33 ; 95 E. R. 917.

Annotation :—Consd. Fisher v. Begrez (1832), 1 Cr. & M. 117.

431. Chaplain to ambassador.]—A chaplain to an ambassador, if he does no duty in his house, is not protected.—SEACOMB v. BOWLNEY (1744), 1 Wils. 20 ; 95 E. R. 469.

432. Interpreter to ambassador.]—C. was interpreter to the ambassador to Great Britain from the Bey of Tripoli & being arrested for a debt, a rule was made for the parties against him to show cause why he should not be discharged out of custody, which rule was founded upon C.'s own affidavit, that he was retained by the ambassador to be his interpreter, for the wages of 30l. per annum, & upon the certificate of the ambassador that he was his interpreter :—*Held* : that it did not appear C. was a domestic servant & the rule must be discharged.

It was formerly thought necessary that a foreign ambassador's servant must lie in the house to entitle him to protection under Diplomatic Privileges Act, 1708, c. 12 (WRIGHT, J.).—CAROLINO'S CASE (1744), 1 Wils. 78 ; 95 E. R. 502.

433. Land-waiter at Customs.]—A land-waiter at the Customs is not an ambassador's menial servant.—MASTERS v. MANBY (1757), 1 Burr. 401 ; 97 E. R. 370.

434. Domestic physician—Colourable appointment.]—A domestic physician is not protected by an ambassador's retainer.—LOCKWOOD v. COYS-GARNE (1765), 3 Burr. 1676 ; 97 E. R. 1041.

435. Chorister in ambassador's chapel—Engaging in other professions.]—(1) It is doubtful whether a British born subject, who follows the professions of a music master & a teacher of languages, & is also prompter at the Italian Opera, can be considered as the domestic servant of an ambassador, because he officiates as first chorister in the ambassador's chapel.

(2) Such a person, renting a large house, & letting out a part of it in lodgings, is clearly liable to have his goods, not being necessary for the convenience of the ambassador, distrained upon for the poor rates.—NOVELLO v. TOOGOOD (1823), 1 B. & C. 551 ; 2 Dow. & Ry. K. B. 833 ; 1 L. J. O. S. K. B. 181 ; 107 E. R. 201.

Annotations :—Consd. Parkinson v. Potter (1885), 16 Q. B. D. 152. Refd. Brunswick v. Hanover (1844), 13 L. J. Ch. 107 ; Re Suarez, Suarez v. Suarez, [1918] 1 Ch. 176.

436. — — — — Bonâ fide hired & paid by ambassador.]—FISHER v. BEGREZ, No. 413, *ante*.

(c) Necessity for Residence in Minister's House.

437. Not essential — English secretary.]—On motion to discharge deft. out of execution as being an ambassador's servant, viz. his English secretary, it was objected he did not lie in the house :—*Held* : the nature of his employment required his attendance at the house & the execution must be set aside.—EVANS v. HIGGS (1728), 2 Stra. 797 ; 2 Ld. Raym. 1524 ; 93 E. R. 854 ; *subsequent proceedings*, *sub nom.* HIGGS v. EVANS (1730), 2 Stra. 837.

Annotation :—Refd. Carolino's Case (1744), 1 Wils. 78.

438. — — — —]—WIGMORE v. ALVAREZ, No. 416, *ante*.

439. — — — —]—The servant of a foreign minister was arrested, though not lodging in his house :—*Held* : it was a breach of privilege, within Diplomatic Privileges Act, 1708 (c. 12).—*Re HASLANG (COUNT)* (1755), Dick. 274 ; 21 E. R. 274.

440. S. P. PRICE v. SCHOMBERG (1756), Barnes, 125 ; 91 E. R. 986.

441. — — — — Formerly thought necessary.]—CAROLINO'S CASE, No. 432, *ante*.

(d) Registration at Office of Secretary of State.

442. Whether essential.]—The secretary of a foreign minister is privileged from arrest, though his name be not registered at the office of either of the Secretaries of State.—HOPKINS v. DE ROBECK (1789), 3 Term Rep. 79 ; 100 E. R. 465.

Annotations :—Appld. Parkinson v. Potter (1885), 16 Q. B. D. 152. Refd. Re Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139.

443. Whether mere registration sufficient to confer privilege.]—WIGMORE v. ALVAREZ, No. 416, *ante*.

444. — — — —]—DELVALLE v. PLOMER, No. 426, *ante*.

445. — — — —]—FISHER v. BEGREZ, No. 413, *ante*.

SUB-SECT. 2.—THE CONSULAR SERVICE.

A. Privileges of Foreign Consuls.

446. Whether privileged—Not a public minister.]—Deft. who was stated to be consul general of the Sublime Porte in London, being in custody under an arrest, a *rule nisi* was obtained for his discharge. Evidence having been produced that deft. had been dismissed from his office:—*Held*: the rule must be discharged.

The words of the statute are "ambassador or other public minister," but a consul is certainly not a public minister (MANSFIELD, C.J.).—CLARKE v. CRITICO (1808), 1 Taunt. 106; 127 E. R. 772.

Annotation:—*Reid*. Viveash v. Becker (1814), 3 M. & S. 284.

447. — Resident London merchant appointed consul to foreign prince.]—A resident merchant of London was appointed & acted as consul to a foreign prince:—*Held*: he was not exempted from arrest upon mesne process.—VIVEASH v. BECKER (1814), 3 M. & S. 284; 105 E. R. 619.

Annotations:—*Consd.* Fenton Textile Assocn. v. Krassin (1921), 38 T. L. R. 259. *Reid*. Service v. Castaneda (1845), 2 Coll. 56. *Mentd.* Re Suarez, Suarez v. Suarez, [1918] 1 Ch. 176.

448. Determination of privileges of—On dismissal.]—Where a person had been appointed consul general from the Porte, but was dismissed from his employment before his arrest & another person appointed in his room:—*Held*: not to be privileged from arrest, though at the time of the arrest he had not received any official notification of his dismissal, or of the appointment of the other.—MARSHALL v. CRITICO (1808), 9 East, 447; 103 E. R. 643.

Annotations:—*Reid*. Musurus Bey v. Gadban, [1894] 1 Q. B. 533. *Mentd.* Re Suarez, Suarez v. Suarez, [1918] 1 Ch. 176.

Forfeiture of privileges.]—*See* Sub-sect. 3, *post*.

449. Whether entitled to sue—For business transacted as officer of own government—In conformity to express instructions.]—A foreign consul, resident in England, & receiving a salary from his own govt., cannot maintain an action for the trouble & labour he has been put to, in transacting business for merchants here, in which he acted as the officer of his own govt., & in conformity to their express instructions.—DE LEMA v. HALDIMAND (1824), Ry. & M. 45; *sub nom.* DE LAMA v. HALDIMAND, 1 C. & P. 183, N. P.

B. Rights and Liabilities of British Consuls.

450. Whether liable to give security for costs—Plaintiff in English action—Resident abroad.]—Pltf. was consul abroad: deft. applied, that pltf. might give security for costs, according to the course of the ct.:—*Held*: pltf. must be considered as a land, or sea officer in the service of his Majesty, & therefore the application was refused.—COLLIER v. JONES (1751), Dick. 154; 21 E. R. 227.

Annotation:—*Reid*. Evelyn v. Chippendale (1839), 9 Sim. 497.

451. Cannot be compelled to advance money—Without adequate security.]—(1) A British consul cannot be compelled to advance money, nor without adequate security.

PART XII. SECT. 2, SUB-SECT. 2.—A.

n. Whether liable to be sued—For libel.]—Where the Spanish Consul in his official capacity wrote a letter to the Governor of Newfoundland, containing certain charges reflecting on the character of a Justice of the Peace for Newfoundland, the latter instituted libel proceedings against him. At the hearing the Consul entered a protest against the trial on the grounds that the ct. had no jurisdiction to try him for such a cause, that he could not be prosecuted before the tribunal of the country of his residence, & that

the subject matter of the suit was a matter to be decided by the Govt. of Spain & the law of nations:—*Held*: the protest could not be received however available it might be as a ground of non-suit.—GRIEVE v. CABALLERO (MARQUIS) (1858), 4 Nfld. L. R. 201.—NFLD.

PART XII. SECT. 2, SUB-SECT. 2.—B.

o. British Consul at Samoa—Liability to be sued in Fiji for assault & false imprisonment—Offence committed at Samoa—Notice of action.]—In an action in the Supreme Ct. of Fiji

A ship having arrived at Boston, the captain who was owner having died on the voyage, & the mate being anxious to be relieved of his duties as captain, the British consul, the guardian of unprotected British property received the freight, paid the sailors, applied the freight to that purpose & to the payment of other necessary expenses, substituted a new captain, & accompanied the ship to New Brunswick, where a cargo had already been provided, agreeably to the old charter-party. For his services a percentage was charged upon the total value as remuneration for his services.

The consul is acting as a public officer of the state, entitled to a liberal *honorarium* fit to be enforced by law, if requisite, for his attentions (LORD STOWELL).—THE ZODIAC (1825), 1 Hag. Adm. 320.

Annotations:—*Reid*. The Cynthia (1852), 20 L. T. O. S. 51. *Mentd.* The Cognac (1832), 2 Hag. Adm. 377; The Kennerley Castle (1833), 3 Hag. Adm. 1; The Glenmanna (1860), Lush. 115; The Karnak (1868), L. R. 2 A. & E. 289.

452. Right to remuneration for services—Consul acting as public officer of state.]—THE ZODIAC, No. 451, *ante*.

453. Authorised to certify handwriting & authority of commissioner—Receiving acknowledgment of married woman—Consular Advances Act, 1825 (c. 87), s. 20.]—The British consul at a foreign port has authority, under the above Act to certify the handwriting & authority of a comr. who receives the acknowledgment of a married woman.—*Re* BARBER'S TRUSTEES (1835), 2 Bing. N. C. 268; 1 Hodg. 318; 5 L. J. C. P. 81; 132 E. R. 105.

Annotation:—*Reid*. Le Veux v. Berkeley (1844), 5 Q. B. 836.

See, now, Commissioners for Oaths Act, 1889 (c. 10), s. 12.

See, further, NOTARIES.

Effect of residence of consular officer in foreign country—On domicile.]—*See* CONFLICT OF LAWS, p. 339, *ante*.

SUB-SECT. 3.—FORFEITURE OF PRIVILEGE.

454. Acting contrary to safety & welfare of country—Ambassador.]—Where a public minister engages in acts contrary to the safety & welfare of the state in which he resides, he may be arrested & detained, & his house may be searched & his papers seized.—GHILLENBERG'S CASE (1717), 1 Martens' Causes Célèbres 97.

455. Engaging in trade—Ambassador.]—A foreign minister who uses merchandizing does not thereby lose his privilege; matters of commerce may be proper objects for the employment of ambassadors. *Qu.*: whether consuls have such privilege.—BARBUT'S CASE (1737), Cas. temp. Talb. 281; 25 E. R. 777, L. C.

Annotations:—*Reid*. Triquet v. Bath (1764), 3 Burr. 1478; Heathfield v. Chilton (1767), 4 Burr. 2015; Viveash v. Becker (1814), 3 M. & S. 284; Taylor v. Best (1854), 14 C. B. 487; The Charkieh (1873), L. R. 4 A. & E. 59; *Re* Republic of Bolivia Exploration Syndicate, [1914]

brought against the British Consul at Samoa for damages for wrongful arrest & imprisonment of a British subject in that country:—*Held*: (1) the Consul was answerable in such action; (2) he was not entitled, independently of legislative enactment, to a month's notice of action.—MARTIN v. LIARDET (1877), Udal, 24.—FIJI.

p. — — — Consul acting in official capacity.]—HARDING v. LIARDET (1877), Udal, 15.—FIJI.

q. — — — No power to deport British subject from Samoa.]—MARTIN v. LIARDET (1877), Udal, 24.—FIJI.

Sect. 2.—Ambassadors and other diplomatic persons:
Sub-sects. 3, 4 & 5. Sects. 3, 4 & 5. Part XIII.

1 Ch. 139; *Re Suarez*, *Suarez v. Suarez*, [1918] 1 Ch. 176; *Fenton Textile Asscn. v. Krassin* (1921), 38 T. L. R. 259. *Montd. R. v. Keyn* (1876), 2 Ex. D. 63; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391.

456. ———.]—*TAYLOR v. BEST*, No. 395, *ante*.

457. ——— Domestic servant of ambassador—**Ceasing to trade on attaining full age.**]—*WIGMORE v. ALVAREZ*, No. 416, *ante*.

458. ———.]—*CRUTCHFIELD v. LOCKMAN*, No. 417, *ante*.

459. ——— — .]—*TAYLOR v. BEST*, No. 395, *ante*.

460. ——— Consul.]—*BARBUI'S CASE*, No. 455, *ante*.

461. **Piracy—Ambassador.**]—A subject of the King of Morocco, pretending to be ambassador to the United Provinces, seized on the sea a Spanish ship, Barbary being at War with Spain, & then came to England, where the Spanish ambassador prosecuted him as a pirate. The civilians were asked for their opinion; they agreed that an ambassador is privileged by the law of nature & of nations; if he commits any offence against the law of nature or reason, he loses his privilege, but not if he offends against a positive law of another kingdom. The common law judges gave no heed to the civilian's opinions but held that piracy should be tried on the Stat. 28 H. 8, c. 15. *Semble*: it would not have been a felony if the seizure of the ship had been on land for it is lawful for one enemy to take from the other.—*MARCHE'S CASE* (1615), 1 Roll. Rep. 175; 81 E. R. 411.

SUB-SECT. 4.—WAIVER OF PRIVILEGE.

462. **By submission to the jurisdiction.**]—*TAYLOR v. BEST*, No. 395, *ante*.

463. ——— **Necessity for strict proof of waiver & full knowledge of party waiving rights.**]—A foreign diplomatist is, by common law & statute, absolutely exempt from the jurisdiction of the English cts. If it is sought to show that he has waived his privilege, the waiver must be strictly proved, & it must also be shown that he had at the time of the alleged waiver a full knowledge of his privileged position & a desire to waive it. The privilege being that of the sovereign state which he represents, it is doubtful if a diplomatist can waive his right to exemption & submit himself to the jurisdiction of the English cts. without first obtaining the sanction of his own govt.—*Re REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LTD.*, [1914] 1 Ch. 139; 83 L. J. Ch. 226; 109 L. T. 741; 30 T. L. R. 78; 58 Sol. Jo. 173.

Annotation:—*Folld. Re Suarez*, *Suarez v. Suarez*, [1917] 2 Ch. 131.

464. ——— **Necessity for consent of own government.**]—*Re REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LTD.*, No. 463, *ante*.

465. ———.]—An ambassador or other foreign minister can, with the consent of his sovereign or govt., waive his diplomatic privilege, notwithstanding the provisions of Diplomatic Privileges Act, 1708 (c. 12), & submit to the jurisdiction of the cts. of the country to which he is accredited.

Deft. a minister to this country accredited by a foreign state, had been surcharged upon his accounts in administration proceedings, & had failed to comply with orders for payment into ct. notwithstanding that he had instructed counsel to waive his privilege as a diplomatic agent, & pltf.

applied for leave to issue a writ of sequestration against the property & effects of deft. for the enforcement of the orders for payment into ct. It appeared that deft.'s diplomatic position had ceased to exist, he having, while he was minister by the direction or with the consent of his govt. expressly waived his diplomatic privilege & voluntarily come in under the proceedings & taken advantage of them to obtain an order against pltf. to account:—*Held*: the ct. notwithstanding the ambassadorial character of deft. had jurisdiction to make the orders it had made, including the order for the issue of the writ of sequestration.—*Re SUAREZ*, *SUAREZ v. SUAREZ*, [1918] 1 Ch. 176; 87 L. J. Ch. 173; 118 L. T. 279; 34 T. L. R. 127; 62 Sol. Jo. 158, C. A.

SUB-SECT. 5.—EFFECT OF PRIVILEGE.

466. **Security for costs—Whether ambassador liable for.**]—The ct. will not compel a foreign ambassador to give security for costs.—*DE MONTELLANO (DUKE) v. CHRISTIN* (1816), 5 M. & S. 503; 105 E. R. 1135.

Annotations:—*Distd. Brazil (Emperor) v. Robinson* (1887) 5 Dowl. 522. *Reid. Taylor v. Best & Drouet* (1854) 22 L. T. O. S. 223.

467. ——— **Whether ambassador's servant liable for.**]—If an ambassador's servant brings a bill he must give security to answer costs, as being a person privileged.—*GOODWIN v. ARCHER* (1727) 2 P. Wms. 452; 24 E. R. 809.

Annotation:—*Reid. De Montellano v. Christin* (1816), 5 M. & S. 503.

SECT. 3.—TREATIES.

468. **Whether consent of legislature necessary—Cession of territory—From government of India to native states.**]—The transfer under an Ord. of the governor-general of India in Council of British territories from ordinary British jurisdiction of the govt. of India to the supervision, laws & regulations of a political agency, by excluding such territories from the British regulations & codes theretofore in force therein, & from the jurisdiction of all British cts. theretofore established therein, with a view to the substitution of a native jurisdiction under British supervision & control, cannot be made without a legislative Act. Such transfer of jurisdiction, even if valid, would not amount to a cession of British territory to a native state; nor would it deprive the Crown of its territorial rights over the transferred districts or the persons resident therein of their rights as British subjects.—*DAMODHAR GORDHAN v. DEORAM KANJI* (1876), 1 App. Cas. 332, P. C. *Annotation*:—*Consd. Hemchand Devchand v. Azam Sakarlal Chhotamial*, [1906] A. C. 212.

469. ——— **Interference with private rights.**]—*Qu.*: whether the Crown has the power of compelling its subjects to obey the provisions of a treaty made either for the purpose of putting an end to war or to preserve peace, or, whether interference with private rights can be authorised otherwise than by the legislature.

Where the Govt. justified certain acts, in derogation of the private rights of pltf. in regard to his lobster fishery, as acts & matters of state arising out of political relations between Her Majesty & the French Govt., contending that they involved the construction of treaties, & of a temporary *modus vivendi* for lobster fishing in N. & other acts of state, & that they were matters which could not be inquired into by the ct.:—*Held*: this defence

disclosed no answer to the action.—*WALKER v. BAIRD*, [1892] A. C. 491; 61 L. J. P. C. 92; 67 L. T. 513, P. C.

Annotations:—*Consd. Johnstone v. Pedlar*, [1921] 2 A. C. 262. *Reid. Francis, Times v. Carr* (1900), 82 L. T. 698.

Treaties of war & peace.—*See, generally*, Part XIII., Sect. 2, *post*.

470. Construction of—As though contract.—In interpreting a treaty as to exemptions or privilege all articles of the treaty must be taken into consideration as though it was a contract.—*LES QUATRES FRÈRES* (1778), Marr. 170.

471. — According to intention of parties.—Treaties, like other compacts, are to be construed according to the intention of the contracting parties (*LORD GIFFORD*).—*DANIEL v. COMRS. FOR CLAIMS ON FRANCE* (1825), 2 Knapp, 23; 2 State Tr. N. S. App. A. 988; 12 E. R. 387, P. C.

Annotation:—*Mentd. Daimler Co. v. Continental Tyre & Rubber Co.* (1916), 85 L. J. K. B. 1332.

472. — — — — ——A treaty must be interpreted with reference to the intention of the contracting parties as gathered from the whole instrument.—*THE IONIAN SHIPS* (1855), Spinks, 193; 2 Ecc. & Ad. 212; 8 State Tr. N. S. 434; 1 Jur. N. S. 549; 164 E. R. 394; *sub nom. THE LEUCADE*; 25 L. T. O. S. 312; *subsequent proceedings, sub nom. THE LEUCADE*, 2 Ecc. & Ad. 228.

Annotation:—*Mentd. R. v. Crewe, Ex p. Selkome*, [1910] 2 K. B. 576.

473. Treaty providing compensation—Property confiscated by foreign Power.—Where there was a treaty providing compensation for losses of movable & immovable property unduly confiscated:—*Held*: no compensation was provided for confiscations of immovable property out of the territory of one of the contracting Powers.—*WEBSTER'S CASE*, *WEBSTER'S REPRESENTATIVES v. CLAIMS ON FRANCE COMRS.* (1834), 2 Knapp, 386; 12 E. R. 532, P. C.

Annotations:—*Reid. Blackburn v. Thompson* (1812), 15 East, 81; *Peru Republic v. Dreyfus* (1888), 38 Ch. D. 348.

474. — Treaty of Peace—Jurisdiction of English courts to construe—Limited to parts of treaty made municipal law of England.—The Treaty of Peace Order, 1919, provides that Part X., sections III. to VII. of the Treaty of Peace shall have full force & effect as law. By virtue of the Treaty of Peace Act, 1919 (c. 33), the Treaty of Peace Order has effect as if enacted in that Act. In the result, therefore, the Treaty of Peace Order & the above-mentioned sections of the Treaty of Peace form part of the municipal law of this country (*RUSSELL, J.*).—*STOECK v. PUBLIC TRUSTEE*, [1921] 2 Ch. 67; 90 L. J. Ch. 386; 125 L. T. 851; 37 T. L. R. 666; 65 Sol. Jo. 605.

Annotation:—*Mentd. Re Chamberlain's Settlement*, [1921] 2 Ch. 533.

— **Particular treaties.**—*See Particular Titles, passim.*

Ratification of treaty of peace.—*See No. 484, post.*

SECT. 4.—FOREIGN JURISDICTION.

Jurisdiction of Consular Courts.—*See COURTS.*

Jurisdiction of political agent outside King's dominions.—*See COURTS; DEPENDENCIES, COLONIES & BRITISH POSSESSIONS.*

SECT. 5.—PASSPORTS.

Conspiracy to obtain—Indictable misdemeanour.

—*See CRIMINAL LAW & PROCEDURE.*

Part XIII.—The Crown in relation to War and Peace.

1.—IN GENERAL.

475. Right of Crown—To grant protection of cartel.—A cartel was appointed in time of peace by an officer in the East India Co.'s service:—*Held*: it was valid against capture in the event of a subsequent war.

His Majesty has a power to confer the protection of cartel. Notwithstanding he may have given away the interest of all captures to the captors he may still grant such particular exemptions as in his wisdom he may deem expedient, & when a cartel appears to have been employed in the public service & for purposes of national utility that circumstance alone will entitle it to be considered as an engagement sanctioned by the public councils of State. Authority delegated by the Crown may be taken as emanating from the Crown (*LORD STOWELL*).—*THE CAROLINA* (1807), 6 Ch. Rob. 336.

476. — To determine its relationship with other countries.—It always belongs to the government of the country to determine in what relation any other country stands towards it, that is a

point upon which Cts. of Justice cannot decide (*GRANT, J.*).—*THE PELICAN* (1809), Edw. App. D.

Annotations:—*Reid. Blackburn v. Thompson* (1812), 15 East, 81; *Peru Republic v. Dreyfus* (1888), 38 Ch. D. 348.

— **To compel pilotage through minefield.**—*See SHIPPING & NAVIGATION.*

477. — To seize private enemy property.—On an appeal from two orders authorising the seizure of private enemy property:—*Held*: (1) under the common law of England the Crown has always had & subject to the effect of the Trading with the Enemy Acts, 1914–16, still has, the right to seize & forfeit private property, including choses in action & equitable interests therein found in this Kingdom belonging to subjects of an enemy State; (2) the right has not been abandoned by desuetude. The powers conferred by the above Acts, however, were so inconsistent with the exercise of the common law right of forfeiture that the right would have to be treated as being thereby at least temporarily superseded; (3) in order to complete the title of the Crown to property

PART XIII. SECT. 1.

r. Royal prerogative as to war—Exercisable by Governor-General—Necessity of occasion for exercise judged by Government.—The royal prerogative as to war, so far as the Commonwealth or any State thereof is concerned, can only be exercised by the Governor-General acting by the ordinary constitutional methods & cannot be exercised by the govt. of a State; the

necessity of the occasion for its exercise must be judged by the Commonwealth Govt.; neither the exercise of the power nor the discretion to judge of the necessity can be delegated to the government of a State; evidence of the existence of a national emergency calling for the exercise of the power, without which the power cannot be exercised, must be given by an officer of the Commonwealth having the

authority to express the opinion of the Commonwealth Govt.—*JOSEPH v. COLONIAL TREASURER* (1918), 25 C. L. R. 32.—AUS.

a. — Wisdom & expediency of acts done in exercise of—Cannot be inquired into in courts of law.—*JOSEPH v. COLONIAL TREASURER* (1917), 17 S. R. N. S. W. 624; 34 N. S. W. W. N. 238; *revid. on other grounds*, 25 C. L. R. 32.—AUS.

Sect. 1.—In general. Sects. 2 & 3 : Sub-sect. 1.]

so seized an inquisition of office would have to be held before the conclusion of peace.

Qu.: whether the forfeiture was invalidated where the property was so seized during war but no inquisition was held until after the conclusion of an armistice.—*Re FERDINAND (EX-TSAR OF BULGARIA)*, [1921] 1 Ch. 107; 90 L. J. Ch. 1, C. A.

See, generally. ALIENS, Vol. II., pp. 147, 148.

478. Relaxation of belligerent rights—Construction of.]—Ord. in Council of Mar. 29, 1854, exempted from capture Russian vessels which prior to its date should have sailed from any foreign port bound for any port in her Majesty's dominions. A vessel under a charterparty for a voyage from H. or M. to C. sailed from H. in ballast prior to that date, took in her cargo at M., & sailed thence subsequently thereto:—*Held*: all relaxation of belligerent rights emanating from the govt. of this country & declared in authentic documents should receive a liberal construction, as liberal a construction as the terms of those documents would admit of, governed & restricted by the words which are used.—*THE ARGO* (1854), 1 Ecc. & Ad. 375; Spinks, 52; 24 L. T. O. S. 16; 18 Jur. 986; 164 E. R. 216.

479. ———.]—A Finnish vessel belonging to B. sailed from H. to C. with a cargo of coals, which she there discharged for the British fleet prior to the declaration of war, which took place on Mar. 29, 1854. She was unable to sail to B. immediately after her cargo was discharged by reason of the ice, but on Apr. 10 she left C. bound for that port in ballast & was captured on Apr. 12:—*Held*: (1) she was not protected by the Ords. in Council; (2) documents such as Ords. in Council relaxing the severity of belligerent rights are to be construed most liberally for those in whose favour they were made; (3) the Queen of England has supreme power, with the advice of her Council, to relax her belligerent rights & so far to make law for the Prize Cts.—*THE PHOENIX (OTHERWISE THE FENIX)* (1854), 1 Ecc. & Ad. 306; Spinks, 1; 23 L. T. O. S. 210; 18 Jur. 656; 164 E. R. 177.

Annotation:—*As to* (2) *Reid*. *The Argo* (1854), Spinks, 52.

SECT. 2.—DECLARATIONS OF WAR AND PEACE.

Treaties generally.]—*See* Part XII., Sect. 3, *ante*.

480. Sovereign alone has power—To declare war or peace.]—*EAST INDIA CO. v. SANDYS (CASE OF MONOPOLIES)*, No. 47, *ante*.

481. ———.]—By the law & constitution of this country the sovereign alone has the power of declaring war & peace. He alone therefore who has the power of entirely removing the state of war has the power of removing it in part by permitting, where he sees proper, that commercial intercourse which is a partial suspension of war (*LORD STOWELL*).—*THE HOOP* (1799), 1 Ch. Rob.

Annotations:—*Reid*. *Potts v. Bell* (1800), 8 Term Rep. 548; *Willison v. Patterson* (1817), 1 Moore, C. P. 133; *The Ionian Ships* (1855), 2 Ecc. & Ad. 212; *The Leucado* (1855), 25 L. T. O. S. 312; *Esposito v. Bowden* (1857),

27 L. J. Q. B. 17; *The Chile* (1914), 84 L. J. P. 1; *The Marie Glaeser*, [1914] P. 218; *Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co., Same v. Tilling* (1915), 84 L. J. K. B. 926; *Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1915] 2 K. B. 379; *The Möwe*, [1915] P. 1; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Morten's Patents*, [1915] 1 K. B. 857; *British & Foreign Marine Insco. v. Sanday*, [1916] 1 A. C. 650; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707; *Horlock v. Beal*, [1916] 1 A. C. 486; *The Manningtry*, [1916] P. 329; *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541; *Continho, Caro v. Vermont*, [1917] 2 K. B. 587; *Ertel Bieber v. Rio Tinto Co., Dynamit Act v. Rio Tinto Co., Vereinigte Königs & Laurahütte Act v. Rio Tinto Co.*, [1918] A. C. 260. *Mentd.* *The Panariellos* (1915), 84 L. J. P. 140; *Robson v. Premier Oil & Pipe Line Co.*, [1915] 2 Ch. 124; *Stevenson v. Akt. für Cartonnagen-Industrie*, [1917] 1 K. B. 842; *Tingloy v. Müller*, [1917] 2 Ch. 144; *Naylor, Benzon v. Krainische Industrie Gesellschaft*, [1918] 1 K. B. 331; *Rodriguez v. Speyer*, [1919] A. C. 59; *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

482. ——— To determine public trade by declaring war—Though trade settled by Act of Parliament.]—*EAST INDIA CO. v. SANDYS (CASE OF MONOPOLIES)*, No. 47, *ante*.

483. State of war—May exist de facto—Without formal declaration.]—A Prussian ship, carrying a cargo of nitrate of soda which was contraband arrived off Dunkirk, to which port she had been ordered by the consignees of cargo, & whilst lying there waiting for the tide her master, hearing that war had broken out between France & Prussia, put back to the Downs, where he arrived on July 17, to make inquiries, but hearing nothing more, & being stopped by his owner, he put into Dover on July 18, & there getting intelligence, refused to proceed to Dunkirk. The ship was running under charter entitling her to be sent to a safe port. War was not declared till July 19, but was imminent on July 16:—*Held*: (1) the ship on July 16 was not bound to go to Dunkirk, as she would have been liable to penalties for trading with the enemies of her country & capture by French cruisers; (2) a state of war might exist *de facto* between two countries, although there had been no formal declaration of war by their govts.—*THE TEUTONIA* (1872), L. R. 4 P. C. 171; 8 Moo. P. C. C. N. S. 411; 41 L. J. Adm. 57; 20 W. R. 421; 1 Asp. M. L. C. 211; 17 E. R. 366, P. C.

Annotations:—*As to* (1) *Distd.* *St. Enoch Shipping Co. v. Phosphate Mining Co.*, [1916] 2 K. B. 621. *Reid.* *The Patria* (1871), L. R. 3 A. & E. 436; *Anderson v. The San Roman, The San Roman* (1873), L. R. 5 P. C. 301; *Akt. Olivebank v. Dansk Soevlsyre Fabrik*, [1919] 2 K. B. 162. *Generally, Reid.* *Horlock v. Beal* (1916), 114 L. T. 193. *Mentd.* *Cargo Ex Argos, Gaudet v. Brown, The Hewsons, Geipel v. Cornforth* (1873), L. R. 5 P. C. 134; *Waugh v. Morris* (1873), L. R. 8 Q. B. 202; *Giovanni Dapucto v. Wyllie, The Pieve Superiore* (1874), L. R. 5 P. C. 482; *Metcalfe v. Britannia Ironworks Co.* (1876), 1 Q. B. D. 613; *Prince v. Union Lighterage Co.*, [1904] 1 K. B. 412; *Wade v. L. & N. W. Ry.*, [1921] 1 K. B. 582.

484. ——— Evidence of—Declaration by government.]—(1) A declaration of war by the govt. of one country against another is evidence of the existence of a war between the two countries.

(2) By the modern usage of states a subsequent ratification by the sovereign authority is necessary to give effect to a treaty of peace although the treaty itself may have been signed by plenipotentiaries.—*THE ELIZA ANN* (1813), 1 Dods. 244.

Annotation:—*As to* (1) *Reid.* *The Teutonia* (1871), L. R. 3 A. & E. 394.

485. ——— Certificate of Secretary of State.]—Gold bullion, the property of a mining co.

PART XIII. SECT. 2.

480 i. Sovereign alone has power—To declare war—Delegation of right.]—The right of making war belongs in every civilised nation to the supreme power of the state, & although this right may be delegated to its inferior authorities in remote possessions, no subordinate authority has the power of declaring war without such delegation

express or implied, or without a subsequent ratification by the supreme authority.—*Re Kok* (1879), 9 Buch. 45.—S. AF.

484 i. State of war—Evidence of—In British Dominions—Declaration or other manifestation by Crown.]—*Held*: until the King, either by express declaration, or by some other manifestations of his hostile intentions, has

placed his dominion in a state of warfare, the state of mutual & reciprocal hostilities between any country & the British Dominions cannot legally commence. When such manifestation is made, & not before, the complete legal state of hostilities exists with all its consequences.—*THE DART* (1812), Stewart, 301.—CAN.

incorporated & registered under the laws of, & carrying on business in, the South African Republic, was insured at Lloyd's to be covered while in transit from the co.'s mine at J. until its arrival in the United Kingdom. The perils insured against included arrests, restraints, & detainments of all kings, princes & people. On Oct. 2, 1899, the gold while in transit was seized by the Govt. of the South African Republic. At that date war was anticipated between Great Britain & the South African Republic but hopes of a peaceful settlement were still entertained. On Oct. 11 war actually broke out. In an action on the policy:—*Held*: (1) plffs. were entitled to recover; (2) the certificate of a Secretary of State as to the date when war broke out between this country & another is evidence of that fact.

I think that the intention of a foreign govt. at any given time ought to be treated by these cts. for such a purpose as that I am now considering as conclusively determined by the way in which our Govt. chooses or has chosen to deal with that foreign Govt., & that where our Govt. has not treated the foreign Govt. as being hostile at a particular time our cts. ought not to try & ascertain what was then in the minds of the King President or responsible Ministers or authorities of the foreign Govt. (ROMER, L.J.).—*JANSON v. DRIEFONTEIN CONSOLIDATED MINES, LTD.*, [1902] A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 18 T. L. R. 796; 7 Com. Cas. 268, II. L.

Annotations:—As to (1) *Reid*. *Robinson Gold Mining Co. v. Alliance Insce.*, [1901] 2 K. B. 919. *Generally, Reid*. *Ingle v. Mannheim Insce.*, [1915] 1 K. B. 227; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857; *Robinson v. Continental Insce. of Mannheim*, [1915] 1 K. B. 155; *Re Sutherland, Beehoff, David v. Bubna* (1915), 31 T. L. R. 248; *Karberg v. Blythe, Green, Jourdain; Schueider v. Burgett & Newsam*, [1916] 1 K. B. 495; *Zinc Corp. v. Hirsch*, [1916] 1 K. B. 541; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *Ertel Bleher v. Rio Tinto Co., Dynamit Akt. v. Rio Tinto Co., Vereinigte Königs & Laurahütte Akt. v. Rio Tinto Co.*, [1918] A. C. 260; *Naylor, Benzon v. Krainische Industrie Gesellschaft*, [1918] 1 K. B. 331; *Central India Mining Co. v. Société Coloniale Anversoise*, [1920] 1 K. B. 753. *Mentd.* *Amorduct Manufacturing Co. v. Defries* (1914), 84 L. J. K. B. 586; *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44; *Stevenson v. Akt. für Cartonnagen-Industrie*, [1917] 1 K. B. 842; *Tingley v. Müller*, [1917] 2 Ch. 144; *Montefiore v. Menday Motor Components Co.*, [1918] 2 K. B. 241; *Rodriguez v. Speyer*, [1919] A. C. 59; *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

486. Effect of—On commercial relations.]

—A declaration of war by this country against a foreign power, imports a prohibition of commercial intercourse with the subjects of that power.

A plea to an action upon a charterparty made between a subject of this country & a Russian subject for loading a cargo at Odessa, stated that at the time of making the contract plff. was a subject of Great Britain & the vessel a British vessel, & deft. a subject of Russia residing & carrying on trade there, & that before the expiration of the time for deft. to load the vessel according to the charterparty & before any breach thereof a state of war existed & had ever since continued between the two countries:—*Held*: this was a

good answer.—*BARRICK v. BUBA* (1857), 2 C. B. N. S. 563; 29 L. T. O. S. 199; 5 W. R. 665; 140 E. R. 536; *sub nom.* *BARWICK v. BUBA*, 26 L. J. C. P. 280.

Annotations:—*Reid*. *Velthardt & Hall v. Rylands* (1917), 86 L. J. Ch. 604. *Mentd.* *Frost v. Knight* (1872), L. R. 7 Exch. 111; *Roper v. Johnson* (1873), L. R. 8 C. P. 167; *Johnstone v. Milling* (1886), 16 Q. B. D. 460.

— — —.]—*See* ALIENS, Vol. II., pp. 162, *et seq.*

487. Treaty of peace—Ratification of by sovereign authority necessary—Though signed by plenipotentiaries.]—*THE ELIZA ANN*, No. 484, *ante*.

488. — Treaty of Peace Order, 1919—Part of English municipal law.]—*STOECK v. PUBLIC TRUSTEE*, No. 474, *ante*.

— — — Position of aliens under.]—*See* ALIENS, Supplement.

SECT. 3.—DEFENCE OF THE REALM.

SUB-SECT. 1.—IN GENERAL.

489. Regulations under Defence of Realm Consolidation Act, 1914 (c. 8)—Binding as statutes.]—

Applt., a foreigner by birth, became a naturalized British subject in 1912 & changed his name by deed poll in 1915 from Ernst to Ernest. In 1919 he was convicted under reg. 14H (1) of the Defence of Realm (Consolidation) Regulations for that, not being a natural-born British subject, he used a name other than that by which he was ordinarily known at the beginning of the war. He contended that reg. 14H (1) was *ultra vires* on the ground that it was not competent by Ord. in Council, issued under the Defence of Realm Consolidation Act, 1914 (c. 8), to deprive him of any rights, powers or privileges which were not at the same time taken away from all British subjects, & that the regulation purported to override an Act of Parliament, although there was no power under the above Act to do so:—*Held*: (1) reg. 14H (1) was not *ultra vires* because it discriminated between naturalised & natural-born British subjects; (2) regulations made by the King in Council under the above Act have all the force of a statute & may take away a statutory privilege or impose a statutory duty.—*ERNEST v. METROPOLITAN POLICE COMR.* (1919), 89 L. J. K. B. 42; 121 L. T. 222; 83 J. P. 182; 35 T. L. R. 512; 26 Cox, C. C. 458; 17 L. G. R. 448, D. C.

490. — Power to issue—Not limited to protection of country against alien enemies—Internal disorder & rebellion included.]—By the Defence of Realm (Consolidation) Act, 1914 (c. 8), s. 1, power was given to His Majesty in Council during the continuance of the war to issue regulations for securing the public safety & the defence of the realm. S. 1, Defence of Realm (Amendment) Act, 1915 (c. 34), s. 1, provided that in the event of invasion or other special military emergency arising out of the war His Majesty might by proclamation suspend the right of trial by jury in the case of offences committed against the regulations & leave the offenders to be tried by cts.-martial:—*Held*: (1) the regulations thereby authorised were not limited to regulations for the

PART XIII. SECT. 3, SUB-SECT. 1.

b. *Bona fide acts done in exercise of war prerogative—Bar action for interference with contractual rights.*—*JOSEPH v. COLONIAL TREASURER* (1917), 17 S. R. N. S. W. 624 34 N. S. W. W. N. 238.—*AUS.*

c. *Emergency legislation (Continuance Act, 1915—Not ultra vires.)*—The above Act is not *ultra vires* of

the Governor-General-in-Council & the High Ct. has not power to call in question orders passed thereunder.—*Re JEW A NATHOO* (1916), 20 C. W. N. 1327.—*IND.*

d. *Rules framed under Defence of India Act, s. 2.*—Rules framed under the above sect. must be read as part of that sect. & are effective from date of publication & are not dependent on remainder of the Act being brought

into operation.—*KANDASAMI PILLAI v. KING-EMPEROR* (1919), 1 L. R. 42 Mad. 69.—*IND.*

e. *Order in Council applying Defence Regulations—In exact accord with statutory powers conferred on Council—Valid—Decision on question of fact preliminary & incidental to Order not open to review.*—*TEWNSLEY v. CENTRAL CONTROL BOARD* (1918), 1 S. L. T. 123.—*SCOT.*

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protection of the country against foreign enemies, but included regulations designed for the prevention of internal disorder & rebellion; (2) when a special military emergency had arisen & a proclamation suspending the right of trial by jury been lawfully made the operation of the proclamation was not limited to the duration of the military emergency but remained in force till the end of the war unless revoked sooner.—*R. v. WORMWOOD SCRUBBS PRISON (GOVERNOR), Ex p. FOY*, [1920] 2 K. B. 305; 89 L. J. K. B. 759; 84 J. P. 94; 36 T. L. R. 432.

Annotation:—*As to (1) Reld. Hudson's Bay Co. v. Maclay* (1920), 36 T. L. R. 469.

491. Proclamation suspending trial by jury—Under Defence of Realm (Amendment) Act, 1915 (c. 34), s. 1 (7)—Limit of operation.]—*R. v. WORMWOOD SCRUBBS PRISON (GOVERNOR), Ex p. FOY*, No. 490, *ante*.

Proclamations generally.]—See Part VI., Sect. 3, ante.

492. Revocation of order under Defence of Realm Regulations—Effect on penalty, forfeiture or punishment incurred in respect of revoked order.]—The revocation of an order under the Defence of Realm Regulations does not affect any penalty forfeiture or punishment incurred in respect of any offence committed against the revoked order where no contrary intention appears in the revoking order, inasmuch as reg. 63 of the Defence of Realm Regulations makes the Interpretation Act, 1889 (c. 63), & consequently s. 38 (2) thereof, applicable to orders under those Regulations.—*BENNETT v. TATTON* (1918), 88 L. J. K. B. 313; 118 L. T. 788; 82 J. P. 303; 31 T. L. R. 591; 16 L. G. R. 786, D. C.

Annotation:—*Consd. R. v. Ellis, Ex p. Amalgamated Engineering Union* (1921), 125 L. T. 397.

SUB-SECT. 2.—COMPULSORY SERVICE.

493. Right of Crown—When necessary for good & safety of Kingdom—To demand ships, men & stores—Without Parliamentary authority.]—*R. v. HAMPDEN, SHIP MONEY CASE*, No. 46, *ante*.

494. ——— To impress mariners—Though not expressly empowered by statute.]—Whenever the public safety calls for it, the Crown has the right to command the service of mariners who have freely chosen a seafaring life & are fitted for the service. The right of impressing mariners for the public service is a prerogative inherent in the Crown grounded upon common law & recognised by many acts of Parliament. It is therefore a great mistake to conclude that it is against law merely because no statute expressly & in terms empowereth the Crown to press. A prerogative grounded upon general immemorial usage not inconsistent with any statute, nor repugnant to the public utility, is as much part of the law of England as statute law.—*BROADFOOT'S CASE* (1743), *Fost.* 154.

Annotation:—*Consd. Galliard v. Laxton* (1862), 2 B. & S. 363.

Under Military Service Acts.]—See ROYAL FORCES.

SUB-SECT. 3.—ENTRY ON LAND.

A. In General.

See, generally, COMPULSORY PURCHASE OF LAND & COMPENSATION, pp. 103, 104.

495. Right to enter, build, or destroy—For purposes of defence of realm or public safety.]—

By the common law every man may come upon his neighbour's land & make bulwarks & trenches upon another's land for defence of the realm, so for saving a city or town a house shall be pulled down if the next be on fire, & so also the suburbs of a city in time of war may be pulled down for the common safety.—*KING'S PREROGATIVE IN SALTPETRE* (1606), 12 Co. Rep. 12; 77 E. R. 1294.

Annotations:—*Consd. Feather v. R.* (1865), 6 B. & S. 257; *Re Petn. of Right*, [1915] 3 K. B. 649; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. **Mentd.** *A.-G. v. Sands* (1869), 3 Rep. Ch. 33; *R. v. Toole* (1867), 16 W. R. 439; *Devonshire v. Pattinson* (1887), 20 Q. B. D. 263.

496. ——— Erection of fortification.]—

The Crown may enter on any land to erect fortifications there.—*MAGDALEN COLLEGE, CAMBRIDGE, CASE* (1615), 11 Co. Rep. 66 b; 77 E. R. 1235; *sub nom. WARREN v. SMITH, MAGDALEN COLLEGE CASE*, 1 Roll. Rep. 151.

Annotations:—*Mentd. Colt & Glover v. Coventry & Lichfield* (1612), *Hob.* 140; *R. v. Hampden* (1637), 3 State Tr. 826; *R. v. Starling* (1664), 1 Keb. 675; *Lyn v. Wyn* (1665), O. Bridg. 122; *Thomas v. Sorrell* (1673), *Freem. K. B.* 85; *Elways v. Cottesford* (1675), 3 Keb. 457; *Woodward v. Fox* (1691), 2 Vent. 267; *R. v. London* (1720), 1 Stra. 318; *A.-G. v. Allgood* (1743), *Park.* 1; *A.-G. v. Downing* (1767), *Wilm.* 1; *A.-G. v. Walker* (1849), 3 Exch. 242; *Abergavenny v. Brace* (1872), L. R. 7 Exch. 145; *Moore v. Clench* (1875), 1 Ch. D. 447; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Perry v. Eames, Salaman v. Eames, Mercers' Co. v. Eames*, [1891] 1 Ch. 658.

497. ———.]—It is law to pull down a house if the next house to it be on fire, & so the suburbs of a town may be pulled down in time of war, & if enemies be on the coast it is good law to come upon another man's land & make bulwarks there, for the public good is preferred before any man's private benefit (*per CUR.*)—*SAMBORNE v. HARILLO* (1621), J. Bridg. 9; 123 E. R. 1162.

498. Whether owner entitled to compensation—Possession taken for purposes of defence.]—The Crown represented by the competent naval & military authorities has power in time of war both by virtue of the Royal prerogative & also under the Defence of the Realm (Consolidation) Act, 1914 (c. 8), & the Regulations thereunder, to take possession of & occupy any lands or premises for the purposes of the defence of the realm without making compensation therefor to the owner. The prerogative right is not limited to a case of actual invasion rendering immediate action necessary.—*Re PETITION OF RIGHT*, [1915] 3 K. B. 649; *sub nom. Re X.'s PETITION OF RIGHT*, 84 L. J. K. B. 1961; 113 L. T. 575; 31 T. L. R. 596; 59 Sol. Jo. 665, C. A.; *on appeal, sub nom. Re X.'s PETITION OF RIGHT* (1916), 32 T. L. R. 699, H. L.

Annotations:—*Consd. Sheffield Conservative & Unionist Club v. Brighton* (1916), 85 L. J. K. B. 1669; *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. **Reld.** *The Lamora*, [1916] 2 A. C. 77; *Lobitos Oilfields v. Admiralty Comrs.* (1917), 86 L. J. K. B. 1444.

499. ———.]—The Crown is not entitled as of right either by virtue of its prerogative or under any statute to take possession of the land or buildings of a subject for administrative purposes in connection with the defence of the realm without paying compensation for their use & occupation.

In May, 1916, the Crown purporting to act under the Defence of the Realm Regulations took possession of a hotel for the purpose of housing the headquarters personnel of the Royal Flying Corps & denied the legal right of the owners to compensation. The owners yielded up possession under protest & by a Petition of Right asked for a declaration that they were entitled to a rent for

the use & occupation of the premises, or in the alternative that they were entitled to compensation under the Defence Act, 1842 (c. 94):—

Held: (1) the suppliants were not entitled to a rent for use & occupation apart from statute as there was no consensus on which to found an implied contract; (2) reg. 2 of the Defence of the Realm Regulations, issued under the Defence of the Realm Consolidation Act, 1914 (c. 8), when read with s. 1 (2) of that Act conferred no new powers of acquiring land, but authorised the taking possession of land under the Defence Act, 1842 (c. 94), while impliedly suspending the restrictions imposed by that Act upon the acquisition & user of land; (3) the Crown had no power to take possession of the suppliants' premises in right of its prerogative *simpliciter*; (4) the suppliants were entitled to compensation in the manner provided by the Defence Act, 1842 (c. 94).—*A.-G. v. DE KEYSER'S ROYAL HOTEL*, [1920] A. C. 508; 89 L. J. Ch. 417; 122 L. T. 691; 36 T. L. R. 600; 64 Sol. Jo. 513, H. L.; *affg.* S. C. *sub nom.* *Re DE KEYSER'S ROYAL HOTEL, LTD., DE KEYSER'S ROYAL HOTEL, LTD. v. R.*, [1919] 2 Ch. 107, C. A. *Annotations*:—*As to* (2) & (3) *Consd.* *Re Ferdinand*, [1921] 1 Ch. 107; *Hudson's Bay Co. v. Muclay* (1920), 36 T. L. R. 469. *Refd.* *R. v. Daily Mail, Ex p. Farnsworth*, [1921] 2 K. B. 733; *R. v. Egan, R. v. Higgins* (1921), 65 Sol. Jo. 782; *Robinson v. R.*, [1921] 3 K. B. 183. *As to* (4) *Refd.* *Curling v. Matthey* (1921), 37 T. L. R. 717.

— Under particular Defence Acts.]—*See*

500. Prerogative right not limited to case of actual invasion.]—*Re PETITION OF RIGHT*, No. 498, *ante*.

B. Under Defence Acts.

501. General rule—Right of owner to compensation under Defence Acts—For injurious affection to adjoining lands.]—Land was compulsorily acquired by the Government for defence purposes under the Defence Acts, 1842–73:—*Held*: the owner of the land was entitled to compensation in respect of any injurious affection of his adjoining lands.—*BLUNDELL v. R.*, [1905] 1 K. B. 516; 74 L. J. K. B. 91; 92 L. T. 53; 53 W. R. 412; 21 T. L. R. 143.

502. 43 Geo. 3, c. 55—Mode of assessing compensation—Not in gross, without reference to time.]—43 Geo. 3, c. 55, s. 10, enabled a jury to assess compensation to the owner or persons interested in land taken possession of by govt. such compensation to be made for the possession or use thereof during the time for which it should be required for the public service:—*Held*: the assessment of compensation only in gross & without reference to time as by an annual rent was bad because of the uncertainty of the period for which the land would be required of which no probable average estimate could be formed pending the exigency.—

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f. 43 Geo. 3 c. 55—Restoration of lands taken under—Crown not bound to restore lands to original condition—Or pay compensation for damage done.]—INCORPORATED SOCIETY FOR PROMOTING PROTESTANT SCHOOLS IN IRELAND *v. R.*, [1900] 1 I. R. 464.—IR.

g. Defence Acts, 1842–1873—Tender of gross sum for absolute purchase of all interests—Possession of Crown.]—The Secretary for War, requiring certain lands for defence purposes, caused the lands to be surveyed, & offered ptff. & his tenants a gross sum for the absolute purchase of the lands. He subsequently took possession of the lands, which included a small portion of the holding of deft. H., a statutory tenant from year to year of ptff. The Secretary for War had obtained from H. a conveyance of his interest in the

portion of his holding so taken, but the compensation for ptff.'s interest in the lands taken had not been ascertained by a valid arbn. Ptff. sued H. & all parties concerned for recovery of possession of H.'s holding for non-payment of rent. The writ having been served on the Secretary for War, a motion was instituted on his behalf, that all proceedings in the action as against him should be stayed:—*Held*: (1) the offer of a gross sum in respect of the absolute purchase of all interests was a sufficient compliance with the statutes; (2) the Secretary for War was lawfully in possession of portion of the land as trustee for the Crown, & as ejectment for non-payment of rent does not lie against the Crown, all proceedings in the action should be stayed as against its representative.—*HARVEY v. HARKIN*, [1898] 2 I. R. 65.—IR.

BINGHAM v. SERLE (1804), 5 East, 534; 2 Smith, K. B. 129; 102 E. R. 1175.

503. Defence Act, 1842 (c. 94)—To what compensation owner entitled—"Compensation for absolute purchase of land"—Not expenses & costs incurred in bringing matter to trial.]—A person whose land has been valued by a jury & sold under the provisions of the above Act is not entitled to expenses & costs which he has necessarily incurred in bringing the matter to trial. The words of s. 19 of the Act, "compensation for the absolute purchase of the land," are not *per se* sufficiently comprehensive to include such expenses & costs.—*Re LAWS* (1847), 1 Exch. 441; 154 E. R. 188; *sub nom.* *LAWS v. H.M. ORDNANCE PRINCIPAL OFFICERS*, 10 L. T. O. S. 189; *sub nom.* *Re LAWS & BOARD OF ORDNANCE*, 12 J. P. 249.

504. — Re-investment of compensation awarded—Recoupment of tenant for life for expenses incurred—Erection of permanent works.]—A pond which supplied a stream by which a flour mill was worked was purchased by the Ordnance under the Defence Act, 1842 (c. 94). The water being diverted, the tenant for life of the mill claimed compensation & before an award was made erected a steam engine & suitable buildings for the mill, expending thereon £1,300:—*Held*: compensation amounting to £920 should be awarded & paid to the tenant for life in respect of the permanent alterations he had made.—*Re WELLINGTON'S (DUKE) SETTLED ESTATES, Ex p. WELLINGTON (DUKE)* (1860), 3 De G. F. & J. 13; 30 L. J. Ch. 187; 3 L. T. 525; 9 W. R. 173; 45 E. R. 782, L. C. & L. JJ.

505. — Owner entitled to compensation under—Possession taken under Defence of Realm Consolidation Act, 1914 (c. 8).]—*A.-G. v. DE KEYSER'S ROYAL HOTEL*, No. 499, *ante*.

506. Defence Act, 1860 (c. 112)—Purchase-money paid into court by Secretary of State—Payment out—On whom petition served.]—Upon a petition to obtain out of ct. the purchase-money for lands taken under the above Act:—*Held*: it was not necessary to serve the Secretary of State who paid it in; (2) a fund paid into ct. for the purchase under the above Act of lands subject to contingent charges would be ordered to be paid out to the trustees they having powers to sell the lands & to give discharges for the purchase-money.—*Re DEFENCE ACT, 1860, Ex p. MORSHEAD*, (1863), 33 Beav. 254; 55 E. R. 365; *sub nom.* *Re MORSHEAD'S WILL*, 3 New Rep. 280; 9 L. T. 597; 10 Jur. N. S. 61; 12 W. R. 236.

507. — — — — — To trustees with powers of sale & discharge.]—*Re DEFENCE ACT, 1860, Ex p. MORSHEAD*, No. 506, *ante*.

508. Defence of Realm Consolidation Act, 1914 (c. 8) & Regulations thereunder—Whether owner

h. — Part of land taken—Apportionment of rent—Date from which rent payable.]—Portion of lands in the occupation of a statutory tenant was required by the Secretary for War for purposes of the Defence Acts. Notice to treat was given, & the rent was apportioned by agreement, as provided by Lands Clauses Act, 1845:—*Held*: the apportioned rent only was payable from the date of the agreement, although no entry had taken place.—*Re WAR SECRETARY & HURLEY'S CONTRACT*, [1904] 1 I. R. 354.—IR.

508 i. Defence of Realm (Consolidation) Act, 1914 (c. 8), & Regulations thereunder—Lands taken under reg. 2L—Whether owners entitled to compensation.]—Lands which were at the time sublet in conacre were compulsorily acquired by defts. for the maintenance

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entitled to compensation.]—Re PETITION OF RIGHT, No. 498, ante.

509. ——— Right to take possession when necessary for public safety or defence—Proof of necessity—Bonâ fide decision of competent military authority binding.]—Reg. 2 of Defence of the Realm Consolidated Regulations provided that it should be lawful for the competent military authority & any person duly authorised by him where for the purpose of securing the public safety or the defence of the Realm it was necessary so to do, to take possession of any land, to take possession of any buildings or other property, & to do any other act involving interference with private rights of property which was necessary for the purpose aforesaid:—*Held*: (1) the compulsory taking of private premises for housing a staff of directors, inspectors & clerks acting under H.M.'s Office of Works & supervising the manufacture of munitions of war in various parts of the kingdom might be in wartime necessary for the public safety & the defence of the realm; (2) the decision of the competent military authority by whose order the premises were taken as to such necessity, provided that he acted reasonably & in good faith, was conclusive.—SHEFFIELD CONSERVATIVE & UNIONIST CLUB, LTD. v. BRIGHTEN (1916), 85 L. J. K. B. 1669; 32 T. L. R. 598.

510. ——— Whether owners entitled to rent for use & occupation—Apart from statute.]—A.-G. v. DE KEYSER'S ROYAL HOTEL, No. 499, ante.

511. ——— Whether powers of acquiring land under Defence Act, 1842 (c. 94), extended by Restrictions imposed by Defence Act, 1842, suspended.]—A.-G. v. DE KEYSER'S ROYAL HOTEL, No. 499, ante.

512. Defence of Realm (Liquor Control) Regulations, 1915—Right of owners to compensation under—Position of Liquor Control Board.]—By Defence of the Realm (Liquor Control) Regulations, 1915, issued pursuant to Defence of the Realm (Amendment) (No. 3) Act, 1915 (c. 42), the Central Control Board was constituted as the authority under the Act to control the sale & supply of intoxicating liquor in defined areas during the war, with power to establish & maintain refreshment rooms for the supply of refreshments including intoxicating liquor. They were also authorised to acquire either compulsorily or by agreement any licensed houses in the area, & the course of procedure for acquiring a house compulsorily was laid down:—*Held*: (1) the operations of the Board constituted an undertaking of which the Board were the promoters within the meaning of the Lands Clauses Consolidation Act, 1845 (c. 18); (2) as there was nothing in the Defence of Realm (Amendment) (No. 3) Act, 1915 (c. 42), to exclude the application of the Lands Clauses Consolidation Act, 1845 (c. 18), & the Board were not in the position of the Crown, the owners of the property taken compulsorily by the Board were entitled to have compensation assessed under the Land Clauses Consolidation Act, 1845 (c. 18).—CENTRAL CONTROL BOARD (LIQUOR TRAFFIC) v. CANNON BREWERY CO., LTD., [1919] A. C. 744; 88 L. J. Ch. 464; 121 L. T. 361; 83 J. P. 261; 35 T. L. R.

of food supply under the above reg. In an action brought by the owners of the lands for a declaration that they were entitled to compensation from defts., & for an order for the assessment & payment of such compensation:—*Held*: plffs. were entitled to compensation, & to an inquiry in chambers to assess such compensation.—ROONEY

v. BOARD OF AGRICULTURE, [1920] 1 I. R. 176.—IR.

k. ——— Whether use of lands "unreasonably withheld"—Conclusion of Department of Agriculture binding.]—ROONEY v. BOARD OF AGRICULTURE, [1919] 1 I. R. 302, 435; 53 I. L. T. 189.—IR.

552; 17 L. G. R. 569, II. L.; *affg.* S. C. *sub nom.* CANNON BREWERY CO., LTD. v. CENTRAL CONTROL BOARD (LIQUOR TRAFFIC), [1918] 2 Ch. 101, C. A. *Annotations*:—As to (2) *Apld.* Robinson v. R., [1921] 3 K. B. 183.—*Refd.* Aksionairnoye Obschestvo A. M. Luther v. Sagor, [1921] 3 K. B. 532.

513. Defence of Realm (Acquisition of Land) Act, 1916 (c. 63)—Power to acquire park, land, etc. on which buildings erected for war purposes—Substantial though incomplete structure included.]—Sect. 13 (1) (b) of the above Act provides: "where before the passing of this Act there have been erected on any park garden pleasure ground or farm any buildings for the manufacture of munitions of war, the Railway & Canal Commission may by order authorise the compulsory acquisition of the park garden pleasure ground or farm or any part thereof where they are satisfied that it is of national importance that it should be acquired, so however, that if the owner so require the whole of such property, including the mansion house, if any, shall be acquired."—*Held*: (1) Buildings for the manufacture of munitions of war were considered to have been "erected" within the meaning of s. 13 (1) (b) of the above Act if there was on the land a substantial, although not a complete, structure; (2) the Railway & Canal Commission might under the above sect. authorise the compulsory acquisition not only of the park, but also of the mansion house or other buildings thereon.—MUNITIONS MINISTER v. CHAMBERLAYNE, [1918] 2 K. B. 758; 87 L. J. K. B. 1266; 118 L. T. 710; 34 T. L. R. 579; 62 Sol. Jo. 738, C. A. *Annotation*:—*Refd.* Munitions Minister v. Mackrill, [1920] 3 K. B. 513.

514. ——— Acquisition of buildings in park included.]—MUNITIONS MINISTER v. CHAMBERLAYNE, No. 513, ante.

515. ——— Conditions precedent to exercise of right.]—A piece of land was used by resp. as a yard in which to store his materials & for building purposes. In 1916 the Minister of Munitions took possession of the land for the purpose of manufacturing munitions of war, & buildings of a permanent nature were erected thereon by the State. In 1919 the Minister of Munitions entered into an agreement to sell the land with the buildings thereon at a price which represented the cost to the Minister of obtaining the land together with the agreed value of the buildings. Resp. had been unable to find other suitable land within a reasonable distance, & would have been seriously hampered in his business if he were permanently deprived of the yard, & he refused to part with the land. The Minister applied under ss. 3, 13 (5) of the above Act for the consent of the Railway & Canal Commission to the compulsory purchase of the land:—*Held*: (1) as the ct. was intended to protect the subject against any undue exercise of the power of the Crown to deprive him permanently of his property it ought, before exercising its discretion in favour of the Crown, to be satisfied not only that the conditions precedent, that the Minister of Munitions was lawfully in possession & that buildings of a permanent nature had been erected on the land at the expense of the State for the purposes of the war, had been fulfilled, but also that the application was on its merits a proper one to which to accede; (2) the compulsory powers

l. ——— Right of owners to compensation decreed by court—Bill for specific performance for assessment of compensation by jury—Not maintainable against Secretary of State or Lord Advocate.]—CARLTON HOTEL CO. v. LORD ADVOCATE, [1921] S. C. 237, 58 Sc. L. R. 172.—SCOT.

given by the above Act were not intended to be exercised when the Crown did not require the land at all or where it only required it in order to sell it to some other person, & the ct. ought not to consent to the compulsory acquisition of land merely because a substantial loss to the State would thereby be avoided; (3) the ct. had to consider not only whether the proposed order was expedient from a public point of view but also whether it would work a hardship and injustice to resp. if he were compulsorily deprived of his property; (4) the fact that resp. would obtain compensation was not sufficient to justify the ct. giving its consent; (5) the ct. should refuse its consent. — **MUNITIONS MINISTER v. MACKRILL.** [1920] 3 K. B. 513; 90 L. J. K. B. 69; 124 L. T. 88; 36 T. L. R. 779; 18 L. G. R. 631.

516. — When court will consent to compulsory acquisition under—Not merely because substantial loss to State would otherwise occur—Land not required by Crown.]—MUNITIONS MINISTER v. MACKRILL, No. 515, ante.

517. — — — If expedient from public point of view —& no hardship or injustice done to owner.] —MUNITIONS MINISTER v. MACKRILL, No. 515, ante.

SUB-SECT. 4.—COAL CONTROL.

518. Power of local authorities to institute proceedings—In respect of offences against Retail Coal Prices Order, 1917—Without permission or instructions from any Government department.]—Article II. of Local Authorities (Retail Coal Prices) Order, 1917, made under Defence of the Realm Regulations, conferred & imposed on local authorities the powers & duties necessary to provide for the due discharge of the functions assigned to Local Authorities by Retail Coal Prices Order, 1917:—Held: Local Authorities were empowered to institute proceedings against persons for alleged offences against the Order without being permitted or instructed to do so by any Govt. department.—PARRY v. PUDDICOMBE (1918), 87 L. J. K. B. 894; 118 L. T. 448; 82 J. P. 154; 26 Cox, C. C. 205; 16 L. G. R. 701, D. C.

519. Order of coal controller—Prohibiting import of rail-borne coal to island near coast—Valid.]—SHUTLER v. ROLFE (1920), 36 T. L. R. 828.

SUB-SECT. 5.—LIQUOR CONTROL.

See INTOXICATING LIQUORS.

SUB-SECT. 6.—REQUISITION AND CONTROL OF FOOD.

See FOOD & DRUGS.

SUB-SECT. 7.—REQUISITION AND CONTROL SHIPS.

See, generally, SHIPPING & NAVIGATION.

520. Requisition under authority of proclamation—National emergency.]—In Jan. 1916 a ship belonging to plffs. was requisitioned under the prerogative on the authority of a Proclamation issued in Aug. 1914. After the ship had been used for some time for Govt. purposes the Admty. chartered her to a firm of munition makers in America at a rate of freight less than the market rate, & claimed to pay the owners at Blue Book

rates, which would throw on plffs. the burden of sea risks. The ship was injured by a sea risk without the fault of the Admty. on a voyage with a cargo of ore for the service of the American charterers. In an arbn. between plffs. & the Admty. the arbitrators found plffs. had accepted terms which threw sea risks on the owners, but they stated a case for the opinion of the ct. on certain questions:—

Held: (1) there was evidence to support the arbitrators' finding that the sea risks were to be borne by the claimants; (2) in the national emergency existing in Jan. 1916 the Proclamation entitled the Govt. to requisition the ship; (3) the employment of the ship for the voyage in question was not an improper use of the prerogative at a time when munitions were urgently needed; (4) the fact of the Admty.'s receiving payment for freight did not entitle plffs. to any extra compensation in respect of the voyage.—**CROWN OF LEON (OWNERS) v. ADMIRALTY COMRS.**, [1921] 1 K. B. 595; 90 L. J. K. B. 417; 124 L. T. 348; 37 T. L. R. 65; 15 Asp. M. L. C. 145, D. C.

521. Defence of Realm Consolidation Act, 1914 (c. 8), s. 1 (1)—Regulations empowering Shipping Controller to requisition & control ships—Whether ultra vires.]—The New Ministries & Secretaries Act, 1916 (c. 68), s. 6, provided that, "It shall be the duty of the Shipping Controller to control & regulate any shipping available for the needs of the country in such manner as to make the best use thereof having regard to the circumstances of the time, & to take such steps as he thinks best for providing & maintaining an efficient supply of shipping, & for those purposes he shall have such powers as may be conferred on him by Regulations under Defence of the Realm Consolidation Act, 1914 (c. 8)." The Shipping Controller wrote a letter to the managers of plffs.' steamships by which he purported to requisition plffs.' steamships, the services of the managers, & the profits of the owners under reg. 39 BBB (3) of Defence of the Realm (Consolidation) Regulations made under Defence of the Realm Consolidation Act, 1914 (c. 8). The scheme contained in the letter purported to be mandatory in all respects:—Held:** (1) the scheme was indivisible & must be judged as a whole; (2) no power was conferred upon the Shipping Controller by reg. 39 BBB, where alone his powers were to be found, to requisition the services of the owners, & the scheme contained in the letter was *ultra vires* in that respect, & the order contained in the letter could not be supported; (3) an action will lie against an officer of State whether he is the head of a Department or not, for a declaration that an act done by him is not justified by any Act of Parliament or State authority, & it is not necessary that such action should be brought against the A.-G. as representing the Crown.—**CHINA MUTUAL STEAM NAVIGATION CO. v. MACLAY**, [1918] 1 K. B. 33; 87 L. J. K. B. 95; 117 L. T. 821; 34 T. L. R. 81; 14 Asp. M. L. C. 175.**

Annotations:—Consd. **Brightman v. Tate** (1919), 35 T. L. R. 209; **Hudson's Bay Co. v. MacLay** (1920), 36 T. L. R. 469.

522. — — — — —.]—Regs. 39 BBB (1) & 39 DD of Defence of the Realm (Consolidation) Regulations made under s. 1 (1) of Defence of the Realm Consolidation Act, 1914 (c. 8), which empower the Shipping Controller to give directions as to the use of ships & to prohibit any British ship from going to sea without a licence from him, are not *ultra vires*.—HUDSON'S BAY CO. v. MACLAY** (1920), 36 T. L. R. 469.**

Annotation:—Refd. **Robinson v. R.**, [1921] 3 K. B. 183.

523. — — — — — Power to requisition services of

. 7, 8 & 9.]

shipowners not included.]—CHINA MUTUAL STEAM NAVIGATION CO. v. MACLAY, No. 521, *ante*.

Whether action maintainable against Shipping Controller.]—See PUBLIC AUTHORITIES & PUBLIC OFFICERS.

524. Compensation for requisitioned ship—To what amount claimant entitled—Difference between contract price & increased cost of replacement—Not for loss of services.]—Under a contract made in Dec. 1914 between a Dock Board & a firm of shipbuilders, the latter were to build for the former a barge of special construction. In Feb. 1917, when the barge was nearing completion, the Admty. requisitioned her, altering her construction for purposes of their own, & in Aug. 1917 purchased her for the original contract price to be paid by them to the shipbuilders. If the barge had not been requisitioned she would have been completed & delivered to the Board in Apr. 1917. Owing to difficulties arising from the war it was impossible for the Board to replace the barge by another of like construction in less than three years from the last-mentioned date, or at a cost less than three times the contract price of the original barge:—*Held*: (1) the Board were entitled to recover the amount of the difference between the contract price of the original barge & the increased cost to them of replacing her; (2) they were not entitled to any compensation for the loss of the services of the barge during the above-mentioned period of three years, the damage thereby caused being too remote.—*Re MERSEY DOCKS & ADMIRALTY COMRS.*, [1920] 3 K. B. 223; 90 L. J. K. B. 148; 123 L. T. 462; 36 T. L. R. 547; 15 Asp. M. L. C. 24, D. C.

525. ——— Ship injured by risk accepted by claimant—Admiralty receiving freight not liable for extra compensation.]—CROWN OF LEON (OWNERS) v. ADMIRALTY COMRS., No. 520, *ante*.

526. ——— Under Indemnity Act, 1920 (c. 48), s. 2 (1)—Claim of owner not within Act—Jurisdiction of court not transferred to Board of Arbitration.]—Certain ships were requisitioned in 1918, in respect of which the Admty. had previously agreed with their owner that if they were requisitioned they should be paid for at the market rate & not at the Blue Book rates. The owner claimed in a petition of right to be paid the free market rate. The Admty. claimed that the rates payable were fixed by an Ord. known as the Limitation of Freights (French Ports) Ord. 1918, & in any event the matter was not within the jurisdiction of the Ct.:—*Held*: (1) the terms of the Admty. agreement were not a modification of the Blue Book rates within the meaning of the sched. to the above Act; (2) the principles of the sched., being inconsistent with those terms, were not applicable to the suppliant's claim; (3) his claim for payment did not come within s. 2 (1) (a) of the above Act; (4) the jurisdiction of the Ct. to deal with the matter was not transferred to the Board of Arb'n. established by the above Act.

Qu.: whether a breach of contract is an "act, matter or thing done" within the meaning of s. 1 of the above Act, & whether consequently the Act has any application to a breach of contract at all.—*BROOKE v. R.*, [1921] 2 K. B. 110; 90

L. J. K. B. 521; 125 L. T. 183; 37 T. L. R. 375.

Annotation:—As to (3) *Apprvd.* Royal Mail Steam Packet Co. v. R. (1921), 37 T. L. R. 897.

See, also, No. 531, *post*.

Loss of or injury to requisitioned ship—Due to compliance with Admiralty regulation—"War risks."—See INSURANCE; SHIPPING & NAVIGATION.

SUB-SECT. 8.—REQUISITION OF WAR MATERIAL, ETC.

527. Defence of Realm Consolidation Act, 1914 (c. 8), s. 1 (1)—Regulation empowering taking possession of war material, food, forages & articles for production thereof—Whether *ultra vires*.]—Reg. 2B of Defence of the Realm Regulations, which gives power to the Army Council to take possession of any food & any articles required for the production thereof, is within the power given to His Majesty in Council by s. 1 (1) of Defence of the Realm Consolidation Act, 1914 (c. 8) to make regs. for the purpose of securing the public safety & defence of the realm, & is therefore not *ultra vires*.

On Aug. 17, 1916 the Army Council delivered to a firm of raspberry growers a requisition requiring them to place at the disposal of the Army Council a quantity of raspberries & to deliver same to such persons & in such amounts as the Director of Army Contracts might direct. The raspberries requisitioned were in substance gathered after the date of the requisition:—*Held*: (1) reg. 2B contemplated the separate existence, as chattels, of the articles to be taken possession of & did not give the right to take possession of growing crops; (2) as the requisition upon its true construction was a notice of intention to take possession of the raspberries when gathered it was within the powers given by reg. 2B; (3) an exercise of the powers under this reg. for the purpose of procuring a substantial quantity of a necessary supply for the use of the troops was an exercise of the powers for securing the public safety & defence of the realm.—*LIPTON, LTD. v. FORD*, [1917] 2 K. B. 647; 86 L. J. K. B. 1241; 116 L. T. 632; 33 T. L. R. 459; 15 L. G. R. 699.

Annotations:—As to (3) *Refd.* *Brightman v. Tate* (1919), 35 T. L. R. 209; *Hudson's Bay Co. v. MacLay* (1920), 36 T. L. R. 469. *Generally, Mentd.* *Gurney v. Houghton* (1920), 123 L. T. 706; *Newcastle Breweries v. R.*, [1920] 1 K. B. 854; *Shutler v. Rolfe* (1920), 36 T. L. R. 828.

528. ——— Exercise of powers for procuring substantial quantity for troops—Public safety & defence of realm.]—*LIPTON, LTD. v. FORD*, No. 527, *ante*.

529. ——— Whether growing crops included.]—*LIPTON, LTD. v. FORD*, No. 527, *ante*.

530. ——— Price for goods requisitioned—By whom determined.]—Reg. 2B of Defence of the Realm Regulations made under Defence of the Realm Consolidation Act, 1914 (c. 8), s. 1, provides that "it shall be lawful for the Admty. Army Council or Air Council or the Minister of Munitions to take possession of any war material food forage & stores of any description & of any articles required for or in connection with the production thereof. Where any goods, possession of which has been so taken, are acquired by the Admty.

PART XIII. SECT. 3, SUB-SECT. 8.

m. What amounts to requisition—Whether presumed in absence of intention to seize.]—During war, a horse belonging to pltf., a British subject, was seized by the military & taken into a protection camp. No receipt was given to show that the property was

being duly requisitioned. When the horse was seized pltf. was a rebel, unknown to the military. There was no evidence of any intention by the military to requisition the horse for military use:—*Held*: (1) in the absence of evidence of such intention, the ct. would not presume requisition from the facts that the horse, after

seizure, had come into the possession of a remount officer, who had branded him with the military brand, had been used for military purposes, & that pltf. had been a rebel; (2) the ownership in the horse belonged to pltf.—*JOHNSON v. VAN DER WALT* (1903), 13 C. T. R. 931.—S. AF.

Army Council or Air Council or the Minister of Munitions the price to be paid in respect thereof shall, in default of agreement, be determined by the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined." It also provides that regard may be had in determining such price to other considerations than the market value of the goods :—

Held : (1) the reg. so far as it purports to deprive persons whose goods are requisitioned by the naval or military authorities of their right to the fair market value & to a judicial decision of the amount is *ultra vires*; (2) it is an established rule that a stat. will not be read as authorising the taking of a subject's goods without payment unless an intention to do so be clearly expressed, & this rule applies no less to partial than to total confiscation, & *a fortiori* to the construction of a stat. delegating legislative powers.—NEWCASTLE BREWERIES, LTD. v. R., [1920] 1 K. B. 854; 89 L. J. K. B. 392; 123 L. T. 58; 84 J. P. 125; 36 T. L. R. 276; 18 L. G. R. 781.

Annotations :—As to (1) *Consd. Hudson's Bay Co. v. MacLay* (1920), 36 T. L. R. 469. *Distd. Robinson v. R.*, [1921] 3 K. B. 183. *Refd. A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508.

531. ————.]—The Food Controller requisitioned certain cattle feeding stuffs under the Defence of Realm Regulations, but whether under reg. 2B. or reg. 2F. was doubtful. By reg. 2B. the price to be paid for goods taken thereunder was to be determined by the tribunal by which claims for compensation under the Defence of Realm Regulations were determined, but was not to exceed a certain maximum price fixed by an Ord. in Council. By reg. 2F. compensation for goods taken thereunder was to be paid as determined by an arbitrator taking into account the cost of production of the goods & a reasonable profit. The maximum price fixed by the Order in Council had been paid.

The Defence of Realm Losses Commission refused to entertain a claim for compensation & the owners of the goods presented a petition of right claiming that the Food Controller had acted under reg. 2F., & that they were entitled to compensation fixed by arbn. thereunder. The petition was dismissed. On July 22, 1920, the suppliants gave notice of appeal. On Aug. 16, 1920, the Indemnity Act, 1920 (c. 48), was passed. By s. 1 of that Act, "No action or other legal proceeding shall be instituted in any Ct. of law in respect of any act done during the war before the passing of this Act if done in the public interest by a person holding office under the Crown, & if any such proceeding has been instituted, whether before or after the passing of the Act, it shall be discharged & made void":—*Held* : (1) the appeal was not a "proceeding instituted" within the meaning of that section; (2) these words did not include a final judgment given before the passing of the Act, & therefore the appeal well lay; (3) the provisions of reg. 2B for fixing the price of goods taken thereunder were not *ultra vires*; (4) the suppliants were not precluded by that reg. from having the price of their goods fixed by the Supreme Ct. upon the terms of the reg.; (5) the suppliants were entitled to payment for the goods at prices to be determined in accordance with reg. 2B & to an account of what was due to them on that basis.—ROBINSON & Co. v. R., [1921] 3 K. B. 183; 90 L. J. K. B. 1177; 125 L. T. 675; 37 T. L. R. 698, C. A.

532. ————.]—Whether provisions for determination of *ultra vires*.]—NEWCASTLE BREWERIES, LTD. v. R., No. 530, *ante*.

533. ————.]—ROBINSON & Co. v. R., No. 531, *ante*.

534. ————.]—Whether applicable to requisition of timber of foreign company on British ship in foreign port—Requisition good under right of *angary*.]—Pltfs., an Egyptian co., in June, 1914, chartered a vessel to carry from F. to A. a cargo of timber of which they were the owners. By reason of the outbreak of war the vessel was not able to complete her voyage, & she put back into a Finnish port. In 1915 pltfs. paid her owners certain sums in consideration of her remaining in that port until she could proceed to Alexandria without war risk. In 1917 while the vessel was still in Finnish territorial waters the British Ministry of Shipping requisitioned her & the cargo eventually arrived in England. Deft., the Controller of Timber Supplies, then took possession of her without pltfs.' consent. In an action for a declaration that the requisition of the timber was *ultra vires* & that, if deft. kept it, he must pay for it, deft. alleged that the requisition of the timber was justified (a) under reg. 2B of Defence of the Realm Regulations, (b) under the right of *angary* :—*Held* : (1) reg. 2B had no application to the case; (2) the requisition of the timber was good under the right of *angary* & full compensation must be paid to pltfs.—COMMERCIAL & ESTATES CO. OF EGYPT v. BALL (1920), 36 T. L. R. 526; 149 L. T. Jo. 340.

Annotation :—Generally, *Mentd. Robinson v. R.* (1920), 36 T. L. R. 773.

535. ————.]—Appeal by owners instituted before Indemnity Act, 1920 (c. 48)—Not "proceeding instituted" within Act.]—ROBINSON & Co. v. R., No. 531, *ante*.

See, also, No. 526, *ante*.

SUB-SECT. 9.—RESTRICTIONS ON BUILDING.

536. Under Defence of Realm Consolidation Act, 1914 (c. 8), s. 1 (1) (e)—Regulation prohibiting building or construction work when total cost exceeding £500—Whether *ultra vires*.]—An order made by the Minister of Munitions under reg. 8E. of Defence of the Realm (Consolidation) Regulations, provided that no person should, without a licence, carry on any building or construction work except where the total cost of the completed work in contemplation did not exceed £500 & the use of constructional steel was not involved :—*Held* : such order was within the powers conferred by s. 1 (1) (e) of the above Act.—PUBLIC PROSECUTIONS DIRECTOR v. FORD (1918), 35 T. L. R. 206, D. C. *Annotations* :—*Folld. Brightman v. Tate*, [1919] 1 K. B. 463. *Refd. Shutler v. Rolfe* (1920), 36 T. L. R. 828.

537. ————.]—By reg. 8E of Defence of the Realm (Consolidation) Regulations, 1914, as amended to May 31, 1917, it was provided that : "It shall be lawful for the Minister of Munitions by order to regulate or restrict the carrying on of building & construction work as hereinafter defined, & by such order to prohibit, subject to such exceptions as may be contained in the order, the carrying on of such work without a licence from the Minister." On July 14, 1916, an order was made by the Minister of Munitions that on & after July 20, 1916, no person should, without licence from the Minister of Munitions, commence or carry on any such building or construction work as therein defined, with a proviso that where the total cost of the whole completed work in contemplation did not exceed £500 the licence of the Minister of Munitions should not be required :—*Held* : the reg. & Ord. were *intra vires* & valid.—BRIGHTMAN & Co. v. TATE, [1919]

Sect. 3.—Defence of the Realm: Sub-sects. 9, 10, 11, 12, 13 & 14

1 K. B. 463; 88 L. J. K. B. 921; 120 L. T. 512; 35 T. L. R. 209.

Annotations:—*Refd.* *Shutler v. Rolfe* (1920), 36 T. L. R. 828. *Mentd.* *Whitham & Butterworth v. Lindley* (1920), 37 T. L. R. 75; *Re Mahmoud & Isphani*, [1921] 2 K. B. 716.

Effect of restrictions on contracts.]—*See* BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., pp. 402, 403; Nos. 282-287, & generally, CONTRACT.

SUB-SECT. 10.—RESTRICTIONS ON PERSONAL FREEDOM.

538. Prerogative of Crown to imprison alien enemy—Court has no jurisdiction to interfere with exercise of.]—The Crown is entitled in the exercise of its prerogative to imprison an alien enemy, & the K. B. Div. has no jurisdiction to interfere with the exercise of the prerogative. An alien enemy resident in the United Kingdom, who, in the opinion of the Executive Govt., is a person hostile to the welfare of this country & is on that account interned may properly be described as a prisoner of war although not a combatant or a spy, & an application by him for a writ of *habeas corpus* will be refused.—*R. v. VINE STREET POLICE STATION SUPERINTENDENT, Ex p. LIEBMANN*, [1916] 1 K. B. 268; 85 L. J. K. B. 210; 113 L. T. 971; 80 J. P. 49; 32 T. L. R. 3; 25 Cox, C. C. 179, D. C.

Annotations:—*Consd.* *Schaffenius v. Goldberg*, [1916] 1 K. B. 284. *Folld.* *R. v. Knockaloe Camp, Ex p. Forman* (1917), 87 L. J. K. B. 43. *Distd.* *Stoeck v. Public Trustee*, 2 Ch. 67.

—.]—*See, also*, ALIENS, Vol. II., p. 198, No. 5

539. Internment of British subject—Under Defence of Realm (Consolidation) Regulations, 1914, reg. 14B—Regulation not ultra vires—Naturalised British subject.]—By Defence of the Realm Consolidation Act, 1914 (c. 8), s. 1 (1), His Majesty in Council had power during the continuance of the war to issue regulations for securing the public safety & the defence of the realm. By reg. 14B, of Defence of the Realm (Consolidation) Regulations made under the above Act "Where on the recommendation of a competent naval or military authority or one of the advisory committees hereinafter mentioned it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient, in view of the hostile origin or associations of any person, that he shall be subjected to such obligations & restrictions as are hereinafter mentioned, the Secretary of State may by Ord. require that person to be interned in such place as may be specified in the Ord."—*Held*: (1) the reg. was not *ultra vires* but was authorised by the express language of the stat.; (2) a naturalised British subject who had been interned under the reg. was not entitled to a writ of *habeas corpus* addressed to the commandant of the internment camp.—*R. v. HALLIDAY*, [1917] A. C. 260; 86 L. J. K. B. 1119; 116 L. T. 417; 81 J. P. 237; 33 T. L. R. 336; 25 Cox, C. C. 650, H. L.

Annotations:—*As to* (1) *Refd.* *Ex p. Howsin* (1917), 33 T. L. R. 527; *Brightman v. Tate* (1919), 35 T. L. R. 209; *Ernest v. Metropolitan Police Comr.* (1919), 89 L. J. K. B. 42; *Re De Keyser's Royal Hotel, De Keyser's Royal Hotel v. R.*, [1919] 2 Ch. 197; *Chester v. Bateson*, [1920] 1 K. B. 829; *Fowle v. Monsell* (1920), 90 L. J. K. B. 105; *Hudson's Bay Co. v. Maclay* (1920), 36 T. L. R. 469; *Robinson v. R.* (1920), 36 T. L. R. 773; *Shutler v. Rolfe* (1920), 36 T. L. R. 828; *Brady v. Gibb* (1921), 37 T. L. R. 975. *Generally, Refd.* *R. v. Brixton Prison Governor, Ex p. Sarno*, [1916] 2 K. B. 742; *Gurney v. Houghton* (1920), 123 L. T. 706; *R. v. Leman Street Police Inspector, Ex p. Venicoff*, [1920] 3 K. B. 72; *R. v. Wormwood Scrubbs Prison Governor*, [1920] 2 K. B. 305.

540. ——— Evidence of hostile intention.]—

The ct. refused a rule *nisi* for a writ of *habeas corpus* in the case of a British subject who had been interned under reg. 14B, of the Defence of Realm (Consolidation) Regulations, 1914, as there was evidence on which the Home Secretary could reasonably come to the conclusion that appct. had hostile associations.—*Ex p. HOWSIN* (1917), 33 T. L. R. 527, C. A.

Registration, internment & other restrictions on aliens.]—*See* ALIENS, Vol. II., p. 197, Nos. 554, *et seq.*

Alien enemy in time of war.]—*See* ALIENS, Vol. II., p. 139, Nos. 144 *et seq.*

541. Prohibition from residing in or entering particular locality—Under Defence of Realm (Consolidation) Regulations, 1914, reg. 14—Order by competent military authority on "honest suspicion"—When legality of order questioned by court.]—Reg. 14 of Defence of the Realm (Consolidation) Regulations provides that where a person is suspected of having acted, or of being about to act in a manner prejudicial to the public safety or the defence of the realm, & it appears to the competent military authority that it is desirable that such person should be prohibited from residing in or entering any locality, the competent military authority may by order prohibit him from residing in or entering any area which may be specified in the order:—*Held*: (1) where the legality of an order made under this regulation is called in question, the ct., in the absence of evidence that the military authority did not honestly suspect the person to whom the order was directed, will not interfere to protect such person; (2) the ct. cannot enquire whether the grounds upon which the military authority suspected such person were reasonable.—*R. v. DENISON, Ex p. NAGALE* (1916), 85 L. J. K. B. 1744; 115 L. T. 229; 80 J. P. 421; 32 T. L. R. 528; 60 Sol. Jo. 527; 14 L. G. R. 1088, D. C.

Annotation:—*Generally, Consd.* *Ronnfeldt v. Phillips* (1918), 35 T. L. R. 46.

542. ——— Onus of proof on person impugning order.]—An order may be made under reg. 14 of Defence of the Realm (Consolidation) Regulations prohibiting a person from residing in a particular locality where the competent military authority honestly suspects him of being about to act in a manner prejudicial to the public safety, & where a person impugns such an order the burden is on him to prove that the military authority did not honestly suspect him.—*RONNFELDT v. PHILLIPS* (1918), 35 T. L. R. 46; 82 J. P. Jo. 480, C. A.

Annotation:—*Refd.* *Shutler v. Rolfe* (1920), 36 T. L. R. 828.

543. Arrest without warrant—Under Defence of Realm (Consolidated) Regulations, reg. 55—"Behaviour" prejudicial to public safety—Not restricted to matters actually witnessed.]—Reg. 55 of Defence of the Realm (Consolidation) Regulations provided that any police constable, officer of customs, or any other person authorised for the purpose by the competent naval or military authority, might arrest without warrant any person whose behaviour was of such a nature as to give reasonable grounds for suspecting that he had acted or was acting in a manner prejudicial to the public safety or who was suspected of having committed an offence against those regulations:—*Held*: the word "behaviour" included all acts of which the competent naval or military authority might be credibly informed, & was not restricted to matters actually witnessed by the person giving such information.—*MICHAELS v. BLOCK* (1918), 34 T. L. R. 438.

SUB-SECT. 11.—RESTRICTIONS ON TRADING WITH THE ENEMY.

See ALIENS, Vol. II., pp. 162-188, Nos. 330-512.

SUB-SECT. 12.—RESTRICTIONS ON TRADE IMPOSED BY STATUTE.

See TRADE & TRADE UNIONS.

SUB-SECT. 13.—RESTRICTIONS ON COMMUNICATION OR PUBLICATION OF INFORMATION USEFUL TO THE ENEMY.

544. Defence of Realm (Consolidation) Regulations, 1914, reg. 18—Not ultra vires.]—Appct., a newspaper reporter, dispatched from Portland to newspapers in London telegrams giving information as to the sinking of a German submarine which would have been of service to the enemy. He knew the telegrams would go through the Press Bureau, & supposed the officials would strike out anything undesirable. The telegrams were stopped by the Press Bureau & the information never appeared in any of the newspapers. Appct. was convicted under reg. 18 of the regulations made under the Defence of Realm Consolidation Act, 1914 (c. 8), s. 1 (1). On an application for a *certiorari* to quash the conviction on the ground that the regulation was *ultra vires* & the conviction bad:—*Held*: the regulation was not *ultra vires* & the justices were justified in convicting.—*Ex p. DYSON* (1915), 31 T. L. R. 425, D. C.

545. — Communicating information to enemy—Whether information true or false immaterial.]—By regs. 18 & 57 of the Defence of Realm (Consolidation) Regulations, made under the Defence of Realm Consolidation Act, 1914 (c. 8), it was made an offence triable by Court-martial to attempt without lawful authority to communicate to the enemy military information calculated to be or which might be useful to the enemy, & a person found guilty of this offence was liable to penal servitude for life or any less punishment, or, if the ct. found that the offence was committed with the intention of assisting the enemy, to suffer death or any less punishment. By the Defence of Realm (Amendment) Act, 1915 (c. 34), s. 1, the offence was made triable by a civil court with a jury.

Applt. was indicted for attempting to communicate military information to the enemy with the intention of assisting the enemy, the averment as to the intent being contained in the same count as the charge of the attempt. The question of intent was left to the jury, they being directed that it made no difference whether the information sent by applt. was true or untrue, & applt. was convicted of committing the offence with intent to assist the enemy:—*Held*: (1) the averment as to intent was rightly inserted in the count charging the attempt; (2) the question of intent was a question of fact & was rightly left to the jury; (3) it was immaterial whether the information communicated by the applt. was true or false.

PART XIII. SECT. 3, SUB-SECT. 13.

n. War Precautions Regulations, 1915, reg. 28A—To what matters applicable—Bond fide belief that matters not within regulation—No defence.]—Held: (1) the matters to which the above regulation applies are not limited to matters *ejusdem generis* with

the subjects mentioned in regs. 19 or 28 (2) where a person has published matter which relates to the war, it is not a defence to a prosecution for failure to comply with an order given under the regulation, that *bond fide* believed that the matter published did not come within the terms of the regulation.—*Ross v.*

R. v. M. (1915), 32 T. L. R. 1; 11 Cr. App. Rep. 207; 79 J. P. Jo. 508, C. C. A.

546. — Form of indictment.]—An indictment under regs. 18 & 48 of the Defence of Realm (Consolidation) Regulations, 1914, for attempting to communicate naval & military information to the enemy:—*Held*: not vitiated by inserting in each count the words “with the intention of assisting the enemy.”—*R. v. KUEPFERLE* (1915), 31 T. L. R. 461.

547. — “Press offence”—Communication of information for publication in newspaper—Notwithstanding use of words “for private information.”]—Reg. 18 of the Defence of Realm (Consolidation) Regulations, 1914, makes it an offence for any person to communicate or attempt to elicit any information with respect to the movement numbers description condition or disposition of any of His Majesty's Forces. Under reg. 56 (13), if the offence against the regulation appears to the Director of Public Prosecutions to be a “press offence” the case, instead of being referred to the competent naval or military authority, must be referred to the Director of Public Prosecutions to determine whether the case shall be proceeded with. “Press offence” was defined as “the publication or attempted publication or communication or attempted communication for publication in any newspaper or other periodical of any information in contravention of the provisions of these regulations.”

The editor of a provincial newspaper in the course of a conversation over the telephone with a London press agency said: “For private information. Putting a lot of troops at Deal & Sandwich all day; arriving all day; several thousands; expect some liveliness on sea.” Proceedings were taken against him under reg. 18 by the competent military authority without the matter having been referred to the Director of Public Prosecutions, but the justices dismissed the information:—*Held*: (1) it was a communication or attempted communication of information for publication in a newspaper notwithstanding the use of the words “for private information”; (2) the alleged offence was a “press offence,” & the case ought to have been referred to the Director of Public Prosecutions before the proceedings were instituted; (3) if it were possible on investigation that an alleged offence against the regulations might turn out to be a press offence the matter must be referred to the Director of Public Prosecutions to decide whether or not proceedings should be instituted.—*FOX v. SPICER* (1917), 86 L. J. K. B. 580; 116 L. T. 86; 81 J. P. 71; 15 L. G. R. 151, D. C.

548. — Reference to Director of Public Prosecutions—As to institution of proceedings.]—*FOX v. SPICER*, No. 547, *ante*.

SUB-SECT. 14.—SEIZURE AND DESTRUCTION OF PROHIBITED DOCUMENTS.

549. Defence of Realm (Consolidated) Regulations 1915, regs. 27 & 51 A—Whether ultra vires.]—N. was summoned with several other persons under reg. 51 A of the Defence of Realm (Consolidated)

K (1916), 22 C. L. R. 197.

AUS.

PART XIII. SECT. 3, SUB-SECT. 14.

o. Defence of Realm (Consolidated) Regulations, 1915, regs. 51 & 51A.—All documents seized not seditious—No bar to stay of action for damages & return of documents.]—Pltf.'s premises

Sect. 3.—Defence of the Realm: Sub-sects. 14, 15, 16 & 17. Sects. 4 & 5.]

Regulations, 1915, to show cause why certain printed publications of which he was the owner, & which were prohibited by reg. 27, should not be destroyed or otherwise disposed of. The proceedings were held *in camera* & an order was made for the destruction of the documents. N. applied for a rule *nisi* for a writ of *certiorari* to bring up the order for the purpose of having it quashed, on the ground, (a) that the provision in reg. 51 A for the hearing of proceedings *in camera* was *ultra vires*, (2) that the order was bad, as it did not specify the exact breach of the regulations committed by N. nor the exact publication in respect of which it had been committed:—**Held:** (1) reg. 51 A, in providing for the hearing of proceedings *in camera* was *intra vires* &, in view of the object of the Defence of Realm Consolidation Act, 1914 (c. 8), & the Regulations made thereunder, reasonable; (2) the order was good.—*Ex p. NORMAN* (1915), 85 L. J. K. B. 203; 114 L. T. 232; 80 J. P. 156; 60 Sol. Jo. 90; 25 Cox, C. C. 263, D. C.

550. ———.]—Regs. 27 & 51A of Defence of the Realm (Consolidation) Regulations made under Defence of the Realm Consolidation Act, 1914 (c. 8), s. 1, & dealing with the spreading of prejudicial reports & with the seizure & destruction of prohibited documents are not *ultra vires*.—*NORMAN v. MATHEWS* (1916), 85 L. J. K. B. 857; 114 L. T. 1043; 32 T. L. R. 303; 80 J. P. Jo. 100, D. C.; *on appeal*, 32 T. L. R. 369, C. A.

551. ——— **Order for destruction of documents—Not specifying exact breach or exact publication—Good.]—***Ex p. NORMAN*, No. 549, *ante*.

SUB-SECT. 15.—MANUFACTURE AND SUPPLY OF MUNITIONS OF WAR.

See ROYAL FORCES.

SUB-SECT. 16.—EFFECT OF WAR LEGISLATION ON CONTRACTS.

See BUILDING CONTRACTS, ENGINEERS, & ARCHITECTS, Vol. VII., pp. 402, 403, Nos. 282–287, &, generally, CONTRACT; SHIPPING & NAVIGATION.

SUB-SECT. 17.—OTHER RESTRICTIONS AND POWERS.

552. Spreading reports prejudicial to recruiting—Tribable by court of summary jurisdiction—

were entered under the above regulations by doft., a police inspector, & documents therein were seized & taken away by him. Pltf. issued a writ claiming damages, an injunction, & a return of the documents seized. Doft. applied to have the action stayed on the ground that it was frivolous & vexatious & an abuse of the process of the ct.:—**Held:** (1) the fact that all the documents seized were not seditious would not be sufficient to prevent the ct. from staying the action where the great bulk of them were clearly of a seditious & inflammatory kind; (2) doft. had acted within the powers conferred by reg. 51, & the action must be stayed.—*MAIRE NIC SHIBLAIGH v. LOVE* (1919), 53 I. L. T. 137.—**IR.**

PART XIII. SECT. 3, SUB-SECT. 17.

p. Spreading reports prejudicial to recruiting—Tribable by court of summary jurisdiction—Rules under De-

*fence of India Act.]—*A person in M., who, in contravention of rules under Defence of India Act, dissuades any one from entering into His Majesty's military service, is guilty of an offence though the remainder of the Act is not brought into operation in the province.—*KANDASAMI PILLAI v. KING-EMPEROR* (1919), I. L. R. 42 Mad. 69.—**IND.**

q. — War Precautions Act, 1914–1916—War Precautions Regulations, 1915, reg. 28 (1) (6)—Whether *ultra vires*.]—The above Act so far as it deals with the recruiting of forces for service outside Australia is not *ultra vires*. The above regulation, which prohibits under a penalty the making in any circular or other printed publication of statements likely to prejudice the recruiting, etc., of any of His Majesty's Forces is within s. 4 (1) (i) of above Act.—*SICKERDICK v. ASHTON* (1918), 25 C. L. R. 506.—**AUS.**

Though offence not committed within six months of date of hearing—Summary Jurisdiction Act, 1848 (c. 43), s. 11 not applicable.]—By reg. 27 of Defence of the Realm (Consolidation) Regulations it is an offence for any person to spread reports intended or likely to prejudice the recruiting of His Majesty's Forces, & by reg. 56 a person charged with an offence against the regulations may be tried either by a ct.-martial, or by a civil ct. with a jury, or by a ct. of summary jurisdiction. A person was charged before a ct. of summary jurisdiction with an offence under reg. 27 of the Regulations:—**Held:** (1) the limitation imposed by s. 11 of the above Act had no application, & the ct. had jurisdiction to deal with the case although there was no evidence that the offence had been committed within six months of the date of the hearing.—*KAYE v. COLE* (1916), 86 L. J. K. B. 1084; 115 L. T. 783; 81 J. P. 3; 33 T. L. R. 30; 25 Cox, C. C. 573; 15 L. G. R. 45, D. C.

553. Restriction on use of "motor spirit"—Defence of Realm (Consolidation) Regulations 1914, reg. 8G.]—Reg. 8G of Defence of the Realm (Consolidation) Regulations, 1914, prohibits the use for certain purposes of motor spirit, & provides that the expression "motor spirit" shall have the same meaning as in Part VI., s. 84 (7) of the Finance (1909–10) Act, 1910 (c. 8).

Appls. were convicted by justices under reg. 8G of using motor spirit which admittedly came within the definition of "motor spirit" in the Finance (1909–10) Act, 1910 (c. 8), Pt. VI., s. 84 (7). There was no evidence before the justices that the liquid was inflammable at a temperature of less than 73° Fahr. or at any other temperature:—**Held:** the conviction was right, since there was no provision in the Finance (1909–10) Act, 1910 (c. 8), that the word "inflammable" meant inflammable at or below any particular temperature.—*LLANDUDNO MOTOR & GARAGE CO. v. GUEST* (1917), 86 L. J. K. B. 886; 116 L. T. 597; 81 J. P. 157; 15 L. G. R. 523, D. C.

See, further, STREET & AERIAL TRAFFIC.

Restriction on use of powerful motor lamps.]—*See* STREET & AERIAL TRAFFIC.

554. Paper Restriction (Posters & Circulars) Order, 1918—"Advertising circular" of tipster—What amounts to.]—By paragraph 8 of Paper Restriction (Posters & Circulars) Order, 1918, "In this Order the expression 'advertising circular' includes advertisements of any description other than posters issued gratuitously & printed or written on paper cardboard or other similar material & of which advertising is the main & not merely an ancillary purpose." By para-

s. Restriction on use of motor spirit—Motor Spirit (Consolidation) & Gas Restriction Order, 1918—"Journey conveniently accomplished otherwise."]—*ROGERS v. HOWMAN*, [1918] S. C. (J.) 88.—**SCOT.**

t. — "Motor cab" "Hire car."]—**Held:** the owner of a "motor cab" who used it to convey a person to a railway station beyond the limits within which it was entitled to ply as a "motor cab," was not guilty of a contravention of the above Order, for the motor was being used on that occasion as "hire car."—*CLELLAND v. ARCHIBALD*, [1918] S. C. (J.) 111.—**SCOT.**

554 i. Paper Restriction (Posters & Circulars) Order 1917—"Advertising circular"—What amounts to—Liability of bookmaker for causing football coupons to be printed.]—Under the above order:—**Held:** (1) football betting coupons, sent by a bookmaker

graph 17, "No advertising circular shall be despatched by or on behalf of any tipster whether in connection with a game sport or otherwise."

Applt., who was a tipster within the meaning of paragraph 17, despatched to ten persons who owed him money for tips on horse races a typed document & nine copies taken on a duplicating machine, asking for the money & also referring to his business generally. On an information against applt. for despatching an advertising circular on behalf of himself, a tipster, in connection with sport, the justices found that the document was primarily a circular issued for the purpose of advertising applt.'s business of a tipster, & was therefore an advertising circular, & they convicted him:—*Held*: the conviction must be affirmed, as the document had been sent to several persons & was therefore a circular, & as there was evidence on which the justices could find that advertising was its main object.—*CASHMORE v. SMITH* (1919), 83 J. P. 157; 35 T. L. R. 372; 17 L. G. R. 344, D. C.

555. Notice under Defence of Realm Regulations reg. 2M.—Requiring grass field to be ploughed up—No justification for ploughing public footpaths across field.—A notice under reg. 2 M of Defence of the Realm Regulations requiring a grass field to be ploughed up is not a justification for ploughing public footpaths running across the field.—*DENNIS & SONS, LTD. v. GOOD* (1918), 88 L. J. K. B. 388; 120 L. T. 88; 83 J. P. 110; 35 T. L. R. 93; 17 L. G. R. 9, D. C.

556. Forged document of foreign government—Sufficiency of certificate of competent military authority—Jurisdiction of magistrate—Defence of Realm Regulations, reg. 45 (1).—Deft., a Russian, produced to a police officer a document which purported to be his Russian birth certificate. The document was examined at the Russian consulate & the police officer was there informed that it was a forgery. The police officer reported to Scotland Yard that deft. appeared to have infringed reg. 45 (1) (ccc) of Defence of the Realm Regulations in having in his possession a forged document so nearly resembling a certificate issued by a foreign Govt. as to be calculated to deceive. The case was referred to the competent military authority in accordance with reg. 56 (3), to investigate & determine whether the offence was such as could adequately be tried by a ct. of summary jurisdiction. The competent military authority gave his written authority certifying "that I have investigated the above case & have determined that it is to be proceeded with, & have further determined that it is an offence of such a character that it can adequately be dealt with by a ct. of summary jurisdiction." Deft. was brought before the magistrate & charged with "having in his possession on May 23, 1918, at Vine Street Police Station, W., without lawful authority or excuse a document so nearly resembling a certificate issued by a foreign Government as to be calculated to deceive, against reg. 45 (1) (ccc) of Defence of the Realm Regulations." The certificate of the competent military authority was produced to the magistrate, but the magistrate took objection to the form of the certificate on the ground that it did not define the offence which the competent military authority had investigated so as to enable the magistrate

to identify the case before him as the one which the competent military authority had considered:—*Held*: the certificate of the competent military authority was *prima facie* evidence that the provisions of reg. 56 (3) had been complied with, & was sufficient to give the magistrate jurisdiction to hear the case; (2) there was no merit in the objection taken by the magistrate; (3) the rule for a mandamus directing him to hear the case must be made absolute.—*R. v. MEAD & FOX, Ex p. PUBLIC PROSECUTIONS DIRECTOR*, [1918] 2 K. B. 866; 88 L. J. K. B. 98; 119 L. T. 314; 83 J. P. 1; 35 T. L. R. 4; 62 Sol. Jo. 763; 16 L. G. R. 830, D. C.

557. Restriction on change of name—Regulation discriminating between natural born & naturalised British subjects—Whether ultra vires.—*ERNEST v. METROPOLITAN POLICE COMR.*, No. 489, *ante*.

See, further, *ALIENS*, Vol. II., pp. 197, 198, Nos. 554–563.

558. Restriction on use of current gold coin—Regulation providing for forfeiture of "goods" in respect of which offence committed—Forfeiture of money included.—Reg. 58 of Defence of the Realm Regulations provided that where a person was convicted of an offence against the regulations by a ct. of summary jurisdiction the ct. might, in addition to any other sentence which might be imposed, order that any goods in respect of which the offence had been committed be forfeited.

A man was convicted under regs. 30E & 48 of doing certain acts preparatory to using £1,800 in gold otherwise than as currency, & an order was made for the forfeiture of the £1,800:—*Held*: the money was "goods" within the meaning of reg. 58, & the order for forfeiture had been rightly made.—*R. v. DICKINSON, Ex p. NEWMAN*, [1920] 3 K. B. 552; 90 L. J. K. B. 140; 123 L. T. 716; 85 J. P. 24; 36 T. L. R. 860; 26 Cox, C. C. 636; 18 L. G. R. 657.

Purchase of linseed oil without licence—Purchaser refusing delivery on ground that contract illegal by reason of his omission to obtain licence.—*See CONTRACT*.

Trading in non-ferrous metals without licence.—*See TRADE & TRADE UNIONS*.

Early closing of shops.—*See FACTORIES & SHOPS*.

SECT. 1.—ALIEN ENEMIES.

Who ———. *See ALIENS*, Vol. II., pp. 139–145.

Position of in time of war.—*See ALIENS*, Vol. II., pp. 147–162.

Position of under Treaty of Peace Act, 1919 (c. 33).—*See ALIENS*, Supplement.

Registration, internment & other restrictions.—*See ALIENS*, Vol. II., pp. 197–198.

Winding-up of enemy companies & partnerships.—*See ALIENS*, Vol. II., pp. 149–154.

SECT. 5.—BLOCKADE.

See, generally, *PRIZE LAW & JURISDICTION*.

; his agents to regular customers & others who asked for them, several coupons being sent at a time, which could be handed by the recipient to his friends, were "advertising circulars"; (2) the bookmaker who had

caused them to be printed was guilty of an offence against the Order.—*MACKENNA v. DUNN* (1918), 55 Sc. L. R. 622.—*SCOT*.

a. Ministry of Transport Act, 1919—Power of Minister of Transport to

fix free time for detention of railway waggons & authorise charge for detention after free time—Right to arbitration as to reasonableness of free time or charge excluded.—*NORTH BRITISH RY. CO. v. STEEL CO.*, [1921] S. C. 304.—*SCOT*.

Sect. 5.—Blockade. Sect. 6. Parts XIV., XV., XVI., XVII., XVIII. & XIX. Sect. 1: Sub-sect. 1.]

559. Declaration of—Act of high sovereignty—Not to be extended by subordinates.]—A declaration of blockade is a high act of sovereignty, & a commander of a King's ship is not to extend it.—*THE HENRICK & MARIA* (1799), 1 Ch. Rob. 146.

*Annotations:—***Refd.** *Northcote v. Douglas, The Franciska* (1855), 10 Moo. P. C. C. 37. **Mentd.** *The Rolla* (1807), 6 Ch. Rob. 3.

SECT. 6.—PRIZE.

See, generally, PRIZE LAW & JURISDICTION.

560. General rule.]—Prize is altogether a creature of the Crown. No man has, or can have any interest but what he takes as the mere gift of the Crown (*SIR WILLIAM SCOTT*).—*THE ELSEBE* (1804), 5 Ch. Rob. 173.

*Annotations:—***Consd.** *The Parlement Belge* (1879), 4 P. D. 129. **Refd.** *Alexander v. Wellington* (1831), 2 Russ. & M. 35. **Mentd.** *The Derfflinger, The Förde, The Leda, Re American Meat Packers' Agreement, Re Certain Swedish Copper*, [1919] P. 264.

Part XIV.—The Crown as the Fountain of Honour.

Peerages & dignities generally, *see* PEERAGES & DIGNITIES.

561. General rule.]—*EAST INDIA CO. v. SANDYS* (CASE OF MONOPOLIES), No. 47, *ante*.

562. Power to create new dignities.]—The King may erect any name of dignity, which was not before.—*ANON.* (1611), 12 Co. Rep. 81; 77 E. R. 1359.

563. No power to create quality of descent—Unknown to the law.]—The Crown cannot give to the grant of a dignity or honour a quality of descent unknown to the law.—*WILTES' PEERAGE CLAIM* (1869), L. R. 4 H. L. 126, H. L.

*Annotation:—***Consd.** *Buckhurst Peerage* (1876), 2 App. Cas. 1.

Part XV.—The Crown in relation to Ports and Harbours.

See, generally, SHIPPING & NAVIGATION; WATERS & WATERCOURSES.

564. Right of creation in Crown.]—No subject may institute or erect a common port without the charter of the King or a lawful prescription.—*NEWCASTLE (BURGESSES) v. TINMOUTH (PRIOR)* (1292), Hale's *De Portibus Maris*, Part II., Chapter vi. published in Hargrave's Tracts, vol. 1, p. 79.

*Annotation:—***Refd.** *Blundell v. Catterall* (1821), 5 B. & Ald. 268.

565. ———.]—However commodious a place may be for the shelter of vessels, it will not therefore be a port, the establishment of which must be by authority of the Crown.—*FOREMAN v. WHITSTABLE FREE FISHERS & DREDGERS* (1869), L. R. 4 H. L. 266; 38 L. J. C. P. 345; 21 L. T. 804; 31 J. P. 147; 18 W. R. 1046; 3 Mar. L. C. 337, H. L.; *affg. S. C. sub nom. WHITSTABLE FREE FISHERS v. FOREMAN* (1868), L. R. 3 C. P. 578, Ex. Ch.

*Annotations:—***Consd.** *R. v. Keyn* (1876), 13 Cox, C. C. 403. **Refd.** *Denaby & Cadeby Main Collieries v. Anson*, [1911] 1 K. B. 171. **Mentd.** *Brecon Markets Co. v. Neath & Brecon Ry.* (1872), L. R. 7 C. P. 555; *Truro Corp'n. v. Rowe* (1902), 71 L. J. K. B. 974; *A.-G. v. Horner*, [1913] 2 Ch. 140.

566. ——— Though soil property of subject.] The corp'n. of E. had been for a long series of years in the receipt of port dues levied on goods imported

at T., a smaller port, member of the larger port of E. These dues were granted to the corp'n. of E. by ancient charter. Neither the Crown nor the corp'n. were at any time owners of the soil of the port of T. & no consideration for them was shown:—*Held*: (1) the Crown is entitled except where rights previously vested would be interfered with, to create a port for the landing of goods, & to assign its limits, though the soil be in a subject.

(2) Such creation is a good consideration for the receipt of port dues issuing out of a neighbouring port.—*EXETER CORPN. v. WARREN* (1844), 5 Q. B. 773; 6 State Tr. N. S. 1104; 1 Dav. & Mer. 524; 2 L. T. O. S. 420; 8 J. P. 181; 8 Jur. 441; 114 E. R. 1441.

*Annotations:—**As to* (1) **Refd.** *Whitstable Free Fishers v. Foreman* (1868), L. R. 3 C. P. 578. *Generally, Mentd.* *A.-G. v. Stephens* (1855), 1 K. & J. 724.

567. King cannot dispose of by testament—Though under Great Seal.]—*ANON.*, No. 172, *ante*.

568. Right of public user.]—The public have a right to use the cranes erected on public quays. In justifying in a plea to an action of trespass the use of a crane in a public wharf, it is sufficient to say that it is a public open & lawful wharf, without claiming the right by immemorial usage.—*BOLT v. STENNETT* (1800), 8 Term Rep. 606; 101 E. R. 1572.

*Annotations:—***Consd.** *Allnutt v. Inglis* (1810), 12 East, 527. **Mentd.** *A.-G. v. Simpson*, [1901] 2 Ch. 671.

PART XIII. SECT. 6.

560 i. General rule.]—In prize, a British subject forfeits every right, which he would be entitled to in that capacity, by residence in a foreign country. If Great Britain were in a state of peace, during a war between

France & Spain, an Englishman who inhabited either of those countries would be liable to have his property seized by the respective enemies, as much as the natural-born subjects of the country. His British allegiance would afford him no protection.

Persons residing in a country, reaping the advantages of the trade of that country, & contributing to the well-being of that country, must for the purpose of trade be considered as belonging to that country.—*T. NANCY* (1805), Stewart, 49.—**CAN.**

Part XVI.—The Crown in relation to the Coinage.

Money generally.]—See MONEY & MONEY-LENDING.

569. Right of Crown—To make foreign money lawful.]—The King by his absolute prerogative may make any foreign coin lawful money of England at his pleasure, by his proclamation.—**WADE'S CASE** (1601), 5 Co. Rep. 114 a; 77 E. R. 232.

*Annotations:—***Refd.** Case of Mixed Money (1605), 2 State Tr. 113; **A.-G. v. Lade** (1745), Park. 57. **Mentd.** Lancashire v. Killingworth (1701), 1 Ld. Raym. 686; **Betterbee v. Davis** (1811), 3 Camp. 70; **Dean v. James** (1833), 4 B. & Ad. 546; **Isherwood v. Whitmore** (1843), 11 M. & W. 347; **Startup v. Macdonald** (1843), 6 Man. & G. 593; **Re Farley, Ex p. Danks** (1852), 1 W. R. 57.

570. — To coin money in any form—Of any matter.]—The King by his prerogative may make money of what matter & form he pleases & establish the standard of it; he may change money in substance & impression, & enhance or debase the value of it, or entirely decry & annul it.—**CASE OF MIXED MONEY** (1605), 2 State Tr. 113.

571. — To change money in substance or impression—& enhance or debase value.]—**CASE OF MIXED MONEY**, No. 570, *ante*.

What is legal tender.]—See CONTRACT.

Coinage Offences.]—See CRIMINAL LAW & PROCEDURE.

Part XVII.—The Crown in relation to Weights and Measures.

See WEIGHTS & MEASURES.

Part XVIII.—The Crown as Parens Patriæ.

As to charities.]—See CHARITIES, Vol. VIII., pp. 383–385, Nos. 1976–2002.

As to infants & children.]—See INFANTS & CHILDREN.

As to lunatics & persons of unsound mind.]—See LUNATICS & PERSONS OF UNSOUND MIND.

Part XIX.—Royal Grants.

SECT. 1.—HOW EFFECTED.

SUB-SECT. 1.—CROWN GRANTS.

572. Necessity for Great Seal—Goods & chattels—Writing unnecessary.]—**ANON.**, No. 172, *ante*.

573. — — — — —.]—A gift of the King is good of chattels movable without writing; as of a horse, & the like.—**ANON.** (1543), Bro. N. C. 152; 73 E. R. 913.

574. — — Land held in jure coronæ.]—**ANON.**, No. 172, *ante*.

575. Office.]—Qu.: whether by 27 Hen. 8, c. 27, establishing the et. of augmentations, the grant of the office of steward in that et. be good, if sealed only with the Great Seal.—**SOUTHAMPTON'S (EARL) CASE** (1541), Dyer, 50 a; 73 E. R. 109.

*Annotations:—***Refd.** **Anon.** (1553), Ben. & D. 9. **Mentd.** **Foster's Case** (1615), 11 Co. Rep. 56 b; **Sur Le Stat.** (1675), Freem. K. B. 203.

576. — Lease—Agent's seal.]—The King by letters patent gave authority to his surveyor to make leases. The surveyor made a lease between the King of the one part & S. of the other part, & affixed his own seal:—**Held**: the lease was void, because the seal of the King should have been used.—**ANON.** (1564), Ben. & D. 71; 123 E. R. 282.

*Annotation:—***Mentd.** **R. v. Cotton** (1751), 2 Ves. Sen. 288.

PART XIX. SECT. 1, SUB-SECT. 1.

b. Necessity for Great Seal.]—Crown lands can only be alienated by means of a grant, by letters patent, duly passed under the Great Seal; according to law, & in conformity with H.M.'s instructions to the Governor.—**R. v. STEEL** (1834), 1 Legge, 65.—**AUS.**

c. — — — — —.]—A grant from the Crown must be a matter of record & under the Great Seal. —**Doe d.**

v. WILKES (1835), 4 O. S. 142.—**CAN.**

d. — — — — —.]—A grant of lands, in 1784, by the then governor of Quebec, & under his seal at arms, to the Mohawk Indians & others, conveyed no legal estate, as not being by letters patent under the Great Seal.—**DOE D. SHELDON v. RAMSAY** (1852), 9 U. C. R. 105.—**CAN.**

e. — — License affecting Crown lands.] Qu.: Whether by common

577. — — — Copyhold land—Exchequer seal.]—The King seised of a manor in right of his Crown, by his steward granted copyhold lands, parcel of the manor, to one in fee, & afterwards demised the lands under the Exch. seal to S. for years, who assigned to the copyholder:—**Held**: though no grants of the King are available, but under the Great Seal, yet this lease under the Exch. seal was good by the common usage of that et.—**LANE'S CASE** (1586), 2 Co. Rep. 16 b; 76 E. R. 423; *sub nom.* **SMITH v. LANE & LANE**, 1 And. 191.

*Annotations:—***Fold.** **Kemp v. Barnard** (1638), Cro. Car. 513. **Refd.** **Mounson v. Bourn** (1639), Cro. Car. 527; **Baukers Case** (1695), Skin. 601. **Mentd.** **Floyer's Case** (1611), 9 Co. Rep. 125 b; **Fild v. Boethsby** (1658), 2 Sid. 17, 137; **Randall v. Riddle** (1673), Freem. K. B. 315; **Shaftesbury's Case** (1677), 1 Mod. Rep. 144; **R. v. Hornby** (1694), 5 Mod. Rep. 29; **Hayward v. Kinsey** (1701), 12 Mod. Rep. 568; **R. v. Carlisle Corpn.** (1722), 11 Mod. Rep. 378; **Doe d. Biddulph v. Poole** (1848), 11 Q. B. 713; **Cobbett v. Hudson** (1849), 13 Q. B. 497.

578. — — — Crown land—Exchequer seal.]—A lease for years of Crown lands under the Exch. seal is good.—**KEMP v. BARNARD** (1638), Cro. Car. 513; 79 E. R. 1043.

— **Franchises.]—See Sect. 6, post.**

579. — Chose in action—Private seal of Crown.]—The Crown granted to A. a bond

law a license affecting Crown lands should not be in the name of the Queen & under the Great Seal of the province, or some other authority to the Governor shown under the Great Seal for issuing it.—**BECKWITH v. McPHELM** (1852), 7 N. B. R. (2 All.) 501.—**CAN.**

f. — — Lands in railway belt of British Columbia.]—Letters patent for public lands situated within the railway belt in B.C. should issue under

Sect. 1.—How effected: Sub-sects. 1 & 2. Sect. 2: Sub-sects. 1 & 2.]

conditioned for the payment of £600:—*Held*: choses in action could be granted by the private seal of the Sovereign.—*CULLOM v. SHERMAN* (1614), 1 Roll. Rep. 7; 81 E. R. 287.

580. — Bargain & sale—34 Hen. 8, c. 21.]—Where the King by indenture bargained & sold land to another, nothing passed by the common law, or by 27 Hen. 8, c. 16, for he could not be seised to a use, yet it appeared that the intent of the King was to pass it. 34 Hen. 8, c. 21, made all the King's grants by patent or indenture to be good which otherwise were not good.—*ATKINS v. LONGVILLE* (1604), Cro. Jac. 50; 79 E. R. 42.

581. — Letters patent passing by bill.]—THE PRINCE'S CASE, No. 33, *ante*.

Effect of acceptance of grant—No counterpart executed by grantee.]—See No. 817, *post*.

Necessity for seal of Duchy of Lancaster.]—See Part XXI., Sect. 3, sub-sect. 1, B., *post*.

SUB-SECT. 2.—GRANTS TO THE CROWN.

582. Necessity for enrolment—1 Edw. 6, c. 14.]—A grant to the King is good by virtue of 1 Edw. 6, c. 14, s. 42, without being enrolled.—*WHARTON v. MORLEY* (1565), Cro. Eliz. 24; 78 E. R. 290.

*Annotation:—*Refd. Magdalen College Case (1615), 11 Co. Rep. 66 b.

583. —.]—A conveyance of land was made by deed to the King in fee:—*Held*: good although the deed was not enrolled, for the King did not take by the enrolment but by the deed.—*ABRAHAM v. WILCOX* (1603), Yelv. 30; 80 E. R. 22.

584. — Deed subsequently brought into court for enrolment.]—An *ejectione firmæ* was brought by C. against I. upon a lease made by J. S., heir to E. S., for a farm. E. S. was seised in fee, & about 1537 the land was supposed to be conveyed to Henry VIII. in fee for the enlargement of the honour of H., but no deed nor any other matter of record was in being to prove this conveyance; but it was proved that the land had continued in exchange as the land of Henry VIII. all his life, & that it had been enjoyed by divers leases made by Edward VI. & Queen Elizabeth & rent had been paid for it, & that in 1573 she granted it in fee farm to L. & under that title the land had been quietly enjoyed until of late time:—*Held*: if there were a deed by which S. conveyed the land to Henry VIII. & it was brought into the Ct. of Augmentation, although the deed could not be found & was not enrolled yet it was a sufficient record to entitle the King & it was a record by being brought into ct. & being received there to be enrolled.—*COMBES v. INWOOD* (1617), Hut. 1; 123 E. R. 1057.

*Annotation:—*Mentd. R. v. Hopper (1817), 3 Price, 495.

the Great Seal of Canada & not under the Great Seal of B.C.—*R. v. FARWELL* (1893), 3 Exch. C. R. 271; 14 S. C. R. 392.—CAN.

g. — Territorial or prerogative rights.] The rights of the Crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or Province, as the case may be, in which is vested the beneficial interest therein.—*FARWELL v. R.* (1893), 22 S. C. R. 553.—CAN.

h. — Crown lands vesting by Order in Council without formal grant.]—Under Sydney Harbour Trust Act, 1900, s. 27, the Governor has power to vest Crown lands in the Comrs.

by Order in Council declaring that land which had been resumed by the Crown under Public Works Act, 1900, was deemed to be necessary & should thereby be vested in the Commissioners for the purposes of the Act without any grant or further conveyance.—*SYDNEY HARBOUR TRUST COMRS. v. WAILES* (1908), 5 C. L. R. 879; 25 N. S. W. W. N. 84.—AUS.

PART XIX. SECT. 1, SUB-SECT. 2.

583 i. Necessity for enrolment.]—Enrolment of a surrender to the Crown is unnecessary in this country to perfect the title of the Crown.—*R. v. GUTHRIE* (1877), 41 U. C. R. 148.—CAN.

585. —.]—S. made a grant of land to Edward VI., by deed brought into the Ct. of Augmentations, where it was left to be enrolled, but was not enrolled. The King afterwards granted this land to the dean & canons of W., & long after, one M., supposing this land to belong to the Crown by the attainder of S., as if it had never been conveyed by S. to the King, procured a patent from the King:—*Held*: the King by the bringing & leaving the deed of grant in ct. took a good title without enrolment.—*WINDSOR (DEAN & CANONS) CASE* (prior to 1603), cited in Moore, K. B. 676; 72 E. R. 832.

*Annotation:—*Mentd. R. v. Hopper (1817), 3 Price, 495.

586. — Surrender of charter.]—A new charter granted in consideration of the surrender of an old charter, which surrender was not enrolled, is void.—*BULLY v. PALMER* (1698), 12 Mod. Rep. 247; 88 E. R. 1296.

SECT. 2.—VALIDITY OF GRANTS.

SUB-SECT. 1.—PRESUMPTION OF VALIDITY.

587. Charters granted by Henry III.]—Charters of King Henry III. have to be carefully considered, for he was forced to grant many while under imprisonment.—*ANON.* (circa 1327–1377), Keil. 151; 72 E. R. 325.

588. King's title presumed.]—When one derives title by the King's grant it is good without showing the title of the King.—*BROWNE v. SPENCE* (1663), 1 Sid. 163; 1 Keb. 502, 590; 82 E. R. 1033.

589. Until proceedings taken to set aside—In what court such proceedings should be taken.]—A royal charter must be assumed to be valid, unless proceedings are taken to set it aside, & the Ct. of Ch. is not the proper ct. in which to try the validity of the charter.—*A.-G. v. AVON CORPN.* (1863), 33 Beav. 67; 2 New Rep. 146; 33 L. J. Ch. 176, n.; 8 L. T. 594; 27 J. P. 757; 9 Jur. N. S. 1117; 11 W. R. 709; 55 E. R. 291; *reversd.* on other grounds, 3 De G. J. & Sm. 637, L. J.J.

SUB-SECT. 2.—EFFECT OF RECITALS.

590. In general—Whether estoppel.]—On an information of intrusion:—*Held*: (1) a false recital of a thing not parcel of the consideration, does not vitiate the King's grant; (2) the King is not estopped by a recital in his patent but the law will rather adjudge him to be deceived, & a recital of the King's estate will not help the grant if the King is deceived; (3) letters patent with the words *ex certa scientia*, etc. are to be construed beneficially for the grantee according to the King's intent expressed in the grant, unless the King is deceived in his grant or his intent

PART XIX. SECT. 2, SUB-SECT. 1.

k. Letters patent from Crown—Conclusive.]—When the Crown has issued the letters patent in view of all the facts, the grant is conclusive, & a party cannot set up equities behind the patent.—*FARMER v. LIVINGSTONE* (1882), 8 S. C. R. 140.—CAN.

PART XIX. SECT. 2, SUB-SECT. 2.

1. In general.]—A grant of land from the Crown to A. in 1805 recited that a prior grant of the same land had been made to B. in 1765, under the Great Seal of Nova Scotia, & that such grant had not been registered in N.B., as required by Act of Assembly,

cannot by law take effect, & such a grant is to be construed according to the proper signification of the words; (4) the King's grant passes only what he may lawfully convey; (5) when a patent is capable of two constructions one of which will make it good & the other bad the former shall be adopted; (6) general words in a patent will not pass things which belong to the King by virtue of his prerogative; (7) if the King grant his reversion without reciting the particular estate or make a second grant without recital of a former one, it is void; (8) the King's grant cannot enure to a double intent.—**ALTON WOODS' CASE** (1600), 1 Co. Rep. 40 b; 76 E. R. 89.

Annotations:—*As to* (1) **Consd.** *Alcock v. Cooke* (1829), 2 State Tr. N. S. 327. **Refd.** *Gledstan v. Sandwich* (1842), 4 Man. & G. 995; *A.-G. v. Hallett* (1847), 1 Exch. 211; *Nickels v. Ross* (1849), 8 C. B. 679; *A.-G. v. British Museum Trustees* (1903), 72 L. J. Ch. 743. *As to* (2) **Refd.** *Needler v. Winchester* (1614), Hob. 220; *R. v. Hornbee* (1691), Freem. K. B. 331; *Gledstan v. Sandwich* (1842), 4 Man. & G. 995. *As to* (3) **Distd.** *Chandos Case* (1607), 6 Co. Rep. 55; *The Churchwardens' Case* (1613), 10 Co. Rep. 66 b. **Refd.** *Needler v. Winchester* (1614), Hob. 220; *R. & Waller v. Hanger* (1615), 3 Bulst. 1; *Taylor & Bishop* (1619), Hob. 315; *Gee v. Freedland* (1626), Cro. Car. 47; *Holland v. Fisher* (1662), O. Bridg. 181; *Bainbridge v. Gardiner* (1665), O. Bridg. 402; *R. v. Chester* (1697), 1 Ld. Raym. 292; *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856. *As to* (4) **Consd.** *Kingfield's Case* (1591), 7 Co. Rep. 11 b. **Refd.** *Liverpool & North Wales S.S. Co. v. Mersey Trading Co.*, [1908] 2 Ch. 460. *As to* (6) **Refd.** *R. v. London (Bp.) & Lancaster* (1693), 1 Show. 441; *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856. **Generally, Refd.** *Fine Levied by the King Tenant in Tail Case* (1605), 7 Co. Rep. 32 a; *The Prince's Case* (1606), 8 Co. Rep. 1 a; *Magdalen College Case* (1615), 11 Co. Rep. 66 b; *Sheffield v. Ratcliffe* (1615), Hob. 334; *Brockham's Case* (1628), Litt. 128; *Grosse v. Gayer* (1629), Cro. Car. 172; *Collingwood v. Pace* (1661), O. Bridg. 410; *Foot v. Berkley* (1667), 2 Keb. 654; *A.-G. v. Allgood* (1743), Park. 1. **Mentd.** *Thompson v. Leach* (1690), 2 Vent. 198; *Symonds v. Cudmore* (1692), Carth. 257; *Winter v. Loveday* (1696), 5 Mod. Rep. 378; *Iveson v. Moore* (1698), 1 Salk. 16; *R. v. Cotton* (1751), Park. 112; *Riddell v. White* (1794), 1 Anst. 281; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *Yarmouth Corpn. v. Simmons* (1878), 10 Ch. D. 518.

591. — Where King deceived.] — **ALTON WOODS' CASE**, No. 590, *ante*.

592. Non-recital—Crown as tenant pur autre vie —Validity of grant of lease for forty years.]—A., seised of a manor in fee, by indenture covenanted to stand seised to the use of himself for life, afterwards to the use of B. in tail, & afterwards to the use of B. in fee. It was also covenanted that if A. by himself or by any other should, during his natural life, deliver or offer to B. a gold ring to the intent to make void the uses then all the uses should be void. A. was indicted for treason & outlawed, & the Queen by patent under the Great Seal leased his lands to C. & D. for 40 years. The attainder was confirmed in Parliament & it was enacted that he should forfeit to the Queen all his lands, manors, etc. the day of the treason committed or at any time after, & that they should be in the actual possession of the Queen. The Queen by letters patent under the Great Seal, reciting the uses & proviso of tendering a ring, deputed E. & F. to make the tender to B. to the intent to make void the uses:—**Held:** if the Queen as tenant *pur autre vie* made a lease for 40 years without any recital or mention of the estate for life the lease would be good, but if she had granted an estate in tail or in fee such grant would be void.—**ENGLEFIELD'S CASE** (1591), 7 Co. Rep. 11 b; *Moore, K. B.* 303; *Poph.* 18; 77 E. R. 428.

& also recited that it had been represented to Govt. of N.B. that the land had been sold & conveyed by B. to A.:—**Held:** the recitals must be taken together, & in the absence of other evidence of the grant to B., & of the conveyance by him to A., the title of A., under the grant of 1806,

was not disproved by the recital of the prior grant to B.—**DOE d. DES BARRES v. WHITE** (1842), 1 Kerr, 595.—**CAN.**

m. — **Crown cannot derogate from previous grant.]**—The Crown cannot, any more than a private person, after

Annotations:—**Consd.** *Holland v. Fisher* (1662), O. Bridg. 181; *Fitzgerald v. Fauconberge* (1729), Fitz-G. 207. **Refd.** *Alton Woods' Case* (1600), 1 Co. Rep. 26 b; *Field v. Boothsby* (1659), 2 Sid. 137; *Grange v. Tiving* (1665), O. Bridg. 107; *Smith v. Wheeler* (1671), Freem. K. B. 9; *Bipus v. Milford* (1674), 3 Keb. 316; *Pybus v. Mitford* (1674), 1 Mod. Rep. 159; *Adams v. Savage* (1703), 2 Ld. Raym. 854; *Marks v. Marks* (1718), 10 Mod. Rep. 419.

593. — Crown having fee simple determinable—Validity of grant over.]—When the King hath a fee simple determinable upon a fee tail his grant over is good without reciting the nature of his estate.—**R. v. HUSSEY** (1596), Cro. Eliz. 519; 78 E. R. 767.

Annotations:—**Refd.** *R. v. Champion* (1606), Cro. Jac. 123; *Baker v. Willis* (1637), Cro. Car. 476; *Holland v. Fisher* (1662), O. Bridg. 181.

594. — Grant of reversion.]—**ALTON WOODS' CASE**, No. 590, *ante*.

595. — Grant of copyhold—Copyhold extinguished.]—The King by letters patent granted land without reciting it to be copyhold land:—**Held:** if copyholders had common in the land of a stranger the common would continue *non obstante* the enfranchisement of the land & should be enjoyed by all tenants of the land as it was before by the copyholders.—**FIELD v. BOOTHSEY** (1658), 2 Sid. 81; 82 E. R. 1269.

Annotations:—**Refd.** *King v. Dilliston* (1688), 1 Show. 83; *Hartop v. Hoare* (1743), 3 Atk. 44; *Wyndham v. Chetwynd* (1757), 2 Keny. 121; *R. v. Mersham* (1806), 7 East, 167.

596. False recital—General rule.]—A. was tenant in tail with remainder to B. in tail. B. by indenture enrolled bargained & sold the lands & all his estate, right, title, etc. to C. during the life of A., remainder to the Queen her heirs & successors upon condition. A. suffered a recovery, the condition was performed & the Queen by letters patent, reciting that the grant & remainder to her were by fraud & covin, etc. *prout nobis satis liquet* granted her remainder to A. in fee:—**Held:** (1) although a false recital of a thing in a patent which sounds to the King's benefit avoids the grant, yet a false recital of a thing *in pais* executed & not material, does not hurt; (2) a false recital of a thing which need not be averred is not material; (3) a recital which is true in terms is sufficient.—**CHOLMLEY'S CASE** (1597), 2 Co. Rep. 50 a; 76 E. R. 527.

Annotations:—*As to* (2) **Refd.** *Bainbridge v. Gardiner* (1665), O. Bridg. 402. *As to* (3) **Refd.** *Bainbridge v. Gardiner* (1665), O. Bridg. 402. **Generally, Refd.** *Hemsley v. Price* (1598), Cro. Eliz. 639; *Magdalen College Case* (1616), 11 Co. Rep. 66 b; *Brockham's Case* (1628), Litt. 95, 105, 128; *Holland v. Fisher* (1662), O. Bridg. 181; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1. **Mentd.** *Fitz-Williams Case* (1605), 6 Co. Rep. 32; *Lampets Case* (1612), 10 Co. Rep. 46 b; *Oxford Case* (1615), 1 Rep. Ch. 1; *Powsely v. Blackman* (1623), Cro. Jac. 657; *Poole v. Haskey* (1663), O. Bridg. 364; *Badge v. Floyd* (1699), 1 Com. 62; *Machell v. Clarke* (1702), 2 Ld. Raym. 778; *Smith d. Dormer v. Parkhouse* (1740), 7 Mod. Rep. 366; *Parkhurst v. Smith* (1741), Willes, 327; *Garth v. Cotton* (1750), 1 Ves. Sen. 545; *Roe v. Quarterley* (1787), 1 Term Rep. 630.

597. — —.]—A question arose upon a grant of the King:—**Held:** (1) the grant would be void (a) where he was misinformed in his grant, (b) where there was a misrecital in the grant, (c) where he was deceived in a matter of fact or law, (d) where the grant was wanting in form, (e) where the thing was in him or comes to him in a different manner than he supposed, (f) where there was a mistake relating to his title; (2) the

it has parted with its interest in lands by grant, by means of a recital in a subsequent instrument, derogate from such grant or give any other person any right or equity in such land.—**BOEINER v. HIRTLE** (1912), 11 E. L. R. 222, 6 D. L. R. 548.—**CAN.**

Sect. 2—Validity of grants: Sub-sects. 2 & 3, A.

grant would be valid (a) if there was an original certainty although there was a mistake after, (b) when there was a mistake relating only to the denomination of the thing; (3) the grant would be construed liberally for his honour.—*R. v. CLARKE* (1674), 1 Freem. K. B. 172; 89 E. R. 124; *sub nom. R. v. ROCHESTER* (BP.) & CLERKE, 1 Mod. Rep. 195; 2 Mod. Rep. 1; 3 Keb. 412.

Annotations:—As to (2) Refd. R. v. Kempe (1694), 1 Ld. Raym. 49. *Generally, Refd. R. v. Chester, Piers & Scroope* (1697), 1 Ld. Raym. 292; *Delacherols v. Delacherols* (1864), 4 New Rep. 501.

598. — Thing not part of consideration.]—ALTON WOODS' CASE, No. 590, *ante*.

599. — Of Crown's title.]—The King granted a manor by letters patent to B. in tail male; afterwards by letters patent, reciting the former letters patent, & that afterwards B. surrendered the letters patent to be cancelled & that they were cancelled, *virtute cuius* the King was seised of the manor in fee, the King granted the manor to B. & his wife to have & to hold to them & to the heirs of E.:—*Held*: (1) the reversion would pass by the last letters patent & the clause *virtute cuius* the King was seised in his demesne as of fee was but the collection of the King himself, & was not the information of the party; (2) where less passed by the King's grant than he intended to pass the grant was good, but if more would pass than he intended it would be otherwise; (3) by the grant of the manor without naming the reversion the reversion would pass.—CHANDOS'S (DUKE) CASE (1606), 6 Co. Rep. 55 a; 77 E. R. 336.

Annotations:—As to (1) Consd. Needler v. Winchester (1614), Hob. 220. *Refd. Rutland Case* (1609), 8 Co. Rep. 55 a. *As to (2) Refd. Priddle & Napper's Case* (1612), 11 Co. Rep. 8 b; *Brook v. Goring* (1630), Cro. Car. 197; *R. v. Kempe* (1694), 1 Ld. Raym. 49. *Generally, Refd. Stafford Case* (1609), 8 Co. Rep. 73 a; *Holland v. Fisher* (1662), O. Bridg. 181; *R. v. Hornbee* (1691), 1 Freem. K. B. 331; *R. v. Chester, Piers & Scroope* (1697), 1 Ld. Raym. 292; *R. v. Blunt* (1738), Andr. 293.

600. — —.]—The premises of a patent recited inaccurately the estates created by a will, those estates being partly vested in the Crown, but referred to the whole will, & the *habendum* of the patent gave, in terms, estates commensurate with the estates in the will itself, being larger than the estate specified in the recital:—*Held*: (1) a misrecital or partial recital of the King's estate did not necessarily make the patent void; (2) where separate estates in fee simple, qualified & absolute, were in the King, with other intervening estates of same lands in other persons,

general words in the *habendum* of the King's grant of the lands, being sufficient to extend to all the separate estates but implying one entire continuing estate, could not pass all the separate estates; (3) where the King intended to pass one estate, & the patent in effect passed more than one, the King was deceived & the patent was void & when, instead of one entire continuing estate, several estates in fractions were created by a patent, that patent was void.—*HOLLAND v. FISHER* (1662), O. Bridg. 181; 124 E. R. 535.

601. — Thing not material—King's intention manifest & apparent.]—*R. v. MUSSARY*, No. 602,

SUB-SECT. 3.—AVOIDANCE OF GRANTS.**A. For Mistake.**

602. General rule.]—(1) Respecting patents, the following general rules have been laid down: (a) every false recital in a thing not material will vitiate the grant if the King's intention is manifest & apparent; (b) if the King is not deceived in his grant by the false suggestion of the party, but from his own mistake upon the surmise & information of the party, it shall not vitiate or avoid the grant; (c) although the King is mistaken in point of law or matter of fact, if that is not part of the consideration of the grant it will not avoid it; (d) where the King grants *ex certa scientia et mero motu*, those words occasion the grant to be taken in the most liberal & beneficial sense, according to the King's intent & meaning expressed in his grant; (e) although in some cases the general words of a grant may be qualified by the recital, yet if the King's intent is plainly expressed in the body of the grant the intent shall prevail & take place.

(2) A writ of *sci. fa.* to repeal letters patent lies in three cases: (a) when the King doth grant by several letters patent one & the self-same thing to several persons, the first patentee shall have a *sci. fa.* to repeal the second; (b) when the King doth grant a thing upon a false suggestion he, *prærogativa regis*, may by *sci. fa.* repeal his own grant; (c) when the King doth grant any thing which by law he cannot grant.

(3) Where a patent is granted to the prejudice of a subject, the King of right is to permit him upon his petition to use his name for the repeal of it.—*R. v. MUSSARY* (1738), 1 Web. Pat. Cas. 41.

603. Immaterial mistake.]—DODDINGTON'S CASE, No. 676, *post*.

PART XIX. SECT. 2, SUB-SECT. 3. —A.

602 i. General rule.]—A patent may be good in part & bad in part, & may be set aside so far as it relates to certain of the property included in it. In order that a patent may be set aside it is not necessary to show that some person is entitled to the land. It is sufficient that there existed claims or material facts which, if present to the mind of the Crown, would have influenced it in dealing with the land. It is not an answer to a charge of improvidence & mistake, that the Crown had in its possession documents which disclosed the claims or material facts, if these are shown not to have been present to the mind of the official when granting the patent.—*A.-G. v. FONSECA* (1888), Man. L. R. 173.—CAN.

n. Where grant made deliberately—On ground of mistake.]—The Ct. may set aside a grant of land made by the Crown upon a deliberate view of all the circumstances of a case, on the ground of mistake.—*SIMPSON v. GRANT* (1855), 5 Gr. 267.—CAN.

o. — — —.]—*A.-G. v. HILL* (1861), 8 Gr. 532.—CAN.

p. — — —.]—*MCDIARMID v. MCDIARMID* (1862), 9 Gr. 144.—CAN.

q. — — —.]—*PROCTOR v. GRANT* (1862), 9 Gr. 26.—CAN.

r. — — —.]—It is sufficient ground for avoiding a Crown grant that it erroneously gives the grantee a roadway shown on a public map or plan, by which he & other persons purchased their lands from the Crown, as having been reserved as a public thoroughfare.—*R. v. WHITE*, Mac. 870.—N.Z.

s. — — — Or improvidence.]—A patent may be set aside upon the ground of improvidence although no fraud is charged against the patentees.—*A.-G. v. FONSECA* (1888), 5 Man. L. R. 173.—CAN.

t. — — — What amounts to "improvidence."]In an action to set aside letters patent for improvidence under Man. Act:—*Held*: effect must be given to the term "improvi-

dence" as meaning something distinct from fraud or error; letters patent may be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentee to the land which, if it had been known, would have been investigated & passed upon before the patent issued.—*FONSECA v. A.-G. OF CANADA* (1889), 17 S. C. R. 612.—CAN.

fact that the patentee, in a letter to the land-office, stated his unwillingness or refusal to sign the patent papers, when he in fact did not sign them, does not show "improvidence" in issuing the patent, particularly when his object for doing so was to defeat the payment of taxes & hinder judgment creditors.—*R. v. DEACON* (1919), 18 Exch. C. R. 308; 45 D. L. R. 274.—CAN.

603 i. Immaterial mistake.]—The Comr. of Crown lands, in deciding between rival claimants to a lot to which neither had any right, was under a false impression as to a matter

604. After original certainty.]—*R. v. CLARKE*, No. 597, *ante*.

605. As to Crown's title—As to denomination of subject-matter.]—*R. v. CLARKE*, No. 597, *ante*.

606. In description of grantee—"Esquire" described as "knight."]—Grant to a man by the name of knight, who was only esquire, is void.—*R. v. CHESTER* (Bp.) (1698), 12 Mod. Rep. 185; 5 Mod. Rep. 297; 1 Ld. Raym. 292; 2 Salk. 56; 3 Salk. 24; Skin. 650; Show. Parl. Cas. 212; 88 E. R. 1251.

Annotations:—Mentd. *R. v. Blunt* (1738), Andr. 293; *Wolferstan v. Lincoln* (Bp.) & *Whitehead* (1763), 2 Wils. 174; *Knight v. Preston* (1767), 2 Wils. 332; *King v. Norman* (1847), 4 C. B. 884.

Effect of misdescription of subject-matter on what property passes.]—*See* Sect. 3, sub-sect. 2, *F., post*.

B. For Deceit.

607. General rule.]—In all cases if the King is deceived in his grant the grant is void.—*ANON.* (1563), Moore, K. B. 45; 72 E. R. 430.

608. —.]—Where the Queen is deceived in her grant the patent is void (*ANDERSON, C.J.*).—*SEGAR'S CASE* (1585), Gouldsb. 8; 75 E. R. 960.

Annotation:—Mentd. *Craig v. Norfolk* (1663), 1 Mod. Rep. 122.

609. — Deception in point of profit or title.]—There is a difference between a subject & the King: a suggestion which is false in the case of the King renders the patent void, if the King is deceived either in point of profit or in point of title.—*SWIFT v. HEIRS* (1639), March, 31; 82 E. R. 398; *sub nom.* *SWIFT v. EYRES*, Cro. Car. 546.

Annotations:—Consd. *Roe d. Conolly v. Vernon* (1804), 5 East, 51. *Refd.* *R. v. Clarke* (1674), Freem. K. B. 178.

610. — Deception in matter of fact or law.]—*R. v. CLARKE*, No. 597, *ante*.

611. — Not part of consideration.]—*R. v. MUSSARY*, No. 602, *ante*.

612. —.]—(1) Parol evidence cannot be resorted to, in order to support a prescriptive right to wreck, if it appear that the property in respect of which wreck is claimed, was in the Crown in the

of fact, which had not been untruly stated by the party in whose favour he decided & was not shown to be material:—*Held*: the error was not a sufficient ground for setting aside the patent at the suit of the disappointed claimant.—*McINTYRE v. A.-G.* (1867), 14 Gr. 86.—*CAN.*

b. — Rectification.]—An error in a Crown grant will not at the suit of the Crown be rectified where the grantee could not readily have detected such error from the data supplied by the selection map from which he made his purchase, & where the correction, if made, would not materially benefit any one, & where all parties have for many years acted on the assumption that the grant was correct.—*R. v. BROOKS* (1889), 8 N. Z. L. R. 64.—*N.Z.*

c. As to value of improvements.]—Land at B. occupied as a residence area under authorised bye-laws was granted by the Crown, & by mistake the improvements then thereon were not valued but a former valuation of prior improvements was adopted:—*Held*: grant should be set aside, as made under a mutual mistake by the Crown & grantee, both he & the representatives of the Crown acting under ignorance of fact.—*A.-G. v. BELSON* (1867), 4 W. W. & A'B. 57.—*AUS.*

606 i. In description of grantee.]—In 1797 an order in council was made in favour of P., as daughter of S. de F., under which a lot was located, & a description therefor regularly made out in her name: but in 1801 a patent for the lot so described issued to F., the sister of the husband of P.:—

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time of Charles I. as a jury could not infer that it was in those under whom the party claims, from time of legal memory. (2) If the King made a grant which cannot take effect according to its terms, it must be concluded that he has been deceived in his grant, & it is void. Where, therefore, wreck was conveyed by lease for a term of years, which had not expired; if such lease be not recited in a grant conveying an immediate estate in fee to the grantees, such grant is void, because the King having already leased the right of possession, he cannot convey same right to another, & all leases from the King must be enrolled.

(3) Although the King holds lands as Duke of Lancaster, he holds them as King also; & the prerogative & privileges of the King belong to him with reference to those lands, as they do with respect to those which belong to him immediately in right of his Crown; therefore, a grant under the Duchy seal is subject to all the incidents of a grant from the Crown.

(4) It seems that wreck will not pass under general words in a grant.—*ALCOCK v. COOKE* (1829), 5 Bing. 340; 2 Moo. & P. 625; 2 State Tr. N. S. 327; 7 L. J. O. S. C. P. 126; 130 E. R. 1092.

Annotations:—As to (2) Consd. *Vancouver City v. Vancouver Lumber Co.*, [1911] A. C. 711. *Refd.* *Morgan v. Seaward* (1837), 2 M. & W. 544; *Gledstanes v. Sandwich* (1842), 4 Man. & G. 995; *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856; *G. E. Ry. v. Goldsmid* (1884), 9 App. Cas. 927. *Generally, Mentd.* *Jewison v. Dyson* (1842), 6 State Tr. N. S. 1.

613. —.]—Grants from the Crown may be avoided upon three grounds: (a) where the Crown professes to give a greater estate than it possesses in the subject matter of the grant; (b) where same estate, or part of same estate, has already been granted to another; (c) where the Crown has been deceived in the consideration expressed in the grant.—*GLEDSTANES v. SANDWICH* (EARL) (1812), 4 Man. & G. 995; 5 Scott, N. R. 689; 12 L. J. C. P. 41; 134 E. R. 407.

Annotation:—Consd. *G. E. Ry. v. Goldsmid* (1884), 9 App. Cas. 927.

Held: the patent should be cancelled.—*A.-G. v. GARBUTT* (1856), 5 Gr. 383.—*CAN.*

d. — "Free grant settler" — Absolute grant.]—In a patent from the Crown, the patentee was described as "a free grant settler": but the patent on its face purported to grant the land absolutely & unconditionally, & did not contain the statements required by Free Grants & Homesteads Act, 1877:—*Held*: the land must be deemed to have been granted absolutely & unconditionally.—*CANADA PERMANENT LOAN & SAVINGS CO. v. TAYLOR* (1880), 31 C. P. 41.—*CAN.*

e. Proof of mistake.]—Although the Crown may show mistake in law or fact in respect of its grant when the individual could not, still the evidence must be conclusive.—*A.-G. v. GARBUTT* (1855), 5 Gr. 181.—*CAN.*

PART XIX. SECT. 2, SUB-SECT. 3.—B.

607 i. General rule.]—A grant may be set aside on the ground of fraud.—*SIMPSON v. GRANT* (1855), 5 Gr. 267.—*CAN.*

607 ii. —.]—Where a patent is issued through the false & fraudulent representations of the patentee, he may be declared to be a trustee of the land for the party legally entitled thereto.—*SINCLAIR v. MULLIGAN* (1888), 5 Man. L. R. 17.—*CAN.*

610 i. — Deception in matter of fact.]—Patents issued under a right of pre-emption obtained by fraudulent concealment of other existing claims to such right are void.—*A.-G. v.*

McNULTY (1860), 8 Gr. 324; 11 Gr. 281, 581.—*CAN.*

610 ii. —.]—*FRICHT v. SCHECK* (1863), 10 Gr. 254.—*CAN.*

610 iii. —.]—*WESTBROOKE v. A.-G.* (1865), 11 Gr. 330.—*CAN.*

610 iv. —.]—M. made an application for letters patent of grant of land upon which Crown dues remained unpaid by a former patentee, in which no mention was made of a sale by him. In an action for annulment of the letters patent granted to M.:—*Held*: the failure to mention the sale in the appln. for the letters patent was a misrepresentation & concealment which entitled the Crown to have the grant declared void & the letters patent annulled as having been issued by mistake & in ignorance of a material fact.—*R. v. MONTMINY* (1899), 29 S. C. R. 484.—*CAN.*

610 v. —.]—Deft., in making application for a grant of land from the Crown, represented that the land applied for was "near" the town of S. when in fact it was in it. Also, that the land was "unoccupied & unimproved" when in truth, to deft.'s knowledge, it was then in the occupation of D., being a part of land which had been expropriated by the town & conveyed to D. for use in connection with works:—*Held*: the Crown having been induced by false suggestions & fraudulent concealment to make a grant which it would not have made if the Crown officers had been properly informed, the grant must be set aside.—*A.-G. v. MCGOWAN* (1901), 37 N. S. R. 35.—*CAN.*

o

3, B. & C.]

614. Covinous conveyance—By third party to King—To evade mortmain—Grant by King to cognisant party—Void.]—The Friars Carmelites obtained from M. for a habitation land, held by him of the Bishop of W.; & because M. could not grant them the land by reason of the statute of mortmain, by covin between M. & the Friars Carmelites to toll the Bishop of his seignior, which was the impediment, M. granted the land to the King, his heirs & successors, whereby the Bishop's seignior would be extinct, to the intent that the King should grant over the same to the Friars Carmelites, which he did accordingly:—*Held*: the charter should be repealed, & the Friars Carmelites should be distrained to deliver the charter to be cancelled.

He who makes the King, who is the fountain of justice, to be the instrument of fraud & covin, & thereupon obtains letters patent, they are void, *quia dolus circuitu non tollitur*. If the King is endeavoured to be made an instrument to toll the right of another, & to that end a man obtains letters patent, such letters patent shall be repealed. Although such covin & fraud was not contained in the grant made to the King, but appears only by averment *dehors*, yet the patent shall be repealed. Although the Friars Carmelites were of a profession of religion, & had not any habitation before, so that it seemed to be a work of piety & charity to provide an habitation for them, yet *non facias malum, ut inde fiat bonum*. Such charter, so obtained, was adjudged to be repealed by the common law (*per Cur.*).—**FRIARS CARMELITES' CASE** (1313), Y. B. 17 Edw. 3, fo. 59, pl. 58; cited in 11 Co. Rep. 73 b; 77 E. R. 1246.

615. Grant of greater estate than entitled to grant.]—**CHANDOS'S (DUKE) CASE**, No. 599, *ante*.

616. —.]—**HOLLAND v. FISHER**, No. 600, *ante*.

617. Second grant of same estate—No recital of first grant.]—**ALTON WOODS' CASE**, No. 590, *ante*.

618. — Grants to different persons—Second grant void.]—**ALCOCK v. COOKE**, No. 612, *ante*.

619. — Second grantee with no knowledge of prior grant.]—Appls. claimed to have been in possession of the property in suit under a grant from the Dominion Government on June 8, 1887, of the use of land contiguous thereto as a park, & also under a lease from the Dominion dated Nov. 1, 1908, for ninety-nine years, which did not expressly include the property in suit & was moreover subject to any existing leases of portions of the land:—*Held*: applts. as defts. in possession could not object as not having been granted under the Great Seal, since that point had not been put forward in the cts. below; nor on the ground that it had been obtained by deceit practised on the Crown, since the respts. were without notice, actual or constructive, of a previous Crown grant if any to applts. inconsistent therewith.—**VANCOUVER CITY v. VANCOUVER LUMBER CO.**, [1911] A. C. 711; 81 L. J. P. C. 69; 105 L. T. 464, P. C.

—.]—*See, further*, Sect. 8, *post*.

620. Consideration.]—An abbot makes a lease for sixty years to B. who leases for eighty to C. the reversion comes to the King, to whom after the sixty years C. surrenders, *ad intentione* that the King should grant it him for the other twenty, which he does *ex certa scientia* reciting the old lease; but the King is deceived, & may avoid this grant.—**ANON.** (1576), 3 Dyer, 352 a; 73 E. R. 790.

Annotations:—**Consd.** **Alton Woods' Case** (1600), 1 Co. Rep. 26 b; **R. v. Kempe** (1694), 1 Ld. Raym. 49. **Mentd.** **Mallet v. Mallet** (1599), Cro. Eliz. 707; **Hill v. Hanks** (1614), 2 Bulst. 201.

621. Surrender of lease—Lessee having demised part.]—(1) The Queen by letters patent made a demise for lives in consideration of the surrender of a former lease also made by letters patent; at the time of the grant last made, the patentee had made several assignments & demises of the premises:—*Held*: the demise for lives is void.

A lease by the Queen in consideration of the surrender of all the lessee's estate is void, where the lessee has previously demised part.

(2) If the consideration, be it executory or executed, or be it on record or not on record, be not truly performed, or if prejudice may accrue to the Queen by reason of non-performance of it, the letters patent are void.—**BARWICK'S CASE** (1597), 5 Co. Rep. 93 b; 77 E. R. 199.

Annotations:—**As to** (1) **Consd.** **R. v. Chester** (1697), 1 Ld. Raym. 292. **As to** (2) **Consd.** **Holland v. Fisher** (1662), O. Bridg. 181; **R. v. Chester** (1697), 1 Ld. Raym. 292. **Refd.** **St. Saviours, Southwark Case** (1613), 10 Co. Rep. 66 b. **Generally, Mentd.** **Hemming v. Brabason** (1660), O. Bridg. 1; **Fox v. Whitechocke** (1614), 2 Bulst. 290; **Cornish v. Cawsey** (1648), Aleyn, 74; **Phillips v. Bury** (1694), Skin. 447; **R. v. Kemp** (1695), 12 Mod. Rep. 77; **Pugh v. Leeds** (1777), 2 Cowp. 714; **Savill v. Bethell**, [1902] 2 Ch. 523.

622. Rent previously paid.]—Lease of rectory & tithes by Queen Elizabeth held void because (a) the Queen was deceived as to the amount of rent previously paid; (b) the whole lease was intended to have the same commencement whereas as to the rectory the lease might commence immediately but the tithes were subject to another lease & the Queen's lease would not take effect until it expired.—**CHAMBERS v. MASON** (1604), Yelv. 47; 80 E. R. 34; *sub nom.* **MASON v. CHAMBERS**, Cro. Jac. 34.

Annotations:—**Consd.** **R. v. Kempe** (1694), 1 Ld. Raym. 49; **Davies v. Stacey** (1840), 12 Ad. & El. 506. **Refd.** **Holland v. Fisher** (1662), O. Bridg. 181; **Winter v. Loveday** (1696), 1 Com. 37; **A.-G. v. Windsor** (1860), 30 L. J. Ch. 529.

623. — Alleged right of grantee to certain profits of office.]—The King by Privy Seal, reciting that unserviceable munition belonged to the Master of the Ordnance, granted it to him, & he thereupon sold it & died:—*Held*: such munition could not be claimed as ancient fees, the office having been erected recently & the grant was void, for the Privy Seal was made upon a false suggestion & the King was therein deceived, & the exor. of the grantee was chargeable to the King for the munition.—**DEVONSHIRE'S (EARL) CASE** (1607), 11 Co. Rep. 89 a; 77 E. R. 1266.

Annotations:—**Consd.** **A.-G. v. Perry** (1734), 2 Com. 481. **Refd.** **Coke's Case** (1623), Benl. 117; **R. v. Inledon** (1811), Wight. 369. **Mentd.** **R. v. Hornby** (1694), 5 Mod. Rep. 29.

624. — Grant ex mero motu.]—A patent is void when the King is deceived in the real consideration that causes this grant; for when the King makes a grant by the word *ex mero motu* & yet expresses a real consideration moving his grant, which is false, now, since these are contrary & cannot stand together, the law shall judge upon the express consideration & shall not regard the clause of the form *ex mero motu*, which is *clausula clericorum*, but shall reject that, as the ct. does the opinion of the jury, when they find the fact, & conclude upon it contrary to law.—**NEEDLER v. WINCHESTER (BP.)** (1614), Hob. 220; 80 E. R. 367.

Annotations:—**Refd.** **Collingwood v. Pace** (1661), O. Bridg. 410; **Holland v. Fisher** (1662), O. Bridg. 181; **R. v. Hornbee** (1691), Freem. K. B. 331; **A.-G. v. Duplessis** (1752), Park. 144. **Mentd.** **Manby v. Scot** (1663), 1 Keb. 361; **Bushel's Case** (1670), T. Jo. 13; **A.-G. v. Allgood** (1743), Park. 1; **Hearle v. Greenbank** (1749), 1 Ves. Sen. 298; **Camplin v. Bullman** (1761), Park. 198; **Buckinghamshire v. Drury** (1762), Wilm. 177; **Johnson v. Clark**, [1908] 1 Ch. 303.

625. Undervalue & false particulars.]

Bill in equity lies to set aside letters patent of grant of lands obtained from the Crown by fraud, where, for instance, it is a purchase at an undervalue & on false particulars.—A.-G. v. VERNON (1685), 1 Vern. 370; 2 Rep. Ch. 353; 23 E. R. 528, L. O.

626. Time at which grant to take effect.]

J. leased to M. a close of land in B. for 44 years; M. was attainted of misprision of treason, & so forfeited to the King, who seised same. The King leased same to R. for 21 years, & died: Edward VI. in the fourth year of his reign, leased same to P. to hold, after the term to M. ended, for 21 years: R. surrendered to Queen Mary, who leased same again to R. for 30 years:—*Held*: the lease made to P., was utterly void, for the King was deceived in his grant; for the lease made to M. was long time before determined by extinguishment in the person of the King, who had it by forfeiture upon the attainder of M. & stat. 1 Edw. 6, c. 8, did not help that lease, notwithstanding the non-recital, or mis-recital of leases made before, for it was not matter of recital, but matter of estate & interest, which was not well limited for the commencement of it in the lease to P.; for there was not any certainty of the commencement of it, for that lease could not begin after the surrender of R., for the words of the limitation of the beginning of it, did not serve to such a construction.—HOLT v. ROPER (1559), 3 Leon. 5; 74 E. R. 504.

627. Point of title.]—Grant by letters patent of two pieces of land called N. & W., containing fifteen acres in W., lately in the tenure of C., & formerly belonging to the late monastery of W., *quæ quidem præmissa a nobis, etc. concealata et detenta fuerunt*. The lands were parcel of the manor of W., & it was found by special verdict that the manor *non concealata nec detenta fuit, sed fuit in onere et compoto*; & the rents & profits, except of the two pieces of land called N. & W., were answered to the King before & at the time of the letters patent:—*Held*: (1) although there was a certainty in the thing granted, in the names, in the content, in the town, county, tenant & in the title, yet the *quæ quidem* being false, avoided the patent for four reasons: (a) the clause *quæ quidem, etc.* was in law the suggestion of the patentee; (b) it was a clause of restraint to restrain the grant to that only which was concealed, & not in charge; (c) the final intention of the King & Queen by the letters patent was, to reward the service of the patentee, & not to diminish any part of their revenue; (d) the words are in the conjunctive, *concealata et detenta fuerunt*, & the land cannot be said to be detained from the King; (2) when the King & Queen were answered of the ancient rent of a manor, although the fermors, or officers & ministers of the King suffered an intrusion into parcel of the manor, yet that parcel was not in law concealed nor detained.

(3) *Ex certâ scientiâ* imports the King had knowledge of the thing he granted.

625 i. Consideration.—Undervalue & false particulars.]—A., on applying to the Crown lands department for the grant of land belonging to the Crown, knowingly misrepresented that the land "was not valuable for its pine timber." At that time the lot was embraced in a timber license to B.; but, in ignorance of that fact, the Comr. of Crown lands granted the appln., & a patent for the lot was prepared, but, before its issue, the fact as to B.'s license was discovered, & thereupon the Comr. indorsed upon the patent a memorandum that "these letters

patent are subject to the renewal of the timber license for one year from " a specified date. In an action brought by a purchaser of the timber from the patentee it was decided that the reservation of the timber so made was unauthorised & invalid:—*Held*: in these circumstances, A.-G. was entitled to proceed for a repeal of the patent, on the ground that it had been issued improvidently.—A.-G. v. CONTOIS (1878), 25 Gr. 346.—CAN.

g. Allegation of deceit.—How pleaded.]—Where concealment or mis-

(4) *Ex mero motu* properly imports the honour & bounty of the King, who rewards the patentee for the merits of his service, of his own mere motion, without any suit of the party.—LEGAT'S CASE (1612), 10 Co. Rep. 108 b; 77 E. R. 1090.

Annotations:—As to (1) *Consd.* Holland v. Fisher (1662), O. Bridg. 181. *Refd.* Brookham's Case (1628), Litt. 128; Litchfield v. Ayres (1639), W. Jo. 435; Swyft v. Eyres (1639), Cro. Car. 546; Thomason v. Mackworth (1666), O. Bridg. 502; R. v. Rochester (Bp.) & Clark (1675), 2 Mod. Rep. 1; R. v. Chester (1698), 2 Salk. 560. *Generally*, *Mentd.* R. v. Vaughan (1596), Cro. Eliz. 507.

628.]—R. v. CLARKE, No. 597, *ante*.

629. Matter of law—Grant in part of monopoly.

—The King leased a manor & mines, & granted that the lessee should have the sole vending of alum, reserving out of the premises £10,000 *per annum* to himself, & £1,640 *per annum* to M.:—*Semble*: the grant was void, as it appeared upon the face of the grant that the King was deceived in the very substance of the grant, & the rent was entirely reserved out of the whole.—MULGRAVE (LORD) v. MOUNSON (1676), Freem. Ch. 17; 22 E. R. 1029.

630. — Grant in fee of chattel interest.]

The estates of B. were seized after his death under an extent, & granted by the Crown to C. in fee:—*Held*: the King's interest under the extent being but a chattel interest, the grant by him in fee was bad, & the King had been deceived.—TRAVELL v. CARTERET (1683), 3 Lev. 134; 83 E. R. 616.

Annotation:—*Refd.* Morgan v. Seaward (1837), 2 M. & W. 544.

C. For Uncertainty.

631. General rule.]—The King's grant is void for uncertainty.—STOCKDALE'S CASE (1611), 12 Co. Rep. 86; 77 E. R. 1363.

Annotations:—*Refd.* Doe d. Devine v. Wilson (1855), 10 Moo. P. C. C. 502; Des Barres v. Shey (1873), 29 L. T. 592.

632. — Grantee claiming specific portion of land.]—A subject claimed a specific portion of land, the property of the Crown, under a grant by letters patent:—*Held*: he must show a specific description of the particular place as meant to be conveyed by the instrument, for he could not avail himself of general words.—PARMIER v. A.-G. (1813), 10 Price, 412; 147 E. R. 356, II. L.

633. — Effect of reference to certainty—Grant with such privileges as named person enjoyed.]

—If the King grants a manor with such privileges & franchises as P. formerly enjoyed therein, it is a good grant, because of the certainty to which it relates.—DARCY'S (LORD) CASE (1596), Cro. Eliz. 512; 78 E. R. 762.

Annotation:—*Refd.* Lyn v. Wyn (1665), O. Bridg. 122.

634. —]—When the King's charter in general terms refers to a certainty, it contains as express mention as if the certainty had been expressed in the charter, although the certainty to which the reference is, be not of record, but lies in averment by matter in pais or in fact.—WHISTLER'S CASE (1613), 10 Co. Rep. 63 a; 77 E. R. 1021.

take as to the issuing of a Crown grant by the Governor is alleged in pleading, it should have reference to the mind of the Governor himself, & he, personally, should be described as deceived or mistaken, under which averment evidence of the facts, as to those through whom he acts as agents having been deceived, may be given; but it would be more convenient, as preparatory to evidence, that the real actors should appear, & the fact of his Excellency having acted by their advice only be stated.—A.-G. v. SANDERSON (1870), 1 V. R. (Eq.) 18.—AUS.

Sect. 2. --Validity of grants: Sub-sect. 3, C.; sub-sect. 4.

*Annotations:--***Refd.** *Stukeley v. Butler* (1614), *Hob.* 168; *R. v. Rochester* (1675), 2 *Mod. Rep.* 1; *A.-G. v. Ewelme Hospital* (1853), 17 *Beav.* 366; *Doe d. Devine v. Wilson* (1855), 10 *Moo. P. C. C.* 502. **Mentd.** *Stonehouse v. Corbet* (1635), *Cro. Car.* 400; *Holland v. Fisher* (1662), *O. Bridg.* 181; *Jewison v. Dyson* (1842), 6 *State Tr. N. S.* 1.

635. As to amount of subject-matter—Grant of parcel of land—No description of what parcel.]—The Queen being seised of a great waste granted to B. the moiety of a yard-land in the waste, without certainty in what part of the waste they should have same, or the special name of the land, or how it was bounded. Afterwards the Queen granted to W. the waste, & afterwards B. authorised A. to enter into the waste, & on his behalf to make election of the moiety:—*Held*: the grant to B. was void for uncertainty, but if a common person had made such a grant it would be good & the grantee might make his choice & reduce the thing into certainty.—*HUNGERFORD'S CASE* (1585), 1 *Leon.* 30; 74 *E. R.* 28.

*Annotations:--***Refd.** *Doe d. Devine v. Wilson* (1855), 10 *Moo. P. C. C.* 502; *Savill v. Bethell*, [1902] 2 *Ch.* 523.

636. — — — — —.]—A Crown grant of so many acres out of a larger number, but not describing them by name, etc., but leaving it uncertain which acres are intended to pass, is void, as the grantee can have no election against the King.—*BRAND v. TODD* (1618), *Noy*, 29; 74 *E. R.* 999.

*Annotation:--***Consd.** *Doe d. Devine v. Wilson* (1855), 10 *Moo. P. C. C.* 502.

637. — Grant of tolls --As taken ibi et alibi.] —The King's grant of such toll as is taken *ibi et alibi* is void for uncertainty. —*LIGHTFOOD v. LENET* (1617), *Cro. Jac.* 421; 79 *E. R.* 360.

*Annotation:--***Refd.** *Stamford Corpn. v. Pawlett* (1830), 1 *Cr. & J.* 57.

638. As to time at which grant to take effect.]—*CHAMBERS v. MASON*, No. 622, *ante*.

639. — — — — —.]—The King granted the herbage & pannage of the park of C. to A. for life, & afterwards the King, reciting the grant to A., & that he was living, granted the herbage & pannage of the park to B. for his life, without showing when it should begin:—*Held*: (1) such grant to B. was good; (2) when the King's charter might be taken to two intents which were good, in many cases it should be taken to such intent as was most beneficial for the King, but if it might be taken to one intent which was good, & to another intent which was void, it should be taken in such manner as that the grant might take effect; (3) there was no uncertainty in the grant, & it should take effect in possession when the first grant should be ended or determined, whether it were by death, surrender or forfeiture. —*RUTLAND'S (EARL) CASE* (1608), 8 *Co. Rep.* 55 a; 77 *E. R.* 555.

*Annotations:--**As to* (1) **Refd.** *Gledstanes v. Sandwich* (1842), 4 *Man. & G.* 995. *As to* (2) **Refd.** *Priddle & Napper's Case* (1612), 11 *Co. Rep.* 8 b; *Rutter v. Chapman* (1841),

PART XIX. SECT. 2, SUB-SECT. 3.—C.

*h. As to amount of subject-matter.]—*Land was granted by a Crown patent describing it as the north part of lot 13, containing 60 acres, & the original plan of the township showed the lot with centre line running through the concession, & showed the part south of the line as 100 acres, & the part north of the line as 80 acres; prior to the grant of the north part, there had been a grant of the southerly part, containing 100 acres, describing it by metes & bounds, which were evidently intended to include all the land south of the line, although they actually fell short of doing so:—*Held*: the patent was not void for uncertainty.—*HYATT v. MILLS* (1891), 20

O. R. 351.—**CAN.**

*k. — — — One boundary "to be fixed."—*A license to occupy unsold Crown lands as a pastoral run is not void for uncertainty because one of the boundaries remains "to be fixed." —*NEW ZEALAND & AUSTRALIAN LAND CO. v. BOYES*, *Mac.* 693.—**N.Z.**

PART XIX. SECT. 2, SUB-SECT. 4.

*l. Opposition to patent.]—*The passing of a patent may be opposed, (1) whilst it is under the consideration of his Majesty; (2) when it comes to the privy seal; (3) when it comes to the Great Seal.—*Ex p. DALY* (1788), *Vern. & Scr.* 499.—**IR.**

*m. Grant void ex facie—May be impeached in any proceeding.]—*A

H. & W. 93. *Generally, Mentd.* *Strata Mercella's Case* (1591), 9 *Co. Rep.* 24 a; *Stafford's Case* (1609), 8 *Co. Rep.* 73 a; *Salisbury's Case* (1613), 10 *Co. Rep.* 58 b; *Lyn v. Wyn* (1665), *O. Bridg.* 122; *R. v. Kempe* (1694), 1 *Ld. Raym.* 49; *Clayton v. Kinaston* (1698), 1 *Ld. Raym.* 419; *R. v. Pasmore* (1789), 3 *Term Rep.* 199; *Alcock v. Cooke* (1829), 5 *Bing.* 340.

640. As to place—Grant of steward of manor—No statement of county in which manor situate.]—*SIREWSBURY'S (EARL) CASE*, No. 90, *ante*.

See, generally, COPYHOLDS.

641. As to name of tenement granted.]—A grant from the Crown of all those messuages called D., & all lands to the messuages belonging, or with them demised, lately belonging to the Priory of A. is good, although at the time the possession of the priory was surrendered to the Crown, & the estate granted was only known by the name of the four closes in D., & the land was not built upon when surrendered. A grant from the Crown of a house *cum pertinentiis* will pass land that was occupied with the house.—*GENNINGS v. LAKE* (1629), *Cro. Car.* 168; 79 *E. R.* 747.

SUB-SECT. 4.—OTHER CASES.

642. Grant cannot enure to double intent.]—*ALTON WOODS' CASE*, No. 590, *ante*.

643. Want of form—Void.]—*R. v. CLARKE*, No. 597, *ante*.

644. Grant to "inhabitants" of parish—Valid.]—(1) A grant made by the Crown to the inhabitants of a parish is good, though such grant cannot be made by private individuals.

(2) Grants by the Crown in derogation of forestal rights are good grants, though they might not be good except so far as they were in derogation of such rights.—*WILLINGALE v. MAITLAND* (1866), 1 *L. R.* 3 *Eq.* 103; 36 *L. J. Ch.* 61; 31 *J. P.* 296; 12 *Jur. N. S.* 932; 15 *W. R.* 83.

*Annotations:--**As to* (2) **Consd.** *Chilton v. London Corpn.* (1878), 7 *Ch. D.* 735; *Rivers v. Adams* (1878), 3 *Ex. D.* 361.

Refd. *Austin v. Amhurst* (1877), 38 *L. T.* 217; *Tyne Improvement Comrs. v. Inrie, A.-G. v. Tyne Improvement Comrs.* (1899), 81 *L. T.* 174. *Generally, Mentd.* *Mills v. Colchester Corpn.* (1867), 16 *L. T.* 626; *De La Warr v. Miles* (1881), 17 *Ch. D.* 535; *Hyde Corpn. v. Bank of England* (1882), 21 *Ch. D.* 176.

Compare No. 756, *post*.

What the Crown may or may not grant.]—*See* Sect. 5, *post*.

SECT. 3.—CONSTRUCTION OF GRANTS.

SUB-SECT. 1.—MODE OF CONSTRUCTION.

645. Charter—Not on criminal information.]—Rights under a charter must be determined in an appropriate manner & cannot be raised by way of defence on an information for unlawfully assembly & riot.—*R. v. SACHEVERELL* (1684), 10 *State Tr.* 30.

Annotation: Mentd. *Cope v. Barber* (1872), 20 *W. R.* 885.

grant from the Crown void *ex facie* may be impeached in any proceeding in which its validity comes directly or collaterally into question. But a grant, good on its face, cannot be defeated by showing that it was obtained by fraud, or that it is voidable on other grounds, unless in a proceeding taken to procure its repeal.—*GREEN v. SPENCER*, *Mac.* 628.—**N.Z.**

*n. Grant for inadequate consideration.]—*The mere fact that the advisers of the Crown in Council have advised the issue of a grant of Crown land for an inadequate consideration or for no consideration is not a ground for avoiding the grant.—*A.-G. v. GOLDSBOROUGH* (1889), 15 *V. L. R.* 638 — **AUS.**

SUB-SECT. 2.—GENERAL PRINCIPLES OF CONSTRUCTION.

646. Construed most favourably to Crown—Grant capable of two constructions.]—ANON., No. 286, *ante*.

647. ———.]—RUTLAND'S (EARL) CASE, No. 639, *ante*.

648. ——— Reservation of rent.]—K. complained against B. in *ejectione firmæ*; & B. pleaded not guilty. It appeared that the prior of St. John's of Jerusalem had demised the premises to C. for 50 years at a rent of £5 10s. 11d., with condition of re-entry if the rent was behind in part or in all. The premises came to the King's hands by surrender; & the King granted one of the houses to the lessee & another in fee. The rent fell in arrear, but before seizure or entry by the Crown, the residue of the premises was granted to one in fee who made a lease to K. B. was the assignee of the exor. of the first lessee; & on his entering, K. brought trespass:—*Held*: it was one entire lease; but the King's grant was to be taken favourably so that no prejudice should accrue to him; & the land devised to his patentee was discharged of the condition, the residue of the condition remaining with the reversion in the King's hands.—KNIGHT'S CASE (1588), 5 Co. Rep. 51 b; 1 And. 173; Gouldsb. 15; 3 Leon. 124; Moore, K. B. 199; 77 E. R. 137.

Annotations:—*Reid*. R. v. Cotton (1751), Park. 112. *Mentd.* Stukeley v. Butler (1615), Hob. 168; Haverhill v. Hare (1616), 3 Bulst. 250; Beare v. Woodley (1629), Cro. Car. 154; Field v. Boothsby (1658), 2 Sid. 137; Petition of Hornbee (1691), Freem. K. B. 331; Ward v. Everet (1699), 1 Ld. Raym. 422; Orby v. Mohun (1706), Freem. Ch. 291; A.-G. v. Allgood (1743), Park. 1; Doe d. Hayne v. Redfern (1810), 12 East, 96; Twynham v. Pickard (1818), 2 B. & Ald. 105; Robins v. Evans (1863), 2 H. & C. 110; Delacherois v. Delacherois (1864), 11 H. L. Cas. 62; Hyde v. Warden (1877), 3 Ex. D. 72.

649. ——— General words.]—General words in the grant of a manor are not to be construed against the Crown. Where a manor was granted with "*tot, talia, tanta, qualia, aliquis alius unquam habuit*":—*Held*: it was not a sufficient answer in *quo warranto* for using certain liberties within the manor to show that King Henry VIII. had granted the manor to Queen Catharine with these liberties for her life.—R. v. WHITE (1617), 3 Bulst. 292; 81 E. R. 244.

650. ———.]—Where, on the dissolution of monasteries, the possessions of an abbey came to the Crown, & the Crown subsequently granted all the tithes yearly renewing, with all their rights, members and appurtenances:—*Held*: the Crown being the rector, or *in loco rectoris*, the tithes granted must mean the rectorial tithes, or all the tithes except such as had been withdrawn by an endowment for the minister; but royal grants being strictly construed, the ct. would not hold the grant extended to the rectory, the rectory not being granted in express terms.

In ascertaining the meaning & effect of a charter, contemporaneous documents, proceedings in causes relating to it, & parol testimony, may be resorted to, in order to explain & give to the charter a construction, but not to contradict it.—SCARLETT v. LUCTON SCHOOL (1836), 10 Bli. N. S. 592; 4 Cl. & Fin. 1; 6 E. R. 218, H. L.; *affg.* S. C. *sub nom.* LUCTON SCHOOL (GOVERNORS) v. SCARLETT (1828), 2 Y. & J. 330; Ex. Ch. in Eq.

651. ———.]—Article 4 of the Union with Ireland Act, 1800 (c. 67), prohibited the creation of a new Irish peerage except so often as three of the Irish peerages existing at the Union shall become extinct. It further provided that "if any peerage shall at any time be in abeyance, such peerage shall be deemed & taken as an existing peerage:

& no peerage shall be deemed extinct unless on default of claimants to the inheritance of such peerage for the space of one year from the death of the person who shall have been last possessed thereof; & if no claim shall be made to the inheritance of such peerage, in such form & manner as may from time to time be prescribed by the House of Lords of the United Kingdom, before the expiration of the said period of a year, then & in that case such peerage shall be deemed extinct: provided that nothing herein shall exclude any person from afterwards putting in a claim to the peerage so deemed extinct: & if such claim shall be allowed as valid by judgment of the House of Lords, such peerage shall be considered as revived: & in case any new creation of a peerage of that part of the United Kingdom called Ireland shall have taken place in the interval, in consequence of the supposed extinction of such peerage, then no new right of creation shall accrue to His Majesty in consequence of the next extinction which shall take place of any peerage of Ireland."

Sir B. Bloomfield in 1825 was created a baron of the kingdom of Ireland by a patent which recited that three peerages had become extinct. Although no claim for one of those peerages for above a year after the death of the last peer had been put in, a subsequent claim to the peerage was allowed by the House of Lords in 1828. Consequently, only two peerages were in fact extinct at the date of the creation of Baron Bloomfield. Subsequently, four peerages of Ireland became extinct, & in 1830 a new baron of the kingdom of Ireland was created by patent. The question whether the grant of the Bloomfield peerage was valid was referred by the Crown to the House of Lords, & the House referred it to the Committee for Privileges:—*Held*: (1) the patent was valid, & the rights conferred by the patent on the peer could not be taken away from him by the revival of a dormant claim. Such revival affected only the right of the Crown to create future peerages. The right of the Crown to confer a peerage exists at Common Law, & could only be taken away by direct words. (2) The Crown is an exception to the general rule as to the construction of grants against the grantor, & grants to which the Crown is a party are to be so construed in favour of the Crown.—BLOOMFIELD PEERAGE CASE (1831), 2 Dow & Cl. 344; 2 State Tr. N. S. 905; 6 E. R. 755, H. L.

652. ———.]—A.-G. v. PARSONS, No. 706, *post*.

653. ——— Droits of Admiralty.]—To constitute wreck of the sea, goods must have touched the ground, though they need not have been left dry. Goods afloat on the high sea though within low water mark if they have not touched the ground, are *droits*. Wreck of the sea is land revenue & is generally granted to the lord of a manor on the coast.

Semble: the Crown cannot lawfully grant *droits* to a private person. All goods found afloat & derelict on the high seas belong, as *droits*, to the Crown, in its office of Admty. A claim to flotsam is therefore, in derogation of the general law, & of that right, & must be clearly made out before it can be admitted. The construction of such a grant, at the suit of the subject, is to be taken most beneficially for the King, & against the grantee, whereas the grant of a subject is to be construed most strongly against the grantor.—R. v. FORTY-NINE CASKS OF BRANDY (1836), 3 Hag. Adm. 257.

Annotations:—*Consd.* The Olympic, [1913] P. 92. *Reid*. R. v. Two Casks of Tallow (1837), 3 Hag. Adm. 294; R. v. Le Pauline (1845), 3 Notes of Cases, 616; R. v. Keyn (1876), 2 Ex. D. 63.

Sect. 3.—Construction of grants: Sub-sect. 2.]

654. —.]—During the Russian war one of her Majesty's ships of war, on her passage to O., fell in with & took possession of a raft of timber, having the Russian imperial mark painted on the several spars composing the same:—*Held*: such timber must be condemned as a *droit* of the Crown, & not a *droit* of Admlty.

Droits of Admlty., being by grant from the Crown, are to be interpreted strictly. It must be satisfactorily shown that the right claimed was granted under the Orders in Council of Mar. 6, 1605, which were issued to set at rest doubts as to the rights of the Lord High Admiral in time of hostility.

If a grant is made by the Crown of any subject-matter, in clear & express terms, the necessary conclusion is, that the Crown reserves to itself all that has not so been granted (DR. LUSHINGTON).—*RAFT OF RUSSIAN TIMBER* (1859), 5 Jur. N. S. 1109.

655. —.]—In 1437 an almshouse or hospital was founded & endowed by the lord of the manor of Ewelme, for thirteen poor men, two priests, for praying for souls & the education of youth, & the right of nominating the master was vested in the lord of the manor for the time being. Previous to 1513 the manor & the rights of patronage became, on the attainder of the lord, forfeited to the Crown. In 1618 King James I., by letters patent, granted the right of nomination of the master to the University of Oxford, for the support of the Regius Professor of Medicine, & in 1818 the manor, with all its advantages & endowments, was duly granted by the Crown to J. B.:—*Held*: (1) the rights of nomination & visitation, incidental to the manor, did not, upon the forfeiture by attainder, become merged & extinguished, but vested in the Crown; (2) the property, etc., of the hospital was not affected by stats. 27 Hen. 8, c. 28, & 31 Hen. 8, c. 13, but remained vested in the Crown as before; (3) they were not, in any degree, affected by 1 Edw. 6, c. 14, so as to vest the property in the Crown, as its *quasi* private possessions; (4) by the grant of King James to the University of Oxford, the *jus patronatus* had, *de facto*, been severed from the manor of E.; (5) by the common law, the grant of a manor by the King *cum pertinentibus* would pass an advowson appendant to it, & stat. 17 Edw. 2, c. 15, created a restriction as to advowson of churches only & did not apply to the present case of a lay advowson. Grants by the Crown are construed favourably to the grantor, & in such a case the usual rule as to the construction of grants is inverted. If it be shown that the King is deceived in his grant, it will not include a subject-matter not expressed.—*A.-G. v. EWELME HOSPITAL* (1853), 17 Beav. 366; 1 Eq. Rep. 563; 22 L. J. Ch. 846; 23 L. T. O. S. 4; 1 W. R. 523; 51 E. R. 1075.

Annotations:—As to (1) *Refd.* *A.-G. v. Boucherett* (1855), 25 Beav. 116. As to (5) *Refd.* *A.-G. v. Windsor* (1860), 30 L. J. Ch. 529.

656. Construed in favour of validity.]—*R. v. CLARKE*, No. 597, *ante*.

657. — Grant for value.]—The King's grant for value shall be construed liberally in favour of the subject & in favour of its validity for the honour of the King.—*MOLYN'S CASE* (1598), 6 Co. Rep. 5 b; 77 E. R. 261.

Annotations:—*Apld.* *R. & Waller v. Hanger* (1615), 3 Bulst. 1; *R. v. Kempe* (1695), 1 Ld. Raym. 49. *Refd.* *Rutland's Case* (1608), 8 Co. Rep. 55 a; *Stafford's Case* (1609),

8 Co. Rep. 73 a; *Priddle & Napper's Case* (1612), 11 Co. Rep. 8 b; *St. Saviour, Southwark Case* (1613), 10 Co. Rep. 66 b; *Orby v. Mohun* (1706), Frein. Ch. 291; *R. v. Eastern Archipelago Co.* (1853), 1 E. & B. 310. *Mentd.* *Bewley's Case* (1610), 9 Co. Rep. 130 b; *Thurman v. Cooper* (1618), Poph. 138.

658. — Grant capable of two constructions—One good & one bad.]—*ALTON WOODS' CASE*, No. 590, *ante*.

659. — — — —.]—*RUTLAND'S CASE*, No. 639, *ante*.

660. — — — —.]—A petition which had been agreed upon at a meeting of the ratepayers of the borough of M. to which all ratepayers had access & which was in fact attended by a thousand, & which petition was afterwards signed by 4000 of the inhabitant householders of the borough of M., was presented to Her Majesty praying for the grant of a charter of incorporation to the inhabitants of such borough, under the provisions of 1 Vict. c. 78, s. 49; afterwards, & before the day which was appointed for the Privy Council to take such petition into consideration, a counter-petition signed by 6000 of such inhabitant householders was presented to Her Majesty praying her not to grant such charter. The whole number of such inhabitant householders amounted to 48,000:—*Held*: (1) such second petition did not necessarily deprive Her Majesty of the power to grant such charter upon the first petition, but such first petition might still authorize the exercise of the powers conferred by the section of the act; (2) whether the first petition was, under all the circumstances the petition of the inhabitants, was a question of fact for a jury & the determination of the Privy Council to advise the Queen to act upon such petition was not conclusive of its validity; (3) the grant of such charter of incorporation was an exercise of the common law prerogative of the Crown, although such charter extended to the new corporation the powers of the municipal act, which the Crown had no power to do except by 1 Vict. c. 78, s. 49; (4) the Crown might by its common law prerogative appoint the number & set out the bounds of the wards in such borough; (5) & might also delegate the power of appointing the first members of such new corporation & might at all events appoint a person to ascertain the individuals who composed the class to whom such charter was granted; (6) such charter might be granted to *part* of the borough from the whole of which the petition has emanated & need not be conferred on the *whole* of such borough; (7) the appointment in such charter of parties to make out & revise the lists, & act as returning officer at the first election under such act was good, & times for holding the first election though not agreeing with the times mentioned for the elections in the municipal corporation act, might be appointed by the charter.

(8) The Queen's charters are to be so construed as, if possible, to give them effect. The petition required to empower the Crown to grant a corporation under the act, must be such a one as can fairly be considered as representing the will of the majority of the inhabitant householders. If two constructions can be made of a King's charter, & by force of one construction, the grant may be good, & by another it may be adjudged void, then, for the King's honour & the benefit of the subject, such construction shall be adopted as that the King's charter shall take effect; & of reasoning if one construction will defeat the express intention of the charter, & another effect it, the ct. is bound

PART XIX. SECT. 3, SUB-SECT. 2.

666 1. Construed in favour of validity.]—A patent of land from the Crown is to be upheld rather than avoided.—*HYATT v. MILLS* (1891), 20 O. R. 351.—*CAN.*

to adopt the latter & reject the former.—**RUTTER v. CHAPMAN** (1841), H. & W. 93; 8 M. & W. 1; 10 L. J. Ex. 495; 5 J. P. 417; 151 E. R. 925, Ex. Ch.

Annotations:—As to (1) & (3) **Consd.** R. v. Beneker & Ellis (1842), 6 J. P. 657. **Refd.** Holford v. Hankinson (1844), 5 Q. B. 584. As to (5) **Consd.** R. v. Dulwich College (1851), 21 L. J. Q. B. 38. As to (8) **Consd.** R. v. Beneker & Ellis (1842), 6 J. P. 657; R. v. Boucher (1842), 3 Q. B. 641; R. v. Warwickshire JJ. (1842), 11 L. J. Q. B. 299. **Distd.** R. v. Aberavon Corpn. (1864), 13 W. R. 90. **Consd.** Graham v. Berry (1865), 3 Moo. P. C. C. N. S. 207.

661. ——— **After long enjoyment—Unless outside power of Crown.**—In the construction of a royal charter reserving a rent to the Crown, which rent has been paid for a considerable length of time, the ct. ought to adopt a construction consistent with the grant falling within the powers of the Crown rather than one which would make the grant in excess of the royal prerogative, & to assume unless there is clear evidence to the contrary, that the state of things at the date of the charter was such as to make the grant of it within the powers of the Crown.

In 1628 Charles I. granted to the predecessor of deft. a charter, part of the term of which was contemporaneous with a former charter & part contemporaneous with the term of a charter of 1638, & thereby he granted to the predecessor certain exclusive rights of navigation in the Ouse & the right to take tolls in respect thereof. This charter had never been put in force:—**Held**: if the acceptance of the later charter did not affect a surrender of the former by operation of law, the ct. could, if necessary presume a lost surrender.—**A.-G. v. SIMPSON**, [1901] 2 Ch. 671; 70 L. J. Ch. 828; 85 L. T. 325; 17 T. L. R. 768, C. A.; *reversd.* on another point *sub nom.* **SIMPSON v. A.-G.**, [1904] A. C. 476, H. L.

Annotations:—**Mentd.** Newcastle v. Worksop U. C., [1902] 2 Ch. 145; Queenborough Corpn. v. Smeed, Dean (1904), 68 J. P. 244; A.-G. v. Antrobus, [1905] 2 Ch. 188; Dibden v. Skirrow, [1908] 1 Ch. 41; Robinson v. Smith (1908), 24 T. L. R. 573; *Re* Hatschek's Patents, *Ex p.* Zerenner, [1909] 2 Ch. 68; A.-G. v. Horner, [1913] 2 Ch. 140; Folkestone Corpn. v. Brockman, [1914] A. C. 338; Hamerton v. Dysart, [1916] 1 A. C. 57; Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co. (1920), 90 L. J. Ch. 420.

662. Construed liberally in favour of subject—Grant for value.]—**MOLYN'S CASE**, No. 657, *ante*.

663. ——— Grant ex certâ scientiâ—Unless Crown deceived.]—**ALTON WOODS' CASE**, No. 590, *ante*.

664. ——— Et mero motu.]—**R. v. MUSSARY**, No. 602, *ante*.

665. ——— ———.]—Grant of a liberty in a certain manor to A., who grants the manor, with etc., to the Crown. The Crown grants the manor again to B. with all etc. liberties, etc., in etc., in as full & ample manner as A. had it—such re-grant passes nothing, but what is expressly mentioned in words, as the subject-matter of such grant, notwithstanding the words of reference to the former grant, which do not extend the operation of the latter beyond the precise terms of the patent. *Qu.*: If the words "*Ex certâ scientiâ speciali gratiâ et mero motu*" reduce a royal grant to the rules of construction to which the grants of private persons are subject, doubted.—**R. v. CAPPER, Re BOWLER** (1817), 5 Price, 217; 146 E. R. 587.

Annotations:—**Consd.** R. v. Dover Corpn. (1835), 1 Cr. M. & R. 726. **Mentd.** Colonial Bank v. Whinney (1885), 30 Ch. D. 261.

Compare No. 627, *ante*.

662 i. Construed liberally in favour of subject.]—Grants from the Crown, either for a valuable consideration or of special favour, are to be construed in the same manner as deeds from subject to subject.—**CLARK v. BONNYCASTLE** (1834), 3 O. S. 528.—**CAN.**

662 ii. ———.]—A patent of land from

the Crown is to be construed most favourably for the grantee.—**HYATT v. MILLS** (1891), 20 O. R. 351.—**CAN.**

o. Presumption against error.—The description in a grant will be taken as correct unless proved wrong by the clearest testimony.—**DOE d. SMITH v.**

666. — .]—**R. & WALLER v. HANGER**, No. 7, *ante*.

667. ——— Licence to trade with enemy.]—A licence to G.F. & Co., of L., merchants, on behalf of themselves & others, to export on board a ship named, bearing any flag except the French, to a hostile port, & to import from thence specified goods notwithstanding all the documents may represent the ship to be destined to a neutral or hostile port, & to whomsoever such property may appear to belong, authorises an enemy subject of the hostile country to which the ship is licenced legally to export from London, & therefore incidentally legalises an insurance made by his agent here for his benefit. It is no objection to his agent's recovering for his use, that the loss is occasioned by the act of the hostile trader's own state from whose acts he separated himself by engaging in the traffic thus licensed. Licences to trade with an enemy are to be construed liberally, & not, like grants of property from the Crown, strictly, & therefore, although the agent, in obtaining the licence did not represent to the Privy Council that he applied on behalf of an hostile trader, the concealment did not vacate the licence, or vitiate the policy.—**FLINDT v. SCOTT** (1814), 5 Taunt. 674; 128 E. R. 856, Ex. Ch.

Annotations:—**Expld.** Bazett v. Meyer (1814), 5 Taunt. 824; Vaughan v. Lomeke (1825), 7 Dow. & Ry. K. B. 236. **Refd.** Anthony v. Moline (1814), 5 Taunt. 711; Robinson v. Morris (1814), 5 Taunt. 720; Schnakoneg v. Andrews (1814), 5 Taunt. 716. **Mentd.** Aubert v. Gray (1862), 32 L. J. Q. B. 50.

See, further, **ALIENS**, Vol. II., pp. 183, 185–188; Nos. 460, 464, 481, 491, 497, 510, 511.

668. ——— Grant capable of two constructions—One good & one bad.]—**RUTTER v. CHAPMAN**, No. 660, *ante*.

669. Grant ex certâ scientiâ—Meaning of.]—**LEGAT'S CASE**, No. 627, *ante*.

670. Grant ex mero motu—Meaning of.]—**LEGAT'S CASE**, No. 627, *ante*.

Compare Nos. 590, 602, *ante*.

671. Abbreviations & incongruous writings.]—**SHREWSBURY'S (EARL) CASE**, No. 90, *ante*.

672. Words of restriction in operative clause—Application to all things following last antecedent word of grant.]—Wreck may be claimed by prescription. The office of Lord High Admiral of England has existed immemorially. Words of restriction in the operative clause of a grant apply to all the things following the last antecedent word of grant. All the appurtenances of a manor in the hands of the Crown pass by a grant of the manor with the appurtenances, though they are not particularly recited in the grant.—**WIGGON v. BRANTHWAIT** (1699), 1 Ld. Raym. 473; 12 Mod. Rep. 259; Holt, K. B. 758; 91 E. R. 1215.

673. Words of permission—In charter to do act for public benefit.]—If there are words of permission in a charter to do an act which is clearly for the public benefit, they are obligatory; therefore where a charter declared that the mayor & jurats of an ancient town might hold a ct. of record for the holding of pleas, but which had been long disused, the ct. granted a mandamus to compel such ct. to be held at the instance of an inhabitant of the town, though he was not a corporator.—**R. v. HASTINGS CORPN.** (1822), 5 B. & Ald. 692, n.;

MEYERS (1832), 2 O. S. 335.—**CAN.**

p. ———.]—The presumption against error in a Crown patent is not so strong as in an ordinary deed between subject & subject.—**A.-G. v. FONSECA** (1888), 5 Man. L. R. 173.—**CAN.**

Sect. 3.—Construction of grants: Sub-sects. 2 & 3, A., B.

1 Dow. & Ry. K. B. 148; 1 Dow. & Ry. M. C. 53; 106 E. R. 1344.

Annotations:—*Refd.* R. v. Eye Corpn. (1822), 2 Dow. & Ry. K. B. 172; R. v. Havering Atte Bower (1822), 5 B. & Ald. 691; Bolton v. Crowther (1824), 4 Dow. & Ry. K. B. 195. **Mentd.** R. v. Great Southern & Western Ry. (1847), 9 L. T. O. S. 375.

674. ———.]—If a royal charter contains words of permission to do an act which is clearly for the public benefit they are obligatory; therefore where a charter of James I., granted to the steward & suitors of a manor, power & authority, to hold a ct. for the purpose, of hearing & determining pleas of debt, &c. but the ct. had been disused for that purpose during fifty years:—*Held*: mandamus would lie to compel the ct. to be held again, notwithstanding the non-user for such purpose.—*R. v. HAVERING ATTE BOWER (STEWART, ETC.)* (1822), 5 B. & Ald. 691; 2 Dow. & Ry. K. B. 176, n.; 1 Dow. & Ry. M. C. 205; 106 E. R. 1343.

Annotations:—*Consd.* R. v. Eye Corpn. (1822), 1 B. & C. 85; A.-G. of Isle of Man v. Cowley (1859), 12 Moo. P. C. C. 27; *Julius v. Oxford* (1880), 5 App. Cas. 214.

SUB-SECT. 3.—WHAT RIGHTS, INTERESTS AND PROPERTY PASS.

A. In General.

675. Only what Crown may lawfully convey.]—ALTON WOODS' CASE, No. 590, *ante*.

B. By General Words.

676. General rule.]—The intent of the King in a grant of land is to be collected from the grant itself & not according to collateral matters.

In a royal grant of "*omnia, terras, tenementa et hereditamenta sua*" nothing passes if it be not restrained to a certainty, as in such a town & late parcel of the possessions of such an one or of such an abbey or the like.

An immaterial mistake in the town or name of tenant shall not hurt the patent.—*DODDINGTON'S CASE* (1594), 2 Co. Rep. 32 b; 76 E. R. 484; *sub nom.* HALL v. PEART, Poph. 60.

Annotations:—*Refd.* Stukeley v. Butler (1614), Hob. 168; R. & Hunsdon v. Arundel (1616), Hob. 109; Bainbridge v. Gardiner (1665), O. Bridg. 402; Doe d. Smith v. Galloway (1833), 5 B. & Ad. 43. **Mentd.** Barker v. Bacon (1604), Cro. Jac. 48; Mirril v. Nichols (1614), 2 Bulst. 176; Jewell v. — (1616), 1 Roll. Rep. 408; Swyft v. Ryres (1639), Cro. Car. 546; Foote v. Berkley (1666), O. Bridg. 527; Morrell v. Fisher (1849), 4 Exch. 591; Norman v. Norman, [1919] 1 Ch. 297.

677. Whether general words qualified by recital.]—R. v. MUSSARY, No. 602, *ante*.

678. Followed by particular words.]—The Crown made a grant of a free Chapel with its appurtenances & also all tithe lands in A. & tithes there, & two other named closes & tithes in other places:—*Held*: the grant did not pass tithes except in A. The Crown expressed its intent in the grant & confirmed it by particularizing. Where

the intent of the Crown was apparent nothing contrary to it would pass by implication. There was a distinction between "*pertinenciis*" & "*pertinentibus*."

Where the Crown grants a manor & closes which are appurtenant thereto, the particularisation of a close is not material, because all closes that are parcel of the manor pass; so the grant of a rectory & the tithes of such & such a place passes all the rectory because natural parts of a manor, but a rectory & tithes are not natural parts of a chapel although they are appurtenant by usage.—*GRAHAM v. GEALES* (1619), Palm. 94; 81 E. R. 995.

679. Implying one entire continuing estate—Separate estates qualified & absolute not included—Intervening estates in other persons.]—HOLLAND v. FISHER, No. 600, *ante*.

680. Apparently limited by later charter—But no inconsistency.]—The charters of the city of London vest in that body fines for misdemeanors committed within the city, though imposed or adjudged by the Ct. of K. B., sitting in banc at Westminster, after a trial at the sittings at Guildhall.

Taking the charter of Charles I. by itself, the grant may appear to be more limited, but at all events, as that of Hen. VI. is not shown to have been surrendered, its comprehensive words will not be affected by the more limited but not inconsistent terms of the latter (LORD LYNTHURST, C.B.).—*R. v. LONDON CORPN.* (1831), 1 Cr. M. & R. 1; 4 Tyr. 709; 3 L. J. Ex. 223; 149 E. R. 968.

681. Not escheated land.]—Where land escheats to the Crown by virtue of an attainder, a grant by the Crown without special words will not pass the right to the land.—*CROMER v. CRANMER* (1566), cited in 1 Leon. 271; 74 E. R. 247.

Annotations:—*Consd.* Winchester's Case (1583), 3 Co. Rep. 1 a. *Refd.* Stanhop v. Lincoln, Williams & Adamson (1616), Hob. 237.

682. Not goods of felons.]—PAGET'S (LORD) CASE (1578), cited in Cro. Eliz. 513; 78 E. R. 762; *subsequent proceedings* (1589), 1 Leon. 194, Ex. Ch.

Annotations:—*Consd.* Darcy's Case (1596), Cro. Eliz. 512; R. v. Capper (1817), 5 Price, 217. *Refd.* Dacre's Case (1589), Cro. Eliz. 148.

683. ———.]—The goods & chattels of felons are a flower of the Crown, & felons' goods cannot pass from the Crown by implication, but only by grant, by plain & express words; usage & prescription cannot divest the Crown of that which can only pass by matter of record.—*HARRIS v. PARKER* (1702), Colles, 197; 1 E. R. 247, H. L.

684. Not things belonging to Crown by prerogative.]—ALTON WOODS' CASE, No. 590, *ante*.

685. Not choses in action.]—By the general grant of the King, things in action do not pass, for as only the King may grant them by his prerogative, they will not pass without special words.—*FORD & SHELDON'S CASE* (1606), 12 Co. Rep. 1; 77 E. R. 1283, Ex. Ch.

Annotations:—*Refd.* Southampton Corpn. v. Richards (1663), 1 Sid. 142; A.-G. v. Sands (1670), 2 Freem. Ch.

PART XIX. SECT. 3, SUB-SECT. 3.—A.

q. General rule.]—The King's grant passes nothing by implication.—*CASE OF THE ROYAL FISHERY OF BANNE* (1610), Dav. Ir. 55.—**IR.**

r. ———.]—The principle that a grant of land implies a grant of way of necessity to the land applies in the case of a Crown grant.—*SMITH v. CHRISTIE* (1904), 24 N. Z. L. R. 561.—**N.Z.**

PART XIX. SECT. 3, SUB-SECT. 3.—B.

676 i. General rule.—Specific description will control.]—The specific description in a patent, & not the general description, will probably govern.—

HENDERSON v. HARRIS (1861), 10 C. P. 374.—**CAN.**

676 ii. —Public lands—No reservation.]—Where the Crown, having authority to sell, agrees to sell & convey public lands, & the contract is not controlled by some law affecting such lands, & there is no stipulation to the contrary, express or implied, the purchaser is entitled to a grant conveying such mines & minerals as pass without express words.—*R. v. CANADIAN COAL & COLONIZATION CO.* (1892), 24 S. C. R. 713; 3 Exch. C. R. 157.—**CAN.**

684 i. Not things belonging to Crown by prerogative.]—Under a general grant

of land from the Crown without any express reservations gold & silver do not pass.—*KENNEDY v. INMAN* [1920], 1 W. W. R. 533; 51 D. L. R. 155; 15 Alta. L. R. 196.—**CAN.**

684 ii. Effect of
Though an ordinary Crown grant of land does not of itself convey to the grantee the Royal metals in the land, or prevent the Crown from working or authorising others to work them, yet the effect of the mining legislation of the colony is that the Crown has given up the prerogative right to mine for gold on Crown-granted land.—*AITKEN v. SWINDLEY* (1897), 15 N. Z. L. R. 517.—**N.Z.**

129; *R. v. Capper* (1817), 5 Price, 217; *Cooke v. Hemming* (1868), L. R. 3 C. P. 334; *Colonial Bank v. Whinney* (1885), 30 Ch. D. 269. *Mentd.* *Ryall v. Rolle* (1749), 1 Atk. 165; *R. v. Smith* (1810), Wight. 34; *Beckham v. Drake* (1849), 2 H. L. Cas. 579.

686. —.]—Choses in action do not pass under a Royal grant of all goods & chattels of suicides, for they are not expressly named.—*SOUTHAMPTON CORPN. v. RICHARDS* (1663), 1 Sid. 142; 82 E. R. 1020.

687. Not forest.—A subject can own a forest by special words of grant but not by a general grant of forest.—*JENNINGS v. ROCKE* (1620), Palm. 93; 81 E. R. 994.

688. —.]—*R. v. BRIDGES*, No. 873, *post*.

689. "All other liberties"—Not forestal rights.—A grant of exemption from forestal duties, does not pass the forestal rights from which those duties spring. A grant of a manor to A. with particular words of reference to a previous grant to B. as "with all liberties etc. etc. etc. which B. had"—"in as full & ample manner as B. held & enjoyed etc. etc." is not sufficient to pass forestal rights, which had been granted to, & enjoyed by B. without express words. A decision in *Eyre* against a former grantee & submitted to by him, if followed by conformable usage is conclusive on those claiming under him.—*A.-G. v. DOWNSHIRE (MARQUIS)* (1816), 5 Price, 269; 146 E. R. 605.

Annotation:—*Reid. R. v. Capper* (1817), 5 Price, 217.

690. "All other tithes"—Whether common law rights of other owners affected.—A grant from the Crown containing general words such as "all other tithes" is not sufficient to bar the right of a person entitled at common law, such as the right of the rector to tithes, unless it had been expressly stated in the grant what was the right of the Crown.—*EKINS v. DORMER* (1747), 3 Atk. 534; 26 E. R. 1108, L. C.

Annotations:—*Mentd.* *Bennett v. Neale* (1811), Wight. 324; *Heaton v. Cooke* (1811), Wight. 281; *Miller v. Jackson* (1826), 1 Y. & J. 65.

691. "Tithes & hereditaments"—Not tithes in gross.—The King in right of his Crown has a general right to the tithes of all lands situate in extra-parochial places.

The words tithes & hereditaments occurring amongst words of general description in a grant, after a particular description of the thing intended to be passed will not pass tithes in gross.—*A.-G. v. HARDLEY (LORD)* (1820), 8 Price, 39; Dan. 271; 146 E. R. 1124.

Annotation:—*Mentd.* *Chapman v. Gatcombe* (1836), 2 Scott, 738.

692. Not wreck.—*ALCOCK v. COOKE*, No. 612, *ante*.

693. "Franchises"—Not treasure trove.—Where gold or silver articles whose owner is unknown are found buried & lying all together in one place, the presumption is that they were intentionally hidden for the benefit of the depositor & they are therefore treasure trove.

Treasure trove, being one of the *jura regalia* which belong to the King by virtue of his Royal prerogative, cannot be claimed under the general grant of franchises in a Royal charter, but must itself be expressly granted; although, when so granted, it becomes a franchise in the grantee.

A franchise is a royal privilege, or branch of the King's prerogative, subsisting in a subject by a grant from the Crown. So long as it is attached to the Crown it is called prerogative, but when granted to a subject it is called franchise. Privileges, accordingly, that belong to the King by virtue of his prerogative, for example, the right to treasure trove, cannot pass in a royal grant under the word franchise.—*A.-G. v. BRITISH MUSEUM TRUSTEES*, [1903] 2 Ch. 598; 72 L. J. Ch. 743; 88 L. T. 858; 51 W. R. 582; 19 T. L. R.

Grants of franchises generally.—See Sect. 6, *post*.

C. By Particular Words.

694. "Appurtenances"—Land occupied with house.—A grant from the Crown of a house *cum pertinentiis* will pass land that was occupied with the house.—*JENNINGS v. LAKE* (1629), Cro. Car. 168; 79 E. R. 747.

695. — All appurtenances—Although not expressly recited.—*WIGGON v. BRANTHWAIT*, No. 672, *ante*.

696. — Toll.—Where the King, before the time of legal memory, was entitled to the soil of the town of C. & to toll traverse within it, & afterwards granted to the burgesses of the town, "the town of C. with all its appurtenances": these words are sufficient to pass the toll.—*BRETT v. BEALIES* (1829), Mood. & M. 416; *subsequent proceedings* (1830), 10 B. & C. 508.

Annotations:—*Mentd.* *Boaumont v. Mountain* (1834), 10 Bing. 404; *Woodward v. Cotton* (1834), 1 Cr. M. & R. 44; *Plin v. Curell* (1840), 6 M. & W. 234; *Beaufort v. Smith* (1849), 4 Exch. 450; *York & North Mid. Ry. v. R.* (1853), 22 L. J. Q. B. 225; *Brecon Markets Co. v. Neath & Brecon Ry.* (1872), L. R. 7 C. P. 555.

697. — Advowson.—The Comrs. of Woods & Forests, having power under 57 Geo. 3, c. 97, to make sale of any royalties, honours, hundreds, manors, lordships, or franchises, or any rights, members, or appurtenances thereof, belonging to the Crown, within the ordering & survey of the Exchequer, contracted for the sale of the Crown manor of E., & all cts. baron, cts. leet, & all fines, reliefs, rents, profits, waifs, strays, doelands, & all other rights, members, emoluments, & appurtenances thereunto belonging:—*Held*: this being in effect a contract for sale by the Crown, the advowson of E., which was appendant to the manor, did not pass under the contract & consequently, the purchaser was bound to take a conveyance of the manor without the advowson. *Semble*: if the contract had been between subject & subject, the advowson would have passed; although, at the time of the contract, it was not known by either party to be appendant to the manor, & therefore the sale of it was not in their contemplation.

Under 57 Geo. 3, c. 97, & the Crown Lands Act, 1829 (c. 50), the issuing of a special warrant from the Treasury to the Comrs. of Woods & Forests is not a condition precedent to the making of any contract between the Comrs. & the purchaser of Crown lands; it is sufficient if a special warrant be obtained before certificates of sale are granted

PART XIX. SECT. 3, SUB-SECT. 3.—C.

a. "All mines"—Not Royal mines.—A grant including in the description "all mines" will not pass Royal mines.—*WOOLEY v. IRONSTONE HILL LEAD GOLD MINING CO.* (1875), 1 V. L. R. 237.—*AUS.*

b. "As trustees"—No beneficial interest.—A Crown grant was issued to six natives in respect of land, the

habendum being "to hold unto" the natives "as trustees" of a reserve as a site for a church:—*Held*: the words "as trustees" governed the whole grant & left no room for any beneficial interest, & that the whole of the land was granted to be held on the public charitable trust expressed in the grant.—*Re HONE TURKIE*, [1920] N. Z. L. R. 733.—*N.Z.*

c. "Bank or edge" of lake.—

Where a grant from the Crown to B. was described as beginning at a stake standing on the "bank or edge" of a lake, & thence south, etc., to a stake standing on the westerly "bank or edge" of the lake, & thence following the several courses of the "bank or edge," to the place of beginning:—*Held*: the words "bank or edge" were intended to express the margin, & made the water's edge the boundary

Sect. 3.—Construction of grants: Sub-sect. 3, C., D., E. & F.: sub-sects. 4 & 5

express renunciation of former rights.—**TRURO CORPN. v. REYNALDS, TRURO CORPN. v. BASTIAN** (1832), 8 Bing. 275; 1 Moo. & S. 272; 1 L. J. C. P. 62; 131 E. R. 407.

721. Waste—Soil between high & low water mark.]—A.-G. v. HANMER, No. 369, ante.

See, further, WATERS & WATERCOURSES.

722. "Waste land"—Not gold or silver thereunder.]—A grant of waste lands in Victoria, under 5 & 6 Vict. c. 36, & made before the 18 & 19 Vict. c. 55, does not transfer to the grantee the gold & silver that may be found under the lands so granted.—WOOLLEY v. A.-G. OF VICTORIA** (1877), 2 App. Cas. 163; 46 L. J. P. C. 18; 36 L. T. 121; 25 W. R. 852, P. C.**

723. Wreck—Not goods that have not touched ground.]—R. v. FORTY-NINE CASKS OF BRANDY, No. 653, ante.

724. — Seashore between high & low water mark.]—A grant of wreck to the lord of the manor is strong evidence of a grant of the sea shore between high & low water mark:—Held: the right of soil between high & low water mark was in the lord of the manor. The grant of the wreck was almost conclusive evidence that with it the sea shore was included.—CALMADY v. ROWE** (1844), 6 C. B. 861; 4 L. T. O. S. 96; 136 E. R. 1487.**

*Annotations:—***Consd. Le Strange v. Rowe** (1866), 4 F. & F. 1048. **Refd. A.-G. v. Hanmer** (1858), 27 L. J. Ch. 837. **Mentd. Re Walton-cum-Trimley Manor, Ex p. Tomline** (1873), 28 L. T. 12.

See, further, WATERS & WATERCOURSES.

Grants of fishing rights.]—See FISHERIES.

Grants of foreshore & seashore.]—See WATERS & WATERCOURSES.

Grants of mineral rights.]—See MINES, MINERALS & QUARRIES.

Grants of rights in respect of water.]—See WATERS & WATERCOURSES.

D. Grants of Offices.

725. General rule—Passes all things making up

office.]—The grant of an office alone passeth all things that make up the office or belong to it time out of mind (TWISDEN, J.).—R. v. TRINITY HOUSE (1662), 1 Keb. 250; 1 Sid. 86; 83 E. R. 928.

*Annotations:—***Refd. Woodward v. Fox** (1691), 2 Vent. 267; **Anon.** (1698), 12 Mod. Rep. 224.

726. Grant of park with fee for exercising office—Park disparked.]—The King by patent granted the custody of a park to A. for life, & granted a fee for the exercise of it to be received by the hands of a bailiff of one of the King's manors:—Held: if the King disparked the park the fee would remain.—ANON.** (1561), Jenk. 225; 145 E. R. 156.**

Power of Crown to make grants of offices.]—See Sect. 5, sub-sect. 8, post.

E. Exceptions and Reservations.

727. Grant of all land of manor—Exception of deer & large trees in manor & park—Whether park passes.]—A question arose over the construction of a Crown grant by Queen Elizabeth purporting to grant to W. all lands belonging to the manor & hundred of O. except all deer & large trees in the manor & park, the park having been referred to in connection with the office of Park-Keeper, but there was no exception of the park from the grant:—Held: though the park as a royal franchise would not have passed under a general grant of lands yet by reason of the express exception of deer therein it was deemed to pass.—ZOUCH (LORD) v. MOORE** (1624), 2 Roll. Rep. 274; 81 E. R. 795.**

*Annotations:—***Consd. Smithett v. Blythe** (1830), 1 B. & Ad. 509. **Mentd. Peak v. Bourne** (1732), 2 Stra. 942.

728. Grant of rectory—Exception of all churches & vicarages belonging thereto—Perpetual curacy not within exception.]—The grant of a rectory by the Crown contained an exception of all churches & vicarages thereto belonging:—Held: a perpetual curacy belonging to the rectory passed by the grant, not being included in the exception.—ARTINGTON v. CHESTER (BP.)** (1790), 1 Hy. Bl. 418; 126 E. R. 243.**

PART XIX. SECT. 3, SUB-SECT. 3.—E.

1. Reservation larger than instructions.]—The construction of a Crown grant cannot be limited by Royal instructions, directing the governor of a province to reserve to the Crown certain minerals. If the exception is larger than the instructions authorised, it may be a ground for repealing the grant, or the grantee may refuse to receive it, but the Crown may ratify the act of the Governor.—GESNER v. CAIRNS** (1853), 7 N. B. R. (2 All.) 595. —CAN.**

g. Grant of land—Reservation of right to resume.]—A reservation in a Crown grant of land of a right to resume any quantity thereof not exceeding 10 acres, as may be required for public purposes, does not constitute an exception repugnant to the grant. Such reservation when carried into effect operates as a defeasance.—COOPER v. STUART** (1889), 14 App. Cas. 286; 5 N. S. W. W. N. 133, P. C. —AUS.**

h. — — —.]—STEWART v. WILLIAMS** (1914), 15 S. R. N. S. W. 4; 31 N. S. W. W. N. 108. —AUS.**

k. — — — Reserving right of entry for defence purposes—Whether grantee may dedicate for highway.]—Land was granted to corpn. of J., reserving a right to the Crown to enter at any time & erect barracks, batteries, etc.:—Held: this did not prevent corpn. from dedicating a part of the land to the public for a highway.—R. v.****

DEANE (1851), 7 N. B. R. (2 All.) 233. —CAN.

l. — — — Reservation of all mines & minerals—Includes mineral oils.]—In a grant from the Crown, all "mines & minerals" were reserved:—Held: "mineral oils" come within the reservation of "minerals."—Re MACKENZIE & MANN & FOLEY** (1909), 10 W. L. R. 668. —CAN.**

m. — — — Reservation of gold, silver, & coal—Whether vein of coal passes.]—A grant from the Crown reserved all mines of gold & silver, & of coals, with full & free liberty & power to search for, dig, & take away the same:—Held: veins of coal were excepted from the grant.—A.-G. v. BROWN** (1847), 2 N. S. W. S. C. R. App. 30. —AUS**

n. — — — Reservation of merchantable timber—Whether more than a license to enter & cut timber.]—A grant of land contained a reservation to the Crown or its agents of all merchantable timber:—Held: the reservation was merely a license to enter & cut the timber.—MACCRIMMON v. SMITH** (1906), 12 B. C. R. 377; 3 W. L. R. 154. —CAN.**

o. — — — Reservation of public road—Whether more than road in actual use.]—A Crown grant of land reserved a public road 21 links wide through the land granted. At the date of the grant a well-recognised & defined road, following the natural & only practicable line, was in use by the public:—

Held: grant only reserved the road actually in use.—WELLINGTON CORPN. v. PLIMMER & WELLINGTON DISTRICT LAND REGISTRAR** (1903), 22 N. Z. L. R. 632. —N.Z.**

p. — — — — —.]—The condition in grants of Crown land that all roads & thoroughfares shall remain free & uninterrupted, does not create any rights where none existed before, but reserves such rights of road as had been acquired against Govt. before date of the grant.—ELLMAN v. WERTH** (1899), 16 S. C. 173. —S. AF.**

q. Grant of riverside property—Reserving free access for all persons—Whether more than easement to public.]—The patent from the Crown of a lot of land situate on the bank of a river reserved free access to the bank for all persons, vessels, &c. There was a quantity of stone on the lot, which pltf. desired to quarry, but was prevented by the penning back of the water of the river by deft., the owner of a mill thereon, below pltf.'s land:—Held: the reservation by the Crown in the grant was merely an easement to the public.—HAWKINS v. MAHAFFY** (1881), 29 Gr. 326. —CAN.**

r. Grant in fee—Condition against alienation.]—The Crown may, by its prerogative, annex a condition against alienation to a grant in fee.—FOWLER v. FOWLER** (1865), 16 I. Ch. R. 507. —IR.**

s. — — — — —.]—GODDARD v. COLONIAL GOVERNMENT** (1908), 3 Buch. A. C. 301. —S. AF**

F. Effect of Misdescription.

729. Of thing granted—Rectory of M. in county of N.—Part of rectory in county of Y.]—The Queen being seised of the rectory of M. which extended into the counties of Y. & N. granted by letters patent the rectory of M. in the county of N. to S. in fee with all the lands glebes & other hereditaments with their appurtenances situated at the said rectory:—*Held*: the choses in Y. passed as the words were to be taken of the rectory of M. generally & not of M. in the county of N.—*ANON.* (1583), Sav. 55; 123 E. R. 1009.

730. —Manor & advowson formerly belonging to abbot & lately to bishop—Advowson appendant held by abbot but not by bishop.]—The King, seised of a manor to which an advowson was appendant, & which was before held by an abbot, granted the manor without the advowson to a bishop who regranted both the manor & advowson to the King. A grant was afterwards made by the King of the manor with the appurtenances, naming the advowson, & describing the whole as formerly belonging to the abbot, and lately to the bishop:—*Held*: by this grant the advowson passed.—*R. v. ROCHESTER (BP.) & CLERKE* (1674), 1 Mod. Rep. 195; 2 Mod. Rep. 1; 3 Keb. 412; 86 E. R. 824.

Annotations:—*Refd.* *R. v. Kemp* (1694), 1 Ld. Raym. 49; *R. v. Chester, Piers & Scroope* (1697), 1 Ld. Raym. 292; *Delacherols v. Delacherols* (1864), 4 New. Rep. 501.

Of grantee—Avoidance of grant.]—*See* No. 606, *ante*.

SUB-SECT. 4.—DATE OF GRANT.

731. Time whence grant takes effect.]—The deed of a subject takes effect from the time of the delivery & not from the time of the date, but the King's charter takes effect from the time of the date & not from the time of delivery.—*LUDFORD v. GREYTON* (1576), 2 Plowd. 491; 75 E. R. 731.

Annotations:—*Consd.* *R. v. Hopper* (1817), 3 Price, 495. *Refd.* *Johnson v. Smith* (1760), 1 Wm. Bl. 215. *Mentd.* *Magrath v. Hardy* (1838), 4 Bing. N. C. 782.

I, DEEDS & OTHER INSTRUMENTS.

SUB-SECT. 5.—USAGE AS EVIDENCE.

732. To divest Crown of things which can only pass by matter of record.]—*HARRIS v. PARKER*, No. 683, *ante*.

733. Corroborative evidence of claims.]—*Edw. VI.* by letters patent erected a school at Shrewsbury & gave the bailiffs & burgesses power to nominate & appoint a master & to make laws concerning *gubernationem et directionem pedagogi* & for the preservation of the revenue. The bailiffs & burgesses made bye-laws providing that upon every vacancy of a master the college should elect & nominate a proper person to them & they should nominate him, but they reserved to themselves power to disapprove. The college covenanted to perform the by-laws & this method of election was observed for 150 years without any interruption. Upon an information by the A.-G. to compel the burgesses to nominate according to the by-laws & usage:—*Held*: the case was corroborated by the usage of 252 years.—*A.-G. v.*

SHREWSBURY TOWN (1726), Bunb. 215; 145 E. R. 652.

734. To control directions of grant.]—No usage can control the direction of a charter.—*R. v. GROSVENOR* (1734), 7 Mod. Rep. 198; *Ridg. temp.* H. 41; 87 E. R. 1187.

735. Where words doubtful.]—Usage will be good or bad according to circumstances; where the words of a charter are equivocal & it stands indifferent how to interpret, contemporary usage will explain the words (*MANSFIELD, C.J.*).—*R. v. JOHNS* (1772), Lofft, 76; 98 E. R. 541.

736. —.]—A charter granted jurisdiction to borough magistrates over a district not within the borough & contained words of reference to former charters in which exclusive jurisdiction was given to the borough justices within the borough, & added that they should have jurisdiction within the new district *in tam amplis modo et forma*, etc.:—*Held*: (1) if there was in the latter charter a saving clause of the rights of the Crown & of all other persons, the borough magistrates would have only a concurrent jurisdiction with the county justices; (2) where the words of a charter were doubtful, they might be explained by long usage; (3) the charter did not exclude the county justices in the absence of express words to that effect.—*BLANKLEY v. WINSTANLEY* (1789), 3 Term Rep. 279; 100 E. R. 574.

Annotations:—*As to* (2) *Refd.* *Rennell v. Lincoln* (1825), 3 Bing. 223. *As to* (3) *Refd.* *Arnold v. Gausson* (1853), 8 Exch. 463; *R. v. Beacontree JJ.*, *R. v. Wright* (1915), 84 L. J. K. B. 2230.

737. —.]—A charter granted to the mayor & commonalty that any alderman being wanted, the rest of the aldermen might nominate two burgesses for the choosing of one of them as alderman by the commonalty:—*Held*: "commonalty" included the whole corpn. & an alderman so elected by the votes of the other aldermen as well as the burgesses at large was properly elected. *Semble*: contemporaneous & continuing usage may be resorted to in aid of the construction of doubtful words in an old charter.—*R. v. OSBOURNE* (1803), 4 East, 327; 102 E. R. 856.

738. —.]—*TEWKESBURY (BAILIFFS, ETC.) v. BRICKNELL*, No. 814, *post*.

739. To extend meaning of words used.]—Action by the Corpn. of London against deft. for disturbing them in exercising the office of gauger within the London Docks:—*Held*: (1) the words of a grant from the Crown might by contemporaneous exposition & constant usage be extended beyond their natural import so as to confer a right to exercise an office within a city & the liberties thereof though the right was granted only to be exercised within the City; (2) it was part of the ancient prerogative of the Crown as incident to the duty of customs to appoint officers to gauge all gaugeable articles imported into the kingdom whether for sale or otherwise.—*LONDON CORPN. v. LONG* (1807), 1 Camp. 22, N. P.

Annotations:—*Generally, Mentd.* *R. v. Adderbury East* (1813), 8 J. P. 375; *Moody v. L. B. & S. C. Ry.* (1861), 1 B. & S. 290.

740. Following decree against grantee—Binding on those claiming under him.]—*A.-G. v. DOWNSHIRE (MARQUIS)*, No. 689, *ante*.

741. To explain but not to contradict grant.]—*LUCTON SCHOOL (GOVERNORS) v. SCARLETT*, No. 650, *ante*.

PART XIX. SECT. 3, SUB-SECT. 3. F.

729 i. Of thing granted.]—A patent from the Crown granted land to B., with the express condition that the patent must be consistent with the patents of other portions of a particular block. The description of the land in

the patent was erroneous, which was apparent from the other patents and the registered & unregistered plans & had the effect of including land to which A. had a good title. In an action of trespass against B. for pulling down A.'s fence, & for a declara-

tion as to his boundaries:—*Held*: the patent must be read as only including the land according to the proper description thereof, & would not include the portion in question.—*DRULARD v. WEISH* (1907), 9 O. W. R. 491; 14 O. L. R. 51. —*CAN.*

Sect. 3.—Construction of grants : Sub-sect. 5. Sect. 4 : 1 & 2. Sect. 5 : Sub-sect. 1.]

742. —.]—A charter of James II. granted & confirmed to the master pilot & seamen of N. certain ancient dues called "primage" to be paid by all persons being owners of goods brought in any ship from beyond the seas into the river T., or any creek or member belonging to the port of N. In an action for dues in respect of merchandise whereof defts., being merchants & natives of S., were the owners, & which had been brought by vessels into the port of N.:—*Held*: evidence of usage was admissible in explanation of the charter, & evidence of payment of the duty under the same circumstances as those under which plffs. were charged was not inconsistent with the right construction of the charter.—*BRADLEY v. NEWCASTLE (PILOTS)* (1853), 2 E. & B. 427; 23 L. J. Q. B. 35; 22 L. T. O. S. 291; 18 Jur. 240; 1 W. R. 394; 118 E. R. 826, Ex. Ch.; *sub nom. NEWCASTLE-UPON-TYNE (MASTER PILOTS & SEAMEN) v. BRADLEY*, 1 C. L. R. 479.

— **Charter endowing charity.**—*See CHARITIES*, Vol. VIII., pp. 334, 335.

— **Charter creating corporation.**—*See CORPORATIONS*.

743. In favour of grant—Against the Crown.—*Primâ facie* all goods without an owner belong to the Crown, & if a claim be set up against the Crown the party setting it up must show either an actual grant or usage from which such a grant may be presumed, as might have been made conformably with law. Usage is not in itself good as against the Crown, except as evidence from which such a grant may be presumed (*NICHOLL, J.*)—*R. v. TWO CASKS OF TALLOW* (1837), 3 Hag. Adm. 294. *Annotations*:—*Refd.* *The Pauline* (1845), 2 Wm. Rob. 358; *The Olympie*, [1913] P. 92.

As to what passes by grant—Foreshore.—*See WATERS & WATERCOURSES*.

744. To determine boundaries of borough—Usage of payment of rates.—Resps. rated applts. to the relief of the poor of the borough of P. as occupiers of the harbour or pool of S. & as receivers of the tolls profits & dues in respect thereof:—*Held*: in construing the P. charter of incorporation which defined the limits of the borough & having regard to other documents & facts set out in the case, & especially to the fact that S. harbour or pool & the dues & profits thereof had been rated to the relief of the poor by the guardians of the poor of P. continuously for the last 150 years, it was impossible to doubt the pool was within the borough.—*SUTTON HARBOUR IMPROVEMENT CO. v. PLYMOUTH GUARDIANS* (1890), 63 L. T. 772; 55 J. P. 232; 6 T. L. R. 400.

Annotation:—*Mentd.* *Blyth Harbour Comrs. v. Newsham & South Blyth & Tynemouth Union Assmt. Com.* (1894), 71 L. T. 34.

SECT. 4.—PRESUMPTION OF GRANTS.

SUB-SECT. 1.—WHAT GRANTS MAY BE PRESUMED.

Lost grants generally.—*See Particular Titles, passim.*

745. Advowson—From long & continual possession.—A lawful grant of the Crown shall be presumed in respect of ancient & continual possession.—*BEDLE v. BEARD* (1607), 12 Co. Rep. 4; 77 E. R. 1288, L. C.

Annotations:—*Refd.* *Kingston upon Hull Corpn. v. Horner* (1774), 1 Cowp. 102; *Sawbridge v. Benton* (1793), 2 Anst. 372; *Meade v. Norbury* (1816), 2 Price, 338; *Halliday v. Phillips* (1889), 23 Q. B. D. 48; A.-G. v.

Horner, [1913] 2 Ch. 140. *Mentd.* *Hillary v. Waller* (1806), 12 Ves. 239; *Bennett v. Neale* (1811), Wight. 324; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Simpson v. Godmanchester Corpn.* (1895), 64 L. J. Ch. 837.

746. — & three presentations.]—A grant from the Crown of an advowson, excepted in a former grant under general words, will be presumed after a possession evidenced by title deeds for 133 years & three presentations.—*GIBSON v. CLARK* (1819), 1 Jac. & W. 159; 37 E. R. 336, L. C.

Annotation:—*Refd.* *A.-G. v. Murdock* (1852), 1 De G. M. & G. 86.

747. Leets, wafis & strays—Usage time out of mind.—*R. v. BRIGGS*, No. 134, *ante*.

748. Tolls—Usage time out of mind.—If a person, claiming a toll for passing over a highway, can show that the liberty of passing over the soil, & the taking of toll for such passage, are both immemorial, & that the soil & the tolls were before the time of legal memory in the same hands, though severed since, it shall be presumed that the soil was originally granted to the public in consideration of the tolls; & such original grant is a good consideration to support the demand.—*PELHAM (LORD) v. PICKERSGILL* (1787), 1 Term Rep. 660; 99 E. R. 1306.

Annotations:—*Folld.* *Rickards v. Bennett* (1823), 1 B. & C. 223. *Consd.* *Beaufort v. Smith* (1849), 4 Exch. 450. *Refd.* *Westover v. Perkins* (1859), 5 Jur. N. S. 1352; *Brecon Markets Co. v. Neath & Brecon Ry.* (1872), L. R. 7 C. P. 555; A.-G. v. *Simpson*, [1901] 2 Ch. 671. *Mentd.* *Henley v. Lyme Regis Corpn.* (1829), 3 Moo. & P. 278; *Jenkins v. Harvey* (1835), 2 Cr. M. & R. 393; *Dalton v. Angus* (1881), 6 App. Cas. 740.

749. Grant which should be by matter of record—After 350 years.—A grant or charter from the Crown, which ought to be by matter of record, may be presumed, though within time of legal memory, & where the presumption was founded on a possession of 350 years:—*Held*: this was a sufficient ground.—*KINGSTON UPON HULL CORPN. v. HORNER* (1774), 1 Cowp. 102; Lofft, 576; 98 E. R. 989.

Annotations:—*Refd.* *Eldridge v. Knott* (1774), 1 Cowp. 214; *Sawbridge v. Benton* (1793), 2 Anst. 372; *Hillary v. Waller* (1806), 12 Ves. 239; A.-G. v. *Parmeter* (1811), 10 Price, 378; *Lowden v. Hierons* (1818), 2 Moore, C. P. 102; A.-G. v. *Horner*, [1913] 2 Ch. 140. *Mentd.* *Read v. Brookman* (1789), 3 Term Rep. 151; *Bennett v. Neale* (1811), Wight. 324; *Meade v. Norbury* (1816), 2 Price, 338; *Doe d. Howson v. Waterton* (1819), 3 B. & Ald. 149; A.-G. v. *Murdock* (1852), 1 De G. M. & G. 86; *Angus v. Dalton* (1878), 4 Q. B. D. 162; *Somersetshire Drainage Comrs. v. Bridgwater Corpn.* (1899), 81 L. T. 729.

Rights in respect of water.—*See WATERS & WATERCOURSES*.

Enfranchisement of copyholds.—*See COPYHOLDS*.

750. Of port dues—Issuing out of neighbouring port—Land not belonging to Crown.—*EXETER CORPN. v. WARREN*, No. 566, *ante*.

751. Franchise to grant licences—Exercised from remote times.—Where a franchise had been exercised from very remote times, under circumstances which made it reasonable to suppose that it emanated from a grant by the Crown, & there had, at no period, been any considerable opposition to it, the ct. would not allow an information in the nature of a *quo warranto* to try its validity, merely on the ground that it could not be distinctly traced to a legal origin, especially as the franchise had been partially recognised in ancient statutes:—*Held*: a rule for an information against the vice-chancellor of C., to try the validity of his title to grant licences to ale-houses must therefore be discharged.—*R. v. ARCHDALL* (1838), 8 Ad. & El. 281; 3 Nev. & P. K. B. 696; 1 Will. Woll. & H. 440; 2 J. P. 486; 2 Jur. 1083; 112 E. R. 843.

Annotations:—*Refd.* *Re Oxford University & Taylor* (1841), 1 Q. B. 952; *Kemp v. Neville* (1861), 10 C. B. N. S. 523. *Mentd.* *R. v. Canterbury* (1848), 11 Q. B. 483.

Dedication of highway.]—See HIGHWAYS, STREETS & BRIDGES.

Foreshore & seashore.]—See WATERS & WATER-COURSES.

Several fishery.]—See FISHERIES.

Of manor.]—See COPYHOLDS.

Franchise of ferry.]—See FERRIES.

SUB-SECT. 2.—WHAT GRANTS MAY NOT BE PRESUMED.

Lost grants generally.]—See Particular Titles, *passim*.

752. Grant void at law—Crown restrained by statute from making grant.]—Possession of Crown land commencing at least 55 years previously by encroachment on the Crown in the time of the lessor of pltf.'s father, maintained by the father till his death 19 years previously, & afterwards continued for two years by his widow, when deft. obtained possession, would be sufficient evidence for the jury to presume a grant from the Crown, if the Crown were capable of making such a grant. But it appeared that by Dean Forest Act, 1667 (c. 3), all grants of land subsequent to the Act by the Crown in the forest of D., within which the land in question lay, were avoided, & consequently no presumption could be made of a valid grant.—**GOODTITLE v. BALDWIN** (1809), 11 East, 488; 103 E. R. 1092.

Annotations:—*Refd.* Doe d. Devine v. Wilson (1855), 10 Moo. P. C. C. 502; Mill v. New Forest Comr. (1856), 2 Jur. N. S. 520.

753. Grant in existence—Refusal of claimant to produce grant.]—*Semble*: where a claim is made under a grant from the Crown, which appears on the evidence to be enrolled of record, but which pltf. refuses to produce, the jury ought not to be directed to presume such grant.—**BRUNE v. THOMPSON** (1843), 4 Q. B. 543; 1 Dav. & Mer. 221; 12 L. J. Q. B. 251; 1 L. T. O. S. 78, 107; 7 Jur. 395; 114 E. R. 1003.

Annotation:—*Refd.* Newcastle upon Tyne Master, Pilots & Seamen v. Bradley & Potts (1851), 2 E. & B. 428, n.

754. —.]—In an action by the A.-G. at the relation of the corpn. of London against deft. as lessee of the land & buildings known as S. Market & of the franchise for holding a market therein:—*Held*: (1) deft. was only entitled to hold the market on the days mentioned in the charter granted by Charles II.; (2) as the presumption of a lost grant is only resorted to to justify a long course of conduct pursued as of right & not otherwise explained, a lost grant could not be inferred.—**A.-G. v. HORNER** (No. 2), [1913] 2 Ch. 140; 82 L. J. Ch. 339; 108 L. T. 609; 77 J. P. 257; 29 T. L. R. 451; 57 Sol. Jo. 498; 11 L. G. R. 784, C. A.

Annotations:—*As to* (2) *Refd.* Dysart v. Hammerton, [1914] 1 Ch. 822. *Generally, Refd.* Fowke v. Berington, [1914] 2 Ch. 308; London Corpn. v. Horner (1914), 111 L. T. 512; Maskell v. Horner, [1915] 3 K. B. 106. *Mentd.* Clode v. L. C. C., [1914] 3 K. B. 852.

755. To carry away soil of another.]—A claim to carry away the soil of another, without stint, cannot be sustained by evidence of a lost grant.—**A.-G. v. MATHIAS** (1858), 4 K. & J. 579; 27 L. J. Ch. 761; 31 L. T. O. S. 367; 4 Jur. N. S. 628; 16 W. R. 780; 70 E. R. 241.

Annotations:—*Consd.* Hough v. Clark & Hall (1907), 23 T. L. R. 682. *Refd.* Johnson v. Barnes (1872), L. R. 7 C. P. 592; Saltash Corpn. v. Goodman (1880), 5 C. P. D. 431; De La Warr v. Miles (1881), 17 Ch. D. 535; Smith v. Andrews, [1891] 2 Ch. 678. *Mentd.* A.-G. v. Hammer (1859), 33 L. T. O. S. 176.

756. Grant in favour of inhabitants of parish—Inhabitants not incorporated.]—A right claimed by the inhabitants of a parish to cut & carry away for use as fuel in their own houses fagots or baskets of the underwood growing upon a common belonging to the lord of the manor is a right to a *profit d prendre* in the soil of another. Such a right cannot exist by grant, unless it be a Crown grant which incorporates the inhabitants, & such a Crown grant will not be presumed from proof of user by inhabitants, if the presumption is inconsistent with the past & existing state of things, & there is no trace of such a corpn. having existed at any time.—**RIVERS (LORD) v. ADAMS** (1878), 3 Ex. D. 361; 48 L. J. Q. B. 47; 39 L. T. 39; 42 J. P. 728; 27 W. R. 381.

Annotations:—*Consd.* Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633; A.-G. v. Horner, [1913] 2 Ch. 140. *Refd.* De La Warr v. Miles (1881), 17 Ch. D. 535; Turner v. Salmon (1885), 1 T. L. R. 482; Smith v. Andrews, [1891] 2 Ch. 678; A.-G. v. Antrobus, [1905] 2 Ch. 188; A.-G. v. Reynolds, [1911] 2 K. B. 888; Harris v. Chesterfield, [1911] A. C. 623.

Compare No. 644, *ante*.

SECT. 5. —WHAT THE CROWN MAY OR MAY NOT GRANT.

SUB-SECT. 1.—IN GENERAL.

757. Grant to do thing against the law.]—**IPSWICH CLOTHWORKERS' CASE**, No. 780, *post*.

758. Grant not subject to right of subject to contend that grant forfeited—By breach of condition.]—A charter, incorporating & conferring certain privileges on a trading co., directed, half of the capital of the corpn., should be subscribed within twelve months, & that £50,000 at least should be paid up within such period; that the co. should not begin business until it had been certified to the Board of Trade, by three directors, that at least half of their capital had been subscribed & £50,000 paid up. The charter contained a proviso, that in case the corpn. should not comply with any of the directions & conditions in the said letters-patent it should be lawful for the Queen, by any writing under the great seal or the sign manual, to revoke the charter either absolutely, or under such terms & conditions as she might think fit:—*Held*: the proviso was intended & must be construed, to confer a cumulative & additional power upon the Crown, & not to restrict the prerogative of the Crown, or to interfere with the privileges of the subject. *Semble*: the Crown cannot grant a charter not subject to the right of the subject to contend that it has been forfeited by breach of a condition in which he has an interest, or by misuser or abuse.—**EASTERN ARCHIPELAGO CO. v. R.** (1853), 2 E. & B. 856; 23 L. J. Q. B. 82; 22 L. T. O. S. 198; 18 Jur. 481; 2 W. R. 77; 2 C. L. R. 145; 118 E. R. 988, Ex. Ch.; *affg.* S. C. *sub nom.* R. v. **EASTERN ARCHIPELAGO CO.**, 1 E. & B. 310; *subsequent proceedings* (1854), 4 De G. M. & G. 199, L. C.

Annotations:—*Consd.* A.-G. of Lancaster Duchy v. Devonshire (1884), 14 Q. B. D. 195; British South Africa Co. v. De Beers Consolidated Mines, [1910] 1 Ch. 354. *Refd.* Rendall v. Crystal Palace Co. (1858), 22 J. P. 321; R. v. Hughes (1866), L. R. 1 P. C. 81; Riche v. Ashbury Railway Carriage Co. (1874), L. R. 9 Exch. 224; Simpson v. A.-G., [1904] A. C. 476. *Mentd.* Jackson v. Beaumont (1855), 19 J. P. 532.

Derogatory grant—Creation of unknown mode of descent.]—*See* No. 563, *post*.

PART XIX. SECT. 5, SUB-SECT. 1.

t. **Derogatory grant—Derogation of right of navigation.]—**A grant

from the Crown which derogates from a public right of navigation is to that extent void unless interference with

such navigation is authorised by statute.—**R. v. FISHER** (1891), 2 Exch. C. R. 365.—**CAN.**

Sect. 5. What the Crown may or may not grant:
1, 2, 3, 4, 5, 6 & 7.]

759. — Derogation of forestal rights.]—
WILLINGALE *v.* MAITLAND, No. 644, *ante*.

Grants of franchises.]—See Sect. 6, post.

Grant of forfeited or escheated land.]—See,
Nos. 775, 776, 777, *post*.

Anticipatory grants.]—See Nos. 775, 776, 777, post.

Lands granted subject to reversion.]—See Part
XX., Sect. 2, *post*.

SUB-SECT. 2.—ANNUITIES AND PENSIONS.

760. Annuity—If charged out of revenues—
Valid.]—The King cannot grant an annuity,
for his person is not chargeable as the person
of a subject; but if he grant it out of his excise,
or any branch of his revenue it is good, for there
is somewhat therewith chargeable.—ANON. (1695),
1 Salk. 58; 91 E. R. 56.

761. — Binding on successors.]—
The revenue of the excise given by Parliament to
Charles II., his heirs & successors, was a gift to
him in fee, & being, like other inheritances,
alienable, a grant made by him of so much a year
out of the revenue of excise, for the payment of
the interest of such sums of money as he had
borrowed from individual subjects, was valid
& bound the King's successors.—*R. v. HORNBY*
(1699), 5 Mod. Rep. 29; Comb. 270; 87 E. R.
500; *sub nom.* BANKERS CASE, Skin. 601; 14
State Tr. 1; *sub nom.* HORNBY, WILLIAMSON,
SMITH & STONE'S PETITION, 1 Freem. K. B. 331.

Annotations:—Distd. *R. v. Treasury Lords Comrs.* (1835),
4 Ad. & El. 286. *Consd.* *Thomas v. R.* (1874), L. R. 10
Q. B. 31. *Refd.* *R. v. Roberts* (1744), 2 Stra. 1208;
Macbeath v. Haldimand (1786), 1 Term Rep. 172;
Meath v. Winchester (1836), 3 Bing. N. C. 183; *Re De*
Keyser's Royal Hotel, De Keyser's Royal Hotel v. R.,
[1919] 2 Ch. 197. *Mentd.* *Ex p. Colebrook* (1819), 7 Price,
87; *Giles v. Grover* (1832), 9 Bing. 128; *Re De Bode*,
Re Canterbury (1810), 2 Ph. 85; *de Bode v. R.* (1848),
13 Q. B. 364; *Tobin v. R.* (1861), 16 C. B. N. S. 310;
Hettibewage Siman Appu v. Queen's Advocate (1884),
9 App. Cas. 571; *Windsor & Annapolis Ry. v. R. &*
Western Counties Ry. (1886), 11 App. Cas. 607; *Re*
Kingsbury Collieries & Moore's Contract, [1907] 2 Ch. 259.

762. — Not chargeable against Crown person-
ally.]—ANON., No. 760, *ante*.

763. Pension—To endure beyond life of Crown—
Invalid.]—LORD ADVOCATE v. DUNGLAS (LORD).
No. 857, *post*.

SUB-SECT. 3.—FINES.

764. General rule.]—GROENVELT'S CASE, No.
175, *ante*.

SUB-SECT. 1.—FRANCHISES.

See Nos. 803–810, post.

SUB-SECT. 5.—JURA REGALIA.

765. Kingly dignity.]—ANON., No. 172, *ante*.

766. — OATHS BEFORE AN ECCLESIASTICAL
JUDGE, EX OFFICIO, No. 23, *ante*.

PART XIX. SECT. 5, SUB-SECT. 6.

a. Land held adversely—Before
ejection of person in
Where there is a *plena possessio* of
land against the Crown, particularly
under colour of title, the Crown must
be re-invested with the possession
before it can grant.—*MILLER v. LANTY*
(1840), 1 N. S. R. 161.—CAN.

b. — When a person is
in possession of Crown land, the Crown

cannot grant the land so occupied to
another, without first ejecting the
occupant.—*SCOTT v. HENDERSON*
(1843), 3 N. S. R. 115.—CAN.

c. — Whether before office
found.]—The Crown cannot grant
lands, of which a subject has been
in adverse possession for 20 years,
without first re-investing itself with the
possession by office found.—*SMYTH v.*
MCDONALD (1863), 5 N. S. R. 274.—
CAN.

d. — Or information of
intrusion.]—When the Crown has been
out of actual possession for 20 years
it may make a grant before it has first
established its title by information of
intrusion.—*EMMERSON v. MADDISON*,
[1906] A. C. 569.—CAN.

e. Land previously dedicated to
public.]—The Crown cannot grant to a
private person land which it has
previously dedicated to the public
as a highway.—*MACKAY v. LYNCH*
(1885), 3 N. Z. L. R. 425.—N.Z.

767. Crown jewels.]—ANON., No. 172, *ante*.

Power to pardon.]—See Nos. 172–175, ante.

Ports of the Kingdom.]—See No. 172, ante.

768. Droits of Admiralty.]—R. v. FORTY-NINE
CASKS OF BRANDY, No. 653, *ante*.

769. Salmon fishings.]—Salmon fishings are
inter regalia; they belong to the class of *regalia*
which the Crown may give away.—*LORD ADVOCATE*
v. SINCLAIR OF FORSS (1867), L. R. 1 Sc. &
Div. 174, H. L.

770. Mussel fishings.]—Mussel scalps on the
foreshore or the estuary of a navigable river form
part of the patrimonial property of the Crown
which it can convey or let in lease to a subject.—
PARKER v. LORD ADVOCATE, [1904] A. C. 364;
20 T. L. R. 547, H. L.

See, further, FISHERIES.

771. Treasure trove.]—A.-G. v. BRITISH
MUSEUM TRUSTEES, No. 693, *ante*.

SUB-SECT. 6.—LAND.

772. Held jure coronæ.]—ANON., No. 172, *ante*.

773. Grant to A. & his heirs male—Void.]—
The King granted land to A. & his heirs male:—
Held: this patent was void; for if A. had only
a daughter & died & the daughter then had a
son the fee would be in abeyance, for the daughter
would be the heir & if she died her son should
have the fee; but the law would not allow such
ceasing & reviving of a freehold. Parliament
could create such an estate but it could not be
otherwise done.—ANON. (1527), Jenk. 199; 115
E. R. 134.

774. Grant in tail to hold of another.]—If the
King makes a gift in tail to hold of another, this
is a good tenure by his prerogative, but a common
person cannot do this. If the King gives lands,
which he has by reason of an honour, to hold of
him in chief, it is good.—ANON. (1570), Moore,
K. B. 93; 72 E. R. 462.

775. Forfeited or escheated—Before office found
—Valid.]—lands vested in the King's posses-
sion by an act of attainder may be granted by him
before office found, notwithstanding 18 Hen.
6, c. 6.—ANON. (1557), Dyer, 145 b; 73 E. R. 318.
Annotation:—Refd. *Doe d. Hayne v. Redfern* (1810), 12
East, 96.

776. — Before inquisition—Void.]—A grant
by the Crown of an estate forfeited before any
inquisition finding the forfeiture, is illegal.

The ct. is cautious in passing a patent for a grant
of warden of the Fleet, because it may occasion a
general escape of the prisoners.—*LEIGHTON'S CASE*
(1690), 2 Vern. 173; 23 E. R. 715.

777. — 8 Hen. 6, c. 16, &
18 Hen. 6, c. 6, prohibiting the granting to farm of
lands seised into the King's hands, upon inquest
before escheators, until such inquest be returned
in the ch. or exch., & for a month afterwards, if
the King's title be not found of record, unless to
the party grieved who shall have tendered his
traverse to such inquest, & avoiding all grants
made contrary thereto, extend to the case of an

escheat upon the death of the tenant last seised, without heirs, where no immediate tenure of the Crown was found by the inquest. *Qu.*: whether at common law, upon the death of the tenant last seised of the land, without heirs, the right & possession must be presumed to be immediately in the Crown, without office, as though the person last seised were the King's immediate tenant; the King's title not appearing by any matter of record, & possession not having been vacant from the death of the tenant last seised.—*DOE v. HAYNE v. REDFERN* (1810), 12 East, 96; 104 E. R. 39.

SUB-SECT. 7.—MONOPOLIES.

778. Definition.]—*EAST INDIA CO. v. SANDYS* (CASE OF MONOPOLIES), No. 47, *ante*.

779. Illegal—As contrary to Magna Carta.]—If a grant be made to any man to have the sole making of cards or the sole dealing with any other trade, that grant is against the liberty & freedom of the subject that before did use, or lawfully might have used that trade, & consequently against Magna Carta. Generally all monopolies are against that great charter because they are against the liberty & freedom of the subject & against the law of the land.—*DARCIE'S CASE* (1602), cited in 1 Co. Inst. 47.

*Annotations:—*Refd. *Jefferys v. Boosey* (1854), 24 L. J. Ex. 81. *Mentd.* *Crossman v. Reade* (1588), Cro. Eliz. 114.

780. — Unless for new invention—& for limited time.]—Held: (1) the King might make corpns. & grant to them that they may make ordinances for the ordering & govt. of any trade, but thereby they cannot make a monopoly, for that is to take away free trade, which is the birth-right of every subject; (2) if a man had brought in a new invention & a new trade within the kingdom or had made a new discovery of any thing, in such cases the King, in recompense of his costs & travail, might grant by charter to him, that he only should use such a trade or traffic for a certain time, because at first the people of the kingdom were ignorant, & had not the knowledge or skill to use it: but when that patent was expired, the King could not make a new grant thereof: for when the trade was become common, & others had been bound apprentices in the same trade, there was no reason that such should be forbidden to use it; (3) corpns. could not be empowered to decide whether there had been a breach of its charter, for in this way it would be a judge in its own cause, which was against the law, & the King could not grant unto another to do a thing which was against the law.—*IPSWICH CLOTH-WORKERS' CASE* (1614), Godb. 252; 78 E. R. 147; *sub nom.* *IPSWICH TAYLORS v. SHERRING*, 1 Roll. Rep. 4; *sub nom.* *IPSWICH TAYLORS' CASE*, 11 Co. Rep. 53 a.

*Annotations:—*As to (1) *Refd.* *Boulton v. Bull* (1795), 2 Hy. Bl. 463; *Jefferys v. Boosey* (1854), 4 H. L. Cas. 815; *Davies v. Davies* (1887), 36 Ch. D. 359. As to (2) *Consd.* *Maraden v. Saville Street Foundry & Engineering Co.* (1878), 3 Ex. D. 203. *Refd.* *Beard v. Egerton* (1846), 3 C. B. 97. *Generally, Mentd.* *Norris v. Staps* (1616), Hob. 210; *Jolliffe v. Brode* (1621), W. Jo. 13; *Thomas v. Sorrel* (1673), 3 Keb. 223; *Hacket v. Tilly* (1706), 11 Mod.

PART XIX. SECT. 5, SUB-SECT. 7.

i. Illegal—Grant of sole right to fish in navigable waters.]—The Crown cannot grant the waters of a navigable arm of the sea, so as to give a right of exclusive fishing therein.—*MEISNER v. FANNING* (1856), 2 Thom. 97; 3 N. S. R. 97.—*CAN.*

g. — — —.]—A grant from the Crown of an exclusive right of fishing in tidal waters would be invalid as

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against other subjects, whatever its force might be as against the Crown.—*DONNELLY v. VROOM* (1907), 40 N. S. R. 585; 2 E. L. R. 358.—*CAN.*

h. — — — Shores & navigable waters of harbours.]—Pltf. erected a building on the shore & over the public waters abutting on & near land held by deft. from the Crown under a mining grant. Deft. notified pltf. to remove the building &, subsequently, tore down &

Rep. 93; *Green v. Durham Corpn.* (1757), 1 Burr. 127; *R. v. Durham Corpn.* (1757), 1 Keny. 512; *French v. Adams* (1763), 2 Wils. 168; *Rogers v. Rajendro Dutt* (1860), 13 Moo. P. C. C. 209; *Kruse v. Johnson*, [1898] 2 Q. B. 91.

781. — — —.]—The Crown has always exercised a control over the trade of the country, & although restrained by the common law, 21 Jac. 1, c. 3, within reasonable limits the Crown might grant the exclusive right to trade with a new invention for a reasonable period. The above Act did not create but controlled the power of the Crown in granting to the first inventors the privilege of the sole working & making of new manufactures.—*CAIDWELL v. VANVLISSENGEN* (1851), 9 Hare, 415; 21 L. J. Ch. 97; 18 L. T. O. S. 192; 16 Jur. 115; 68 E. R. 571.

*Annotations:—*Refd. *Betts v. Neilson*, *Betts v. De Vitre* (1868), 3 Ch. App. 429; *Adair v. Young* (1879), 12 Ch. D. 13; *North-Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439. *Mentd.* *Betts v. Neilson* (1865), 3 De G. J. & Sm. 82; *Betts v. Willmott* (1871), 6 Ch. App. 239; *Nobel's Explosives Co. v. Jones, Scott* (1881), 17 Ch. D. 721; *Jackson v. Needle* (1884), 1 (Griffin's Patent Cases, 174); *United Telephone Co. v. Sharples* (1885), 29 Ch. D. 164.

See, further, COPYRIGHT & LITERARY PROPERTY; PATENTS & INVENTIONS; TRADE MARKS, TRADE NAMES & DESIGNS.

782. — Grant of sole right to trade—In city—Enforcement by forfeiture of subjects' goods.]—Henry VI. granted to the corpns. of Dyers the power to search, & if they found any cloth dyed with logwood, the cloth should be forfeited:—*Held:* by the patent no forfeiture could be imposed on the goods of a subject.—*WALTHAM v. AUSTIN* (1599), cited in 8 Co. Rep. 125; 77 E. R. 663.

*Annotations:—*Consd. *City of London Case* (1610), 8 Co. Rep. 121 b. *Mentd.* *Hutchins v. Player* (1663), O. Bridg. 272.

783. — — — To merchant's guild.]—The Crown cannot grant to a merchant's guild the perpetual right of trading within a city to the exclusion of those not members of the guild & the further right of searching for concealed merchandise & if any be found forfeiting it to the use of the guild. Such a right might exist by prescription or statute. A charter containing a grant of privileges contrary to law is not aided by a *non-obstante* clause.—*DUBLIN CORPN. CASE* (1619), Palm. 1; 81 E. R. 949.

*Annotation:—*Refd. *Winton Corpns. v. Wilkes* (1704), 2 Ld. Raym. 1129.

784. — — — To particular places—Unless authorised by Parliament.]—The King cannot by his charter grant to a society of merchants the exclusive privilege of trading to particular places, & in particular articles, unless he is previously authorised by Parliament so to do.—*MERCHANT ADVENTURERS' CO. v. REBOW* (1687), 3 Mod. Rep. 126; 87 E. R. 81.

785. — — — Within certain limits—Enforcement by forfeiture of subjects' goods.]—The King may create a corpns. of merchants, & give them, by charter, an exclusive right to trade, & hold territories, within certain limits, but a clause prohibiting others to trade within the limits, under pain of forfeiture of their goods wheresoever found, is void, for the King cannot by letters patent create a forfeiture of, or by his own act, confiscate,

removed the same. In an action by pltf. for damages the defence set up was that by virtue of a mining grant held by deft. the property abutting on the waters over which the erection had been placed was their sole & exclusive property & that pltf. was a trespasser:—*Held:* the granting by the Crown of such exclusive right would be contrary to public policy & in derogation of public rights secured by statute. Shores & navigable waters of

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5.—*What the Crown may or may not grant:*
Sub-sects. 7 & 8. Sect. 6

a subject's property.—**NIGHTINGALE v. BRIDGES** (1689), 1 Show. 135; 89 E. R. 496.

786. — Grant of sole right to navigate river.]—A Royal charter purporting to confer upon the patentee the exclusive navigation for all time of part of a public navigable river, & the exclusive licence of transporting goods thereover, is void both by 21 Jac. 1, c. 3, & by the common law.—**SIMPSON v. A.-G.**, [1904] A. C. 476; 74 L. J. Ch. 1; 91 L. T. 610; 69 J. P. 85; 20 T. L. R. 761; 3 L. G. R. 190, H. L.; *revsq.* S. C. *sub nom.* A.-G. v. **SIMPSON**, [1901] 2 Ch. 671, C. A.

Annotations:—**Consd.** **Dibden v. Skirrow**, [1908] 1 Ch. 41. **Refd.** **Re Hatschek's Patents, Ex p. Zerenner**, [1909] 2 Ch. 68; A.-G. v. **Horner** (1913), 82 L. J. Ch. 339. **Mentd.** **Newcastle v. Workson U. C.**, [1902] 2 Ch. 145; **Queenborough Corp'n. v. Smeed, Dean** (1904), 68 J. P. 244; A.-G. v. **Antrobus**, [1905] 2 Ch. 188; **Robinson v. Smith** (1908), 24 T. L. R. 573; A.-G. v. **Horner**, [1913] 2 Ch. 140; **Folkestone Corp'n. v. Brockman**, [1914] A. C. 338; **Hammerton v. Dysart** (1915), 85 L. J. Ch. 33; **Hammerton v. Dysart**, [1916] 1 A. C. 57; **Morpeth Corp'n. v. Northumberland Farmers' Auction Mart Co. & Donkin** (1920), 90 L. J. Ch. 420.

SUB-SECT. 8.—OFFICES.

787. Office requiring skill—To unskilful man—Void.]—The King's grant of an office which requires skill to an unskilful man is void; even though it be made to him & his assigns. A grant of an office of skill to an infant to be exercised *in presenti* is void, but if *in futuro* & that he be of full age & expert, when the office is to be exercised, is good.—**ANON.** (1465), Jenk. 121; 145 E. R. 85.

788. — To infant—Void.]—**ANON.**, No. 787, *ante*.

789. Office in reversion—Of judicial office—Void.]—A judicial office cannot be granted in reversion; nor can the King grant it to any one with power to make a deputy. Where a judicial office was granted to A. & his assigns he could not assign it.—**ANON.** (1471), Jenk. 141; 145 E. R. 98.

790. — Office partly judicial & partly ministerial—Void.]—The nomination of auditors of the ct. of Wards must be under the Great Seal. This office is partly ministerial & partly judicial, & cannot be granted in reversion; for it is by Act of Parliament so entire, that the ministerial part cannot be divided from the judicial. A grant by the King of this office in reversion, to begin after a former grant of the same office in reversion, & which grant is recited in the last made grant, is not good, first, as being a grant in reversion; & secondly, because it recites a void grant as one that is good.

The grant of the office of one of the auditors of the ct. of Wards to two & the survivor of them is good; 32 Hen. 8, c. 46, makes them one officer.—**CURLE'S (AUDITOR) CASE** (1610), 11 Co. Rep. 2 b; 77 E. R. 1147.

Annotations:—**Expld.** **Howard v. Wood** (1678), 2 Show. 21. **Consd.** **Owen v. Saunders** (1696), 1 Ld. Raym. 158; **Eyre v. Shaftsbury** (1722), 2 P. Wms. 102; **Hudson v. Hudson** (1735), Cas. temp. Talb. 127; **Sharp v. Warren** (1818), 6 Price, 131. **Expld. & Distd.** **R. v. Wake** (1857), 8 E. & B. 384. **Consd.** **Bell v. Holtby** (1873), 42 L. J. Ch. 266. **Refd.** **R. v. Kempe** (1695), 1 Ld. Raym. 49; **Cowper v. Cowper** (1734), 2 P. Wms. 720; **R. v. Loxdale** (1758), 1 Burr. 445.

our harbours cannot be alienated.—**BRANSFIELD v. BEATTY** (1894), 7 Nfld. L. R. 813.—**NFLD.**

k. Exclusive right to practise as solicitor.]—An assocn. of procurators enjoyed for more than a century the exclusive privilege of practising in

the inferior cts. of Edinburgh, under regulations as to admission, etc. by the judges of those cts.; they obtained a royal charter ratifying these regulations, & containing a special grant of the exclusive right of practising, & possession continued thereafter for

791. — Ministerial office—Valid.]—The King granted a ministerial office to A. *durante beneplacito*, & afterwards granted the same to B. to commence after the death, surrender or forfeiture of A.:—**Held**: the latter grant was good.—**R. v. KEMPE** (1695), 1 Ld. Raym. 49; Carth. 350; Comb. 334; Holt. K. B. 419; 4 Mod. Rep. 275; 12 Mod. Rep. 77; 2 Salk. 465; Skin. 446, 580; 91 E. R. 929.

Annotations:—**Consd.** **Gledstanes v. Sandwich** (1842), 4 Man. & G. 995. **Refd.** **R. v. Blunt** (1738), Andr. 293; **R. v. Pasmore** (1789), 3 Term Rep. 199.

792. — To commence in futuro—After former grant in reversion—Void.]—**CURLE'S (AUDITOR) CASE**, No. 790, *ante*.

793. — — — Valid.]—**R. v. KEMPE**, No. 791, *ante*.

794. — — —]—The King may grant an estate in an office to commence *in futuro* or upon a contingency which shall arise out of the inheritance he hath in the office itself.—**CULLIFORD v. CARDONNEL** (1697), as reported in Holt, K. B. 506; 90 E. R. 1178.

Annotation:—**Mentd.** **Layng v. Paine** (1745), Willes, 571.

795. Office granted to two & survivor of them—Valid.]—**CURLE'S (AUDITOR) CASE**, No. 790, *ante*.

796. Office granted to two during pleasure—Death of one grantee.]—If the office of controller of the customs, or any other office of trust, be granted by patent to two persons *durante beneplacito*, the patent is determined by the death of one of the grantees.—**ARRIS v. STUKELY** (1677), 2 Mod. Rep. 260; 86 E. R. 1060.

797. Office from day past—Void for time past—Valid as to future.]—**SHREWSBURY'S (EARL) CASE**, No. 90, *ante*.

798. Grant of Warden of Fleet—Court cautious in passing patent for.]—**LEIGHTON'S CASE**, No. 776, *ante*.

799. Office granted inconsistent with grantee's existing duties—Void.]—The King granted by a lease the lot & cope, & all his mineral rights in the soke of W., to A., & by the same instrument granted to him the office of barnaster within the same, the duties of which could not be discharged by the farmer of the dues:—**Held**: as he was incapable of holding that office, the grant of it was invalid.—**ARKWRIGHT v. CANTRELL** (1837), 7 Ad. & El. 565; 2 Nev. & P. K. B. 582; Will. Woll. & Dav. 686; 7 L. J. Q. B. 63; 2 Jur. 11; 112 E. R. 583.

Construction of grant of office.]—*See* Nos. 725, 726, *ante*.

Grant of power to appoint judicial officers.]—*See* Part IX., Sect. 1, *ante*.

SECT. 6.—GRANTS OF FRANCHISES.

800. Nature of franchises.]—A.-G. v. **BRITISH MUSEUM TRUSTEES**, No. 693, *ante*.

801. How franchises granted.]—The King may erect a fair, or a market, a warren, park, forest, chase, piscary, or the like, by ordinance, without granting it unto any.—**BURGESSES OF PARLIAMENT CASE** (1614), Hob. 14; 80 E. R. 165.

Annotation:—**Mentd.** **Ashby v. White** (1703), 1 Salk. 19.

802. —]—A grant of liberty of a market was made by letters patent enrolled in chancery:—**Held**: if the grant was not under the Great Seal

more than 40 years unchallenged:—**Held**: the charter was not reducible as *ultra vires* of the Crown, or in violation of the public law against general monopolies.—**MCANDREW v. EDINBURGH (SOLICITORS OF)** (1833), 11 Sh. (Ct. of Sess.) 806.—**SCOT.**

it was not good.—**KINGDON v. BARNE** (1587), Cro. Eliz. 117; 78 E. R. 375.

803. What franchises may be granted—In general.]—CONSTABLE'S CASE, No. 885, *post*.

— **Corporations.]—**See CORPORATIONS.

— **Ferries.]—**See FERRIES.

804. — Flotsam & jetsam.]—CONSTABLE'S CASE, No. 885, *post*.

— **Free fisheries.]—**See Nos. 769, 770, *ante*; generally, FISHERIES.

— **Free warren.]—**See COMMONS & RIGHTS OF COMMON, pp. 26, 27, Nos. 322-326, *ante*; & generally, GAME.

— **Game.]—**See GAME.

— **Markets & fairs.]—**See MARKETS & FAIRS.

805. — Municipal franchises—Extension of city boundaries.]—The King, by letters patent, may enlarge the boundaries of a city. B.R. has concurrent jurisdiction with the sessions about repairing bridges.—**R. v. NORWICH CITY (INHABITANTS)** (1719), 1 Stra. 177; 93 E. R. 458.

*Annotations:—*Consd. **R. v. New Sarum Borough** (1845), 7 Q. B. 941; **R. v. Southampton County** (1886), 17 Q. B. D. 424. *Refd.* **R. v. Cumberland County** (1795), 6 Term Rep. 194.

806. — —.]—RUTTER v. CHAPMAN, No. 660, *ante*.

807. — — Right of borough to have magistrates—To exclusion of county justices.]—BLANKLEY v. WINSTANLEY, No. 736, *ante*.

808. — — —.]—By charter the mayor & some of the aldermen of London have jurisdiction in Southwark; but as the charter contains no non-intromittent clause as to the justices of the county of Surrey the latter have a concurrent jurisdiction with the former. Where two sets of magistrates have a concurrent jurisdiction & one appoints a meeting to grant ale licences, their jurisdiction attaches so as to exclude the others appointing a subsequent meeting, but they may all meet together on the first day; but if after such appointment the other set of magistrates meet on a subsequent day & grant other licences their proceeding is illegal & the subject of an indictment.—**R. v. SAINSBURY** (1791), 4 Term Rep. 451; 100 E. R. 1113.

*Annotations:—*Consd. **Brown v. Nicholson** (1858), 5 C. B. N. S. 468; **Lawson v. Reynolds**, [1904] 1 Ch. 718; **R. v. Beacontree J.J.**, [1915] 3 K. B. 388. *Refd.* **R. v. Ellis & Greenwood** (1842), 12 L. J. M. C. 20; **Arnold v. Gausson** (1853), 8 Exch. 463; **Candlish v. Simpson** (1861), 1 B. & S. 357. *Mentd.* **R. v. Bidwell** (1847), 2 Car. & Kir. 564; *Re Royal British Bank* (1857), 29 L. T. O. S. 148.

— — —.]—See, further, LOCAL GOVERNMENT;

— — — **Right of town to choose own sheriff.]—**See SHERIFFS & BAILIFFS.

— **Ports & harbours.]—**See WATERS & WATERCOURSES.

809 — Royal fish.]—CINQUE PORTS (LORD WARDEN) v. R., No. 902, *post*.

See, generally, FISHERIES.

— **Estrays.]—**See COPYHOLDS.

810. — Tolls.]—"Tolls may be good where they appear to have a reasonable commencement. Every prescription to charge the subject with a duty must impart a benefit or recompense to him or else some reason must be showed why the duty is claimed" (HOLT, C. J.).—**WARRINGTON v. MOSELY** (1694), Holt, K. B. 673; 4 Mod. Rep. 319; 90 E. R. 1272; *sub nom.* **WARRINGTON v. MOSELY**, Comb. 295.

*Annotation:—*Mentd. **Manchester Corp'n. v. Lyons** (1882), 47 L. R. 677.

— **Wreck.]—**See Nos. 723, 724, *ante*.

811. Effect of grant—On prescriptive claim to franchise granted.]—A bishop, having free warren by prescription over the demesne & tenemental lands of a manor whereof he was seised *jure ecclesiæ*, accepted a grant from the Crown to himself & successors of free warren over the demesne lands of all his manors in England:—*Held*: even admitting the grant to have the effect of extinguishing the prescription as to the demesne lands, which was doubtful, it could not effect it over the other lands of the manor. *Qu.*: whether & to what extent the doctrine that a grant of a franchise by the Crown within time of memory determines a prescriptive claim to the same franchise is law.—**CARNARVON (EARL) v. VILLEBOIS** (1844), 13 M. & W. 313; 14 L. J. Ex. 233; 153 E. R. 130.

*Annotations:—*Mentd. **Doe d. William IV. v. Roberts** (1844), 13 M. & W. 520; **R. v. Bedfordshire** (1855), 4 E. & B. 535.

812. Franchise returning to Crown—Whether extinguished.]—The King is the originator of all franchises, & when one returns into his hand then it is joined to the Crown & every appendency is defeated (**DEVON, J.**).—**ANON.** (*temp.* 1327-1377), Keil. 138; 72 E. R. 309.

813. — —.]—When the King grants any privileges, liberties, franchises, etc. which were in his own hands if they come again to the King they are merged in the Crown & he has them again *in jure coronæ*. But when such privilege, liberty or franchise was at the beginning created by the King then by the accession of them again to the Crown they are not extinct, nor is the appendency of them severed from the possessions (*per cur.*).—**STRATA MERCELLA (ARBOT OR) CASE** (1591), 9 Co. Rep. 24 a; 77 E. R. 765.

*Annotations:—*Consd. **Wiggon v. Branthwait** (1699), 1 Ld. Raym. 473; **R. v. Capper** (1817), 5 Price, 217; **Northumberland v. Houghton** (1870), L. R. 5 Exch. 127; **Saltash Corp'n. v. Goodman** (1880), 5 C. P. D. 431; **Newcastle v. Workson U. C.**, [1902] 2 Ch. 145; **A.-G. v. British Museum Trustees**, [1903] 2 Ch. 598. *Refd.* **Whistler's Case** (1613), 10 Co. Rep. 63 a; **Holland v. Fisher** (1662), O. Bridg. 181; **Woodward v. Fox** (1691), 2 Vent. 267; **Orby v. Mohun** (1706), 2 Freem. Ch. 291; **Colchester Corp'n. v. Brooke** (1846), 7 Q. B. 339; **Saltash Corp'n. v. Goodman** (1881), 29 W. R. 639; **A.-G. v. Horner**, [1913] 2 Ch. 140. *Mentd.* **Orde v. Moreton** (1609), 1 Bulst. 129; **Wale v. Hill** (1611), 1 Bulst. 149; **R. v. Maidenhead Corp'n.** (1620), Palm. 76; **Darcy v. Jackson** (1621), Palm. 224; **Appleton v. Stoughton** (1638), Cro. Car. 516; **Ely's Case** (1663), 1 Sid. 103; **Beeston's Case** (1664), 1 Sid. 172; **Bankers Case** (1695), Skin. 601; **Anon.** (1698), 12 Mod. Rep. 224; **Anon.** (1706), 1 Com. 150; **Watson v. Quilter** (1843), 11 M. & W. 760.

814. — After grant of immunity by grantee—Re-grant by Crown—Whether immunity extinguished.]—A question arose over a grant of immunity to burgesses their heirs & successors:—*Held*: (1) ancient charters of obscure or dubious meaning should be expounded by contemporaneous usage, & this grant should be expounded by usage to be a grant to the burgesses who were corporators only, & not to the burgrave tenants & their heirs; (2) if the grantee of a royal franchise of toll granted an immunity out of it & the franchise afterwards became extinct by unity of possession in the Crown the immunity would not cease, & if the Crown re-granted the toll the grantee would have to take it still subject to the immunity.—**TEWKESBURY (BAILIFFS, ETC.) v. BRICKNELL** (1809), 2 Taunt. 120; 127 E. R. 1022.

*Annotations:—*Mentd. **North & South Shields Ferry Co. v. Barker** (1848), 2 Exch. 136; **Brocon Corp'n. v. Edwards** (1862), 26 J. P. 614; **Crane v. London Dock Co.** (1864), 10 Jur. N. S. 984; **A.-G. v. Horner** (1912), 28 T. L. R. 522.

Presumption of grants.]—See Sect. 4, *ante*.

Franchise coroners.]—See CORONERS.

PART XIX. SECT. 6.

810 i. What franchises may be granted—Tolls.]—A patent granted a public

toll-bridge, with a planked & macadamised toll-road, together with all toll-gates on the road & the tolls rising therefrom:—*Held*: the patent was

not *ultra vires*, but passed the right & franchise of taking tolls.—**R. v. MILLS** (1868), 17 C. P. 654.—CAN.

SECT. 7.—ACCEPTANCE OF GRANTS.

815. Grant cannot be accepted partially.]—A. & B. join in a petition to the Crown representing an estate to have escheated & procure a grant of it to be made to them:—*Held*: A. could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest. *Semble*: the doctrine of election does not extend to grants from the Crown.—CUMMING v. FORRESTER (1820), 2 Jac. & W. 334; 37 E. R. 656.

816. —.]—A charter granted by the Crown cannot be partially accepted, unless it should appear to be the intention of the Crown that the grantee should have the option to accept in part & reject in part.

A charter vested the right to elect burgesses in the general body of an ancient corpn., & gave a power to make bye-laws to a select body. The general body made a bye-law delegating the power to elect burgesses to the select body:—*Held*: this was a good bye-law; for the power given by the charter to the select body to make bye-laws, did not divest the general body of the right to make such laws, which was incident to it at common law.—LOVELL v. WESTWOOD (1830), 2 Dow & Cl. 21; 6 E. R. 637; *sub nom.* R. v. WESTWOOD, 4 Bli. N. S. 213; 7 Bing. 1, H. L.; *affg.* S. C. *sub nom.* R. v. WESTWOOD (1825), 4 B. & C. 781.

Annotations:—*Refd.* R. v. Attwood (1833), 4 B. & Ad. 481. *Mentd.* Chilton v. London & Croydon Ry. (1847), 16 M. & W. 213.

817. Effect of acceptance—No counterpart executed by grantee.]—An action of covenant will lie for a breach by patentee of the Crown, although he did not sign or seal any counterpart; for his acceptance of the deed shall bind him as strongly as if it had been an indenture.—BRETT v. CUMBERLAND (1619), Cro. Jac. 521; 3 Bulst. 164; 1 Roll. Rep. 359; 79 E. R. 446.

Annotations:—*Consd.* Lyme Regis Corpn. v. Henley (1834), 1 Bing. N. C. 222; Nicholl v. Allen (1862), 1 B. & S. 935. *Refd.* Thursby v. Plant (1669), 1 Saund. 237; City of London v. Vanacre (1699), 12 Mod. Rep. 269. *Mentd.* Norton v. Acklane (1640), Cro. Car. 579; Helier v. Caseborough (1665), 1 Keb. 839; Jenkins v. Hermitage (1674), Freem. K. B. 377; Glover v. Cope (1690), Skin. 296, 305; Bally v. Wells (1769), 3 Wils. 25; Rumsey v. George (1813), 1 M. & S. 176; M'Neillage v. Holloway (1818), 1 B. & Ald. 218.

818. — On pre-existent prescriptive right.]—TRURO CORPN. v. REYNALDS, TRURO CORPN. v. BASTIAN, No. 720, *ante*.

Acceptance of charters by corporations.]—See CORPORATIONS.

SECT. 8.—SECOND GRANT OF SAME SUBJECT-MATTER.

819. No actual surrender of prior grant—Extinguishment of prior grant.]—Queen Elizabeth being seised in fee granted to S. for life rendering a rent but these patents were subsequently restored to be cancelled, the Queen granting another patent accepting the surrender made & granting to S.

for life remainder to W. for life, remainder to J. for life, but without any actual surrender or cancellation of the first patents being effected. The question arose, what was the effect of the omission to surrender on the second patent:—*Held*: there was no surrender but there was extinguishment of the prior grant.—BRETT v. JOHNSON (1605), Lane, 1; 145 E. R. 249.

Annotation:—*Refd.* R. v. Hornbee (1691), Freem. K. B. 331.

820. — Second grant void.]—ST. SAVIOUR'S, SOUTHWARK (CHURCHWARDENS) CASE, No. 821, *post*.

821. — Prior grant delivered up for cancellation—Necessity for actual surrender.]—Queen Elizabeth by letters patent demised the rectory of S. to the corpn. of the churchwardens of S. for 21 years; afterwards the Queen by other letters patent, reciting the former letters patent, & that the churchwardens lately having & now possessing the letters patent & all the estate, interest, etc. had surrendered them to be cancelled, demised to the said corpn. the rectory for 50 years in consideration of the surrender, etc. & also of a fine of £20 paid by the corpn. The corpn. at the time of making the lease for fifty years delivered up the first letters patent to be cancelled, & then paid the officers of the Court the fees due for cancelling & entering a *vacat*, but no *vacat* was made of the enrolment:—*Held*: (1) An actual surrender was not necessary; (2) the delivery of the letters patent in Ch. to be cancelled, by their hands without writing, was sufficient.—ST. SAVIOUR'S, SOUTHWARK (CHURCHWARDENS) CASE (1613), 10 Co. Rep. 68 b; Lane, 21; 77 E. R. 1025.

Annotations:—*As to* (1) *Refd.* Needler v. Winchester (1614), Hob. 220; R. v. Kempe (1694), 1 Ld. Raym. 49; The Bankers Case (1695), Skin. 601; Rutter v. Chapman (1841), 8 M. & W. 1; R. v. Eastern Archipelago Co. (1853), 1 E. & B. 310.

822. Lost surrender presumed.]—A.-G. v. SIMPSON, No. 661, *ante*.

823. Acceptance of second grant—Whether surrender of prior grant.]—If the King grant an office by patent, or make a demise for years, the acceptance of a new patent in the one case, or of a new lease in the other, is no surrender of the first grant.—BROOK (LORD) v. GORING (LORD) (1630), Cro. Car. 197; 79 E. R. 773.

824. Second grant releasing power previously reserved—Second grant not in consideration of prior grant—Prior grant void—Validity of second grant.]—By an ancient Parliament roll, it appeared that the Commons, by their petition exhibited in Parliament, prayed King Edward III. that the charter made to his liege subjects, burgesses of the town of B., & the franchises by him granted to his burgesses should be ratified & confirmed in that Parliament. The answer to the petition was, that it was assented & agreed in Parliament that the franchises whereof the petition made mention should be ratified & confirmed under the King's Great Seal. The charter was ratified by King Edward III. accordingly:—*Held*: the Crown was not prevented by this proceeding in Parliament from granting a new charter to the burgesses of

PART XIX. SECT. 7.

1. Effect of acceptance—Power in subject to surrender grant.]—When a grant has issued from the Crown to a subject, the latter cannot surrender the land or revest it in the Crown by simply declining to hold it any longer.—*Re* ROGERS & BROUGHTON (1888), 10 N. S. W. L. R. 179; 6 N. S. W. W. N. 7.—AUS.

PART XIX. SECT. 8.

m. Grants to different persons.

Second grant void.]—Pltf. claimed under a grant from the Crown, containing a condition that the grant should be void if not settled on within a certain time:—*Held*: a subsequent grant from the Crown for the same locus, under which deft. held, was void.—WHEELOCK v. MCKOWN (1835), 1 Thom. 41; 1 N. S. R. 41.—CAN.

n. —.]—DOE d. PONSFORD v. VERNON (1843), 4 N. B. R. (2 Kerr), 351.—CAN.

o. —.]—S. purchased land

from the Crown, but the patent therefor had not issued to him. Thereafter C. was informed that the land was for sale, & immediately purchased & received a patent:—*Held*: grant to C. void.—STEVENS v. COOK (1864), 10 Gr. 410.—CAN.

p. —.]—Where there are two Crown grants to different parties for the same claim, or overlapping portions of two claims, the earlier must prevail.—VICTOR v. BUTLER (1900), 8 B. C. R. 100; 1 M. M. Cas. 438.—CAN.

B., varying the mode of electing a mayor from that provided for in the charter, recited in the petition to the King in Parliament.

Queen Anne, by charter granted to the burgesses of B., that they should be a body corporate, etc., etc., & released to the corpn. that power of removing its members which had been reserved by a former charter of King Charles II., & released any just cause of complaint which might be against the corpn. for having acted in opposition to it:—*Held*: it did not thereby appear that the Queen granted this charter in consideration of the former charter granted by King Charles II., & the Queen's charter was not therefore void, although the supposed charter of Charles II. did not exist.—*R. v. HAYTHORNE* (1826), 5 B. & C. 410; 8 Dow. & Ry. K. B. 228; 108 E. R. 153.

Whether second grant void for deceit.]—See Sect. 2, sub-sect. 3, B., ante.

Grant of new charter to existing corporations.]—See CORPORATIONS.

SECT. 9.—REVOCATION OF GRANTS.

825. General rule.]—R. v. MUSSARY, No. 602, ante.

826. Right of subject to petition in name of Crown—Patent granted to prejudice of subject.]—R. v. MUSSARY, No. 602, ante.

827. Letters patent of parcel of Duchy of Cornwall—Pleading.]—THE PRINCE'S CASE, No. 33, ante.

828. Express power of revocation reserved—Whether additional power or restriction on prerogative.]—EASTERN ARCHIPELAGO CO. v. R., No. 758, ante.

Revocation of letters patent for inventions.]—See PATENTS & INVENTIONS.

SECT. 10.—STAMP DUTIES ON GRANTS.

See, now, Stamp Act, 1891 (c. 39), ss. 1, 2, Sched. I.

829. Lease from Board of Ordnance.]—A lease from the Board of Ordnance, which purported to be signed, sealed & delivered, being first duly stamped, was not stamped:—*Held*: being a lease from the Crown, it was not necessary that it should be.—*PETRIE v. LAMONT* (1842), 3 Man. & G. 702; Car. & M. 93; 4 Scott, N. R. 335; 11 L. J. C. P. 63; 133 E. R. 1322.

Annotation:—Mentd. Pratt v. British Medical Assocn., [1919] 1 K. B. 244.

Part XX.—Rights of the Crown in relation to Property.

SECT. 1.—DEBTS.

830. Priority of Crown—General rule.]—COKE'S CASE, No. 337, ante.

831. ———.]—Goods of debtor already seized under a *fi. fa.*, but not sold, may be taken under an extent, in chief or in aid.

Where the rights of the Crown & the subject concur, that of the Crown is to be preferred. If however, the right of the subject be complete & perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. But if whilst the right of the subject is still in progress towards completion, the right of the Crown arises, the two rights do come into conflict together at one & the same time, & the consequence in that case is that the right of the Crown ought to prevail (ALDERSON, J.).

At common law the King had very peculiar prerogatives, much beyond the common right of a subject for the recovery of his debts. These prerogatives have, at different times, been controlled & regulated by statutes; but these very statutes testify their existence. Thus, in the statutes of

Magna Carta, 9 Hen. 3, c. 18. . . . Again, the stat. 25 Ed. 3, c. 19. . . . After the passing of this statute, which considerably abridged the ancient prerogative, although a subject might pursue his debtor to judgment, yet he could not sue out execution until the King's debts were paid or secured, the King being entitled to the first execution (TAUNTON, J.).—*GILES v. GROVER* (1832), 9 Bing. 128; 6 Bli. N. S. 277; 1 Cl. & Fin. 72; 2 Moo. & S. 197; 131 E. R. 563, H. L.

Annotations:—Folld. Grove v. Aldridge (1832), 9 Bing. 428. *Distd. Doe d. Hughes v. Jones* (1842), 9 M. & W. 372. *Refd. Godson v. Sanctuary* (1832), 4 B. & Ad. 255; *Balme v. Hutton* (1833), 9 Bing. 471; *Woodland v. Fuller* (1840), 11 Ad. & El. 859; *Playfair v. Musgrove* (1845), 14 M. & W. 239; *Re Johnson, Ex p. Rayner* (1872), 41 L. J. Bey. 26. *Mentd. R. v. Maberley* (1834), 4 Tyr. 345; *Garland v. Carlisle* (1837), 11 Bli. 421; *Grainger v. Hill* (1838), 5 Scott 561; *R. v. Archdall* (1838), 2 J. P. 486; *Bothamley v. Heyward* (1862), 8 Jur. N. S. 1156; *Re Clarke*, [1898] 1 Ch. 336.

832. ———.]—Stat. 33 Hen. 8, c. 39, has not abridged the prerogative of the Crown, & the Crown, when in competition with the subject, is entitled to priority of enforcement of its debts, not only when proceeding by writ of extent under the statute, but also when proceeding by distraint or any other mode analogous to execution.—*A.-G. v. LEONARD* (1888), 38 Ch. D. 622; 57

PART XIX. SECT. 9.

q. Whether power to revoke.]—Pltf. purchased some land from a govt. agent, & obtained receipts for partial payment. Defts. were then living on the land, having made valuable improvements. Thereafter, an order of council was made, that on defts. making the required payments, pltf.'s money should be returned to him, & the sale to him cancelled:—*Held*: the Crown could not at its pleasure change a wrongful occupant into a rightful occupant, to the prejudice of their own vendee.—*DOE d. HENDERSON v. SEYMOUR* (1852), 9 U. C. R. 47.—CAN.

r. Express power of revocation reserved—No inquest of office necessary.]

—The Crown by letters patent granted to A. the right to occupy land for twenty-one years, unless the same should be sooner required by the Crown, on notice of which the grant was to cease and be void:—*Held*: no inquest of office was necessary to terminate A.'s right.—*R. v. HERBERT* (1852), 7 N. B. R. (2 All.) 427.—CAN.

s. License revocable at will—Evidence of revocation.]—When a depasturing license is revocable at the will of the Crown, the occupier becomes an intruder from the moment of revocation, & the uniform & persistent refusal of the Comr. of the Crown to accept rents, fees, & assessments is in itself sufficient evidence of revocation.—*R. v. MCLEAN*, 1 J. R. App. VI.—N.Z.

PART XX. SECT. 1.

830 i. Priority of Crown—General rule.]—Whenever the rights of Crown & subject with respect to debts of equal degree come into competition, the Crown's right prevails, & Crown Remedies & Liability Act, 1890, s. 17 (No. 1080), does not affect priority, but applies to procedure only.—*Re COMMERCIAL BANK OF AUSTRALIA* (1893), 19 V. L. R. 333.—AUS.

t. What constitutes "Crown debt"—How determined.]—In determining whether or not a debt falls under the denomination of a Crown debt, the question is not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State.—*JUDAH v. SECRETARY OF*

L. J. Ch. 860; 59 L. T. 624; 37 W. R. 24; 4 T. L. R. 479.

Annotation:—**Mentd.** A.-G. v. Albany Hotel Co., [1896] 2 Ch. 696.

See, further, CROWN PRACTICE; DISTRESS; EXECUTION.

833. — Only when equal in degree with another debt.—A bond debt had been assigned by the creditor to the King. The debtor on the bond was also liable on two judgments in debt to one Andrew who took out execution for them. Subsequently to this execution the King also took out execution for his debt. The question having arisen as to which execution should be preferred:—*Held*: the King had many prerogatives *pro bono publico*, but under 33 Hen. 8, c. 39, the King's debt was only to be preferred when equal in degree with the competing debt.—A.-G. v. ANDREW (1655), Hard. 23; 145 E. R. 360.

Annotations:—**Consd.** R. v. Giles (1820), 8 Price, 293. **Refd.** R. v. Dickenson (1692), Park. 262; Uppom v. Sumner (1779), 2 Wm. Bl. 1294; Rorke v. Dayrell (1791), 4 Term Rep. 402; R. v. Wells (1807), 16 East, 278; Giles v. Grover (1832), 9 Bing. 128; A.-G. v. Leonard (1888), 38 Ch. D. 622. **Mentd.** Doe d. Davies v. Creed (1829), 5 Bing. 327.

834. — Simple contract debt—Though not of record at death of debtor.—Where a person is indebted by simple contract to the King at his death & that debt is found upon a commission, a *diem clausit extremum* may issue against his estate though he was not debtor to the King by record at his death.

By the common law the King has a prerogative of preference in payment to all his subjects & to be first satisfied; *Quia thesaurus Regis est pacis vinculum et bellorum nervi*. This preference which the King had by the common law, was the foundation of Magna Carta which was only declaratory of the common law (*per CUR.*).—R. v. CURTIS (1750), Park. 95; 1 Ves. Sen. 483; 145 E. R. 724.

Annotations:—**Consd.** R. v. Hodgo (1823), 12 Price, 537. **Refd.** R. v. Smith (1810), Wight. 34.

835. — Partnership assets—Only against separate interest of debtor—& subject to partnership debts.—Upon an extent against one partner the Crown can only take the separate interest of the partner & that liable to the partnership debts.—R. v. SANDERSON (1810), Wight. 50; 145 E. R. 1171.

Annotation:—**Refd.** Spears v. Lord Advocate (1839), 6 Cl. & Fin. 180.

— **In administration proceedings.**—*See* EXECUTORS & ADMINISTRATORS.

— **In bankruptcy proceedings.**—*See* BANKRUPTCY & INSOLVENCY, Vol. IV., p. 479, & Vol. V., pp. 828, 829, Nos. 7029–7034.

— **In proceedings to distrain.**—*See* DISTRESS.

— **In execution proceedings.**—*See* EXECUTION.

836. In prize proceedings.—THE TERGESTEA (1915), 31 T. L. R. 180; 59 Sol. Jo. 530.

See, further, PRIZE LAW & JURISDICTION.

STATE FOR INDIA IN COUNCIL (1886), I. L. R. (12) Calc. 445.—**IND.**

a. — **Not recognisance of tenant.**—The recognisance of a tenant under the ct. & his sureties, is not a debt due to the Crown.—BELL v. TAPE (1837), cited in 1 Sau. & Sc. 488.—**IR.**

b. — **—**—**CREED v. CREED** (1841), 4 I. Eq. R. 299; Fl. & K. 396.—**IR.**

c. — **Not bank balances to credit of boards of education in Newfoundland.**—Bank balances of boards of education are not Crown debts within 58

Vict. c. 3.—**FOX v. NEWFOUNDLAND GOVERNMENT**, [1898] A. C. 667, P. C.—**NFLD.**

d. — **Loan to occupier of land—By Public Works Commissioners.**—A loan to an occupier of land by Public Works Comrs. under Land Law (Ireland) Act, 1881, s. 31 (2), & Landed Property Improvement (Ireland) Acts is a Crown debt.—A.-G. v. HOWLEY, [1914] 1 I. R. 124; 48 I. L. T. 145.—**IR.**

e. — **Purchase annuity payable to Irish Land Commission.**—A purchase annuity payable to the Irish

— **In winding up proceedings.**—*See* COMPANIES.

837. Debt charged on land—Part coming into possession of Crown—Land not discharged.—B. being seised of divers manors in fee became bound to King Henry VI. in £6,000, & afterwards sold certain of the manors to S. & to A. who being attainted of felony & treason the manors came to the King who granted them to X. against whom process is made for answer of this debt. Was the bond by the unity of possession of some manors subject & liable to the bond extinguished:—*Held*: if a commoner had a rent charge, & purchased parcel of the land charged, all the rent was determined. But otherwise of the Queen, if she purchased parcel she could have execution of the other land in the possession of others. Unless she came to the possession of the whole & granted them over, when they were free & discharged of the debt.—BRIDGWATER (EARL) CASE (1583), Sav. 69; 123 E. R. 1017.

838. Right of Crown to charge land with debt—Land purchased jointly for wife's jointure.—

S. & his wife, formerly wife of C., treasurer of the household, were brought into the Exchequer in respect of arrears due to the Queen for his office because they were returned terre-tenants in right of the wife of certain land which was C.'s. No judgment had been given against C. in his lifetime of any debt on account of his office:—*Held*: the terre-tenants were liable to account in the circumstances; though lands purchased by the treasurer jointly to himself & his wife for her jointure were discharged; so if seised in fee he conveyed to both for her jointure before he got the office she should not be charged for this land.—SEYNTLOO'S CASE (1563), 2 Dyer, 225 a; 73 E. R. 497.

Annotations:—**Consd.** R. v. Smith (1810), Wight. 34. **Refd.** Harbert's Case (1584), 3 Co. Rep. 11 b; Devonshire's Case (1607), 11 Co. Rep. 89 a; Fleetwood's Case (1610), 8 Co. Rep. 171 a; Coko's Case (1623), Godb. 289. **Mentd.** Giles v. Grover (1832), 9 Bing. 128.

839. Right of Crown to distrain—Right of person distrained upon to replevy.—If a distress be for any duty to the Crown, the party distrained cannot replevy.—R. v. OLIVER (1717), Bunb. 14; 145 E. R. 578.

Annotation:—**Mentd.** Cawthorne v. Campbell & Lowndes (1790), 1 Anst. 205, n.

See, generally, DISTRESS.

Assignment of.—*See* CHOSES IN ACTION, Vol. VIII., pp. 481, 501, Nos. 497, 499, 641–645.

SECT. 2.—LAND GRANTED SUBJECT TO REVERSION.

840. Whether barrable.—(1) Where the King or Queen grants an estate by letters patent reserving the reversion & the patentee levies a fine or suffers a common recovery the King will not be bound nor his royal proviso defeated; (2) where there is a manor house & demesne land appertaining to it & one lord enters on the land & another on the

Land Commission under the Irish Land Act, 1903, is a Crown debt, & does not fall within Courts (Emergency Powers) Act, 1914, or Postponement of Payments Act, 1914.—**IRISH LAND COMMISSION v. O'NEILL**, [1915] 2 I. R. 66; 48 I. L. T. 239.—**IR.**

PART XX. SECT. 2.

f. **Expectant on estate tail—Redemption of reversion.**—Judicial Commissioner has power to redeem & fix redemption price without consent of Crown—Power to distribute purchase-money if reversion of no appreciable

house, the possession of the house will not be the possession of the demesne, nor *à converso*; (3) where A. leaves land to B. reserving rent & B. pays his rent to C., A. is not disseised unless he wishes.—*CROUCH v. WILLS* (1658), 2 Sid. 74; 82 E. R. 1265.

841. Expectant on estate tail—Whether barrable.]—A reversion to the Crown, expectant on the determination of an estate tail in realty granted by the Crown to a subject for services, being excepted by the Fines & Recoveries Act, 1833 (c. 74), s. 18, from the operation of that Act, & protected by 34 & 35 Hen. 8, c. 20, cannot be barred; & although the consideration is not stated in the grant, it will be presumed after lapse of time—unless the grant on the face of it clearly shows that it is a voluntary gift—& the onus is on those who seek to take the grant out of the statute of Henry VIII. to prove the want of consideration. But where a grant from the Crown shows on the face of it that it is a voluntary gift, the reversion expectant on the estate tail created thereunder is not within the statute of Henry VIII., & is barrable.—*ROBINSON v. GIFFARD*, [1903] 1 Ch. 865; 72 L. J. Ch. 757; 88 L. T. 348; 51 W. R. 551; 19 T. L. R. 337.

Annotation:—Mentd. Re Robinson, McLaren v. Public Trustee (1911), 104 L. T. 331.

842. Expectant on life tenancy—Estate pur autre vie granted by tenant for life—Death of tenant pur autre vie.]—Tenant for life, the reversion to the Queen, grants all his estate to J. S. & afterwards J. S. dies, who has the land, the tenant for life still living?—*Held*: the Queen who is in reversion has the land, the grantor cannot have it against his own grant.—*ANON.* (1584), Sav. 62; 123 E. R. 1013.

Mortgage of—Foreclosure against Crown.]—*See* MORTGAGE.

SECT. 3.—CROWN LEASES AND RENTS RESERVED TO THE CROWN.

843. Right of Crown—To re-enter for non-payment of rent—Without demand for payment.]—*ANON.*, No. 855, *post*.

844. ——— Land in Duchy of Lancaster.]—King Edw. VI. made a lease for years by deed under his Seal of the Duchy of Lancaster to B. of the manors of A. & W. in County of York reserving rents with a condition of re-entry if the rent were in arrear for 40 days after the feasts at which they were payable. It was found by office that the rent, was so in arrear, & by another office it was found that the rent was rendered the last day of the 40 days; & since these two offices found, the officers of the Queen outside the Duchy accepted the arrears & also the rent payable on other feast days incurred since the offices found, & then accepted it in the Duchy, & gave a release to the lessee, & afterwards the Queen wished to avoid the lease:—*Held*: the Queen should have demanded the rent.—*BONNYES CASE* (1584), Moore, K. B. 149; 72 E. R. 498.

value.]—Re CARYSFORT (EARL), [1914] 1 L. R. 96; 48 L. L. T. 14.—*IR.*

g. ——— Power of Land Commission to determine price.]—Land Law (Ireland) Act, 1896, s. 31, as amended by Irish Land Act, 1903, s. 98 (2), enables the Land Commission to determine, without consent of the Comrs. of Woods & Forests, the price, if any, to be paid for the redemption of a Crown reversion expectant on the determination of an estate tail.—

A.-G. FOR IRELAND v. PROBY, [1916] 2 A. C. 468, H. L.—*IR.*

PART XX. SECT. 3.

h. of Crown—To hold personally liable.]—The Crown has a right to demand of the Prévôt of a Prévôté Receveuse personally the payment of the rents due in respect of the fief, whether or not he has received the contributions of his tenants thereto: & there is no oblig-

845. ———.]—Queen Elizabeth made a lease of land for years, reserving rent payable at the Exchequer or into the hands of her bailiffs or receivers, with condition to be void by non-payment of rent, & afterwards granted the reversion to another & his heirs:—*Held*: (1) the grantee, to take advantage of the condition, must demand the rent upon the land; (2) in the case of a common person, if the rent is reserved payable at a place out of the land, to take advantage of the condition, the rent must be demanded at the place where it is appointed to be paid; (3) the Queen shall take advantage of the condition without any demand; otherwise of her grantee; (4) if the King makes a lease without appointing any place, or into whose hands the rent should be paid, the lessee may pay it either at the receipt of the Exchequer, or into the hands of the King's bailiffs or receivers, authorised to the purpose.—*BOROUGH'S CASE* (1596), 4 Co. Rep. 72 b; 76 E. R. 1043; *sub nom.* *BURROUGH v. TAYLOR*, Cro. Eliz. 462; Moore, K. B. 404; *sub nom.* *ANON.*, Gouldsb. 124.

Annotation:—As to (2) Refd. Hassell v. Gowthwaite (1744), Willes, 500.

846. ——— Not so as to defeat own grant.]—The Queen shall not re-enter so as to defeat her own grant.—*CRANMER'S CASE* (1587), Cro. Eliz. 69; 78 E. R. 330.

847. ——— To distrain.]—Grantee of fee-farm rents has the same power of distress as the king had; & so may distrain on other land of the tenant, though not subject to the rent.

The King may reserve rent out of things incorporeal, & may distrain for the rent on any other lands of the tenant; but not on such other lands of the tenant as are let out by tenant, or extended. *Qu.*: if he may distrain on other lands of the tenant under sequestration.—*A.-G. v. COVENTRY CORPN.* (1715), 1 P. Wms. 306; 2 Vern. 713; 24 E. R. 402, L. C.

Annotations:—Mentd. Walker v. Bell (1816), 2 Madd. 21; *Russell v. East Anglian Ry.* (1850), 3 Mac. & G. 104.

848. ——— To reserve rent to stranger.]—The Duke of L. gave to an abbot in *frankalmoigne* the manor of D. reserving £20, & after, the monastery being dissolved, the King gave the manor to the Duke of N. reserving the said £20 to the Ct. of Augmentations, & afterwards the Chancellor of the Duchy directed the £20 to be paid to his monastery parcel of the Duchy, & the King could not give this except under the seal of the Duchy:—*Held*: as the King as one person had the rent & the possession of the land in his hands the grant & the reservation were good to the Ct. of Augmentations, & the Duke was discharged.—*ANON.* (1554), Ben. & D. 9; 123 E. R. 232.

849. ——— To officer removable at will.]—The King cannot reserve rent to an officer, removable at will.—*CASE* (1695), 1 Ld. Raym. 36; 91 E. R. 920.

850. ——— On surrender in middle of quarter—Of term of years at quarterly rent.]—If a tenant for a term of years of the Crown at a quarterly rent surrenders to the Crown in the middle of a quarter, the Crown will not lose the rent as a

on the Crown to furnish him with a list of the persons liable to him for contribution in respect of such rents.—*A.-G. FOR JERSEY v. LE MOIGNAN*, [1892] A. C. 402; 66 L. T. 803.—**CHANNEL ISLANDS.**

k. Relief against forfeiture of lease.]—The ordinary provisions of the law relating to relief against forfeiture of leases, for non-payment of rent, apply to the Crown & its tenants.—*R. v. DALE*, [1906] V. L. R. 662.—**AUS.**

Sect. 3.—Crown leases and rents reserved to the Crown.
Sects. 4, 5 & 6. Part XXI. Sect. 1: Sub-sects.
 1, 2, 3, 4, 5 & 6, A

private person would. If the lease is of land or of something of which the profits accrue from day to day, the Crown will have the profits accrued between the last payment of rent & the surrender, but if the lease is of something of which the profit arises quarterly or annually, then if the lessee surrenders, he will not be liable for the period between the last payment & the surrender.—*R. v. FARMERS OF CUSTOMS* (1628), Litt. 140; 124 E. R. 177.

851. Right of grantee—To re-enter for non-payment of rent—Without demand for payment.]—*BOROUGHES CASE*, No. 845, *ante*.

852. — To distrain.]—A.-G. v. COVENTRY CORPN., No. 847, *ante*.

SECT. 4.—TITHES.

853. Liability of Crown to pay—Monastery land.]—The King does not pay tithes of monastery lands in his own hands, unless the monastery formerly paid them. The King's tenant for life or years pays, but not his tenant at will (*per TANFIELD, C.B.*).—*ANON.* (1602), Moore, K. B. 915; 72 E. R. 994.

Annotation:—Mentd. Osborn's Case (1613), 10 Co. Rep. 130 a.

854. — Ancient demesne of Crown.]—In an action of debt upon the statute of 2 Edw. 6, for tithes of E. P. in K., the general issue was pleaded; & upon a trial at bar:—*Held*: the King was not by virtue of his prerogative discharged of tithes for the ancient demesnes of the Crown; but he was capable of a discharge *de non decimando* by prescription (because he was *persona mixta*) as well as a bishop. But if the King alien any of the lands that he was so discharged of tithes for, his patentee should pay tithes, & not only so, but the prescription was destroyed for ever, though the same lands should afterwards come into the King's hands again, by escheat or otherwise.—*CAMPOST v. —* (1662), Hard. 315; 145 E. R. 475.

SECT. 5.—FORFEITURE OF SUBJECTS' PROPERTY ON CONVICTION.

See CRIMINAL LAW & PROCEDURE.

Forfeiture of ships.]—See ADMIRALTY, Vol. I., p. 156, Nos. 646–648, & generally, SHIPPING & NAVIGATION.

SECT. 6.—OTHER CASES.

Goods without owner.]—See No. 743, *ante*; No. 897, *post*.

855. Crown not bound to offer acquittance or receipt.]—The King is not bound to offer an acquittance to any one, but the other is bound to offer it to the King; as if the King makes a lease for a term of years reserving rent, & the rent falls into arrear, the King may re-enter without any demand made for the rent, this is not so in the case of a common person (*BRIAN, C.J.*).

The King is not bound to offer an acquittance or discharge, still the demand must be made by him. But the King, it is true, is not bound to demand the rent in his own proper person; as a common person would be. In the case of a lease the King shall not enter until the rent be found to be in arrear by office. If the King grants me the rent & the re-entry, I shall not enter without demanding the rent. Moreover, the King can assign his action; or anything which lies in action. This, cannot other persons do (*HUSSEY, J.*).—*ANON.* (1486), Y. B. 2 Hen. 7, fo. 8, pl. 25.

Annotations:—Refd. Page's Case (1589), 5 Co. Rep. 52 a; *The Bankers Case* (1695), Skin. 601.

856. Crown cannot be tenant at will.]—The Queen cannot be tenant at will.—*ANON.* (1704), 6 Mod. Rep. 248; 87 E. R. 996.

Bona vacantia generally.]—See DESCENT & DISTRIBUTION; EXECUTORS & ADMINISTRATORS; TRUSTS & TRUSTEES.

— **On dissolution of corporations.]—**See CORPORATIONS.

Copyholds.]—See COPYHOLDS.

Copyright & printing.]—See COPYRIGHT & LITERARY PROPERTY; PRESS & PRINTING.

Letters patent for inventions.]—See PATENTS & INVENTIONS.

Part XXI.—Hereditary and Private Revenues of the Crown.

SECT. 1.—SURRENDERED REVENUES ARISING FROM CROWN LANDS.

SUB-SECT. 1.—IN GENERAL.

857. Limit of operation of surrender—During life of Sovereign.]—In 1827 George IV. conferred upon Lord Dunglas for life the office of chamberlain & collector of the rents, revenues etc. of the lands & lordship of Ettrick Forest, at a salary exceeding the annual value of such rents & revenues, & charged the deficiency on another part of the hereditary revenues of the Crown of Scotland. In an action commenced in the subsequent reign to reduce or rescind the grant:—*Held*: (1) such grant, though purporting to be the grant of an office, was, in fact the grant of a pension to endure beyond the life of the royal grantor, & was so far an illegal alienation of the Crown property. (2)

The surrender of the hereditary revenues to the use of the public at the beginning of a new reign does not operate beyond the life of the sovereign making the surrender. (3) Where the Crown is resp. on an appeal to the House of Lords it is not the usage for the A.-G. to have a general reply on the part of the Crown. (4) The Lord Advocate or other officer suing on behalf of the Crown is not liable for costs even where the suit is improperly instituted. (5) The Lord Advocate, or other officer appealing to the House of Lords on behalf of the Crown, is not required to enter into recognizances to meet the costs of the appeal.—*LORD ADVOCATE v. DUNGLAS (LORD)* (1842), 9 Cl. & Fin. 173; 4 State Tr. N. S. 737; 8 E. R. 381, H. L.

Annotations:—As to (4) *Refd. The Leda* (1862), 32 L. J. P. M. & A. 58; *R. v. Canterbury*, [1902] 2 K. B.

PART XX. SECT. 6.

l. Crown may take chattel mortgage to secure debt—Through & in name of head of department to which debt due.]—*MOGEE v. SMITH* (1859), 9 C. P. 89.—CAN.

m. Lands forfeited to Crown—

Disposal of.]—Lands taken under a conditional sale & afterwards forfeited to the Crown are not open to a conditional purchase under the Crown Lands Alienation Act, 1861, s. 13. The Crown has under s. 18 the option either to sell them by public auction or to retain them in its own hands.—

BLACKBURN v. FLAVELLE (1881), 6 App. Cas. 628, P. C.—AUS.

n. Lands vested in Crown—May be subject to municipal bye-laws.]—*Ex p. O'NEILL* (1892), 13 N. S. W. L. R. 280; 9 N. S. W. W. N. 79.—AUS.

503. *Generally, Reqd.* O'Connell v. R. (1844), 11 Cl. & Fin. 155; Secretary of State for India v. Sahaba (1859), 13 Moo. P. C. O. 22.

SUB-SECT. 2.—MINES AND MINERALS.

See, generally, MINES, MINERALS & QUARRIES.

858. Mines containing gold or silver—Within realm—Belong to Crown.]—All mines of gold or silver within the realm, whether in the lands of the Sovereign or his subjects, belong to the Sovereign by prerogative, with liberty to dig & carry away the ores thereof & with such incidents thereto as are necessary for the getting of the ore. If a mine contain both gold or silver & base metal, then whether the gold, silver or the base metal be of greater value, both the gold & silver & the base metal belong to the Sovereign; otherwise if the base metal exceed the other in value. But where a mine contains only base metal, the proprietor of the soil shall have the ore. A mine royal, of either character, may be aliened by royal grant.—**CASE OF MINES (1567), 1 Plowd. 313; 75 E. R. 477.**

*Annotations:—***Consd.** A.-G. of British Columbia v. A.-G. of Canada (1889), 14 App. Cas. 295; A.-G. v. Morgan, [1891] 1 Ch. 432. **Reqd.** Rogers v. Brenton (1847), 10 Q. B. 26; Woolley v. A.-G. for Victoria (1877), 2 App. Cas. 163; Lloyd-Jones v. Clark-Lloyd, [1919] 1 Ch. 424. **Mentd.** Alton Woods' Case (1600), 1 Co. Rep. 26 b; Case of Mixed Money (1605), 2 State Tr. 113; Devonshire's Case (1607), 11 Co. Rep. 89 a; Coke's Case (1623), Godb. 289; R. v. Hampden, Ship Money Case (1637), 3 State Tr. 826; Popham v. Woolcot (1666), 1 Sid. 291; R. v. London (Bp.) & Lancaster (1693), 1 Show. 441; R. v. Hornby (1694), 5 Mod. Rep. 29; R. v. Cotton (1751), Park. 112; Iggulden v. May (1806), 7 East, 237; R. v. Smith (1810), Wight. 34; Seaman v. Vawdrey (1810), 16 Ves. 390; A.-G. v. Parsons (1832), 1 L. J. Ex. 103; Giles v. Grover (1832), 9 Bing. 128; R. v. Dover Corpn. (1835), 1 Cr. M. & R. 726; A.-G. v. Briant (1846), 15 M. & W. 169; R. v. Edwards (1853), 9 Exch. 32.

859. Mines containing base metal & gold or silver.]—**CASE OF MINES, No. 858, ante.**

860. Mines containing base metal only.]—**CASE OF MINES, No. 858, ante.**

861. Relaxation of prerogative rights as to gold mines—Not applicable when mine worked as gold mine—Even where gold mingled with other minerals.]—The relaxation of the prerogative title of the Crown as to gold mines effected by 1 Will. & M. c. 30 & 5 Will. & M. c. 6 does not apply to a mine worked simply as a gold mine even where the gold is mingled with other minerals, & such a mine cannot be worked by a subject even on his own land without a Crown licence.

The Crown cannot be called upon to exercise its right of pre-emption until the ore has been cleaned & ready for sale (NORTH, J.).—A.-G. v. MORGAN, [1891] 1 Ch. 432; 60 L. J. Ch. 126; 64 L. T. 403; 39 W. R. 324; 7 T. L. R. 209, C. A.

*Annotation:—***Reqd.** Lloyd-Jones v. Clark-Lloyd, [1919] 1 Ch. 424.

862. Crown need not exercise right of pre-emption—Until ore cleared & ready for sale.]—A.-G. v. MORGAN, No. 861, *ante*.

SUB-SECT. 3.—RIGHT TO FORESHORE AND LAND FORMED BY ALLUVION AND DILUVION.

See WATERS & WATERCOURSES.

PART XXI. SECT. 1, SUB-SECT. 2.

858 i. Mines containing gold or silver—Belong to Crown.]—Gold under land alienated from the Crown is not the property of the owner of the land & neither he nor anybody else has a right as against the Crown to take it.—MILLAR v. WILDISH (1863), 2 W. & W. 37.—AUS.

858 ii. .]—The reasons given for the right of the Crown to gold & silver mines in England, apply equally to the colonies; & accordingly the

prerogative right to gold extends to Victoria.—WOOLEY v. IRONSTONE HILL LEAD GOLD MINING CO. (1875), 1 V. L. R. 237.—AUS

q. Mines containing precious metals—Belong to Crown—Intention to transfer must be clear.]—A conveyance by the province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interests in revenues arising from the prerogative

SUB-SECT. 4.—EXEMPTION OF CROWN PROPERTY FROM RATES, TAXES, ETC.

Harbour duties.]—*See SHIPPING & NAVIGATION.*

Income tax.]—*See INCOME TAX.*

Inhabited house duty.]—*See INHABITED HOUSE DUTY.*

Land tax.]—*See LAND TAX.*

Rates.]—*See RATES & RATING.*

Tolls.]—*See HIGHWAYS, STREETS & BRIDGES.*

SUB-SECT. 5.—GENERAL MANAGEMENT OF CROWN PROPERTY.

863. Position of Commissioners of Woods & Forests—Acting on behalf of executive government—For benefit of public.]—Comrs. appointed under a public Act, to do on behalf of the executive govt. certain things for the benefit of the public, are not liable in the same manner as a private co. is held to be, in consideration of the statute granted to them. Where under 9 & 10 Vict. c. 38 the Comrs. of Woods & Forests had given notice to a landowner that they required his land, & he had sent in his claim for compensation, to which the Comrs. did not agree, & he accordingly required to have a jury summoned to assess the amount, which they refused to do.

On an application for a mandamus:—**Held:** the notice to treat did not operate as a contract by the Comrs., & the mandamus could not be supported.—R. v. WOODS & FORESTS COMRS. (1850), 15 Q. B. 761; 19 L. J. Q. B. 497; 15 L. T. O. S. 561; 15 Jur. 35; 117 E. R. 646.

*Annotations:—***Distd.** R. v. St. Marylebone Vestry (1869), 20 L. T. 697. **Reqd.** Steele v. Liverpool Corpn. (1866), 7 B. & S. 261; Guest v. Poole & Bournemouth Rty. (1870), L. R. 5 C. P. 553; R. v. Income Tax Special Purposes Comrs. (1888), 21 Q. B. D. 313. **Mentd.** Re Nathan (1884), 12 Q. B. D. 461.

864. — Not entitled to sue or liable to be sued—For specific performance of contract entered into.]—The Comrs. of Woods & Forests are not under 7 Geo. 4, c. 77 entitled to sue, or liable to be sued for the specific performance of contracts entered into, with, & by them.—NURSE v. SEYMOUR (LORD) (1851), 13 Beav. 254; 51 E. R. 98.

Sales, purchases & leases of Crown lands by Commissioners.]—*See Sub-sect. 6, A., post.*

SUB-SECT. 6.—STATUTORY POSITION OF CROWN LANDS.

A. Sales, Purchases and Leases.

865. Sale by Commissioners of Woods & Forests—Contract with Crown—Necessity for warrant from Treasury.]—A.-G. v. SITWELL, No. 697, *ante*.

866. Lease—Granted by Commissioners of Woods & Forests—Determination of—Notice signed by two out of three Commissioners.]—A lease, dated Oct. 1825 to which the King was a party, was granted by the Comrs. of his Majesty's Woods & Forests, containing a clause that if the Comrs. for the time being should at any time during the term

rights of the Crown. The precious metals in, upon, & under such lands are not incidents of the land, but belong to the Crown, & under British North America Act, 1867, s. 109, beneficially to the province, & any intention to transfer them must be expressed or necessarily implied.—A.-G. OF BRITISH COLUMBIA v. A.-G. OF CANADA (1889), 14 App. Cas. 295, P. C.—CAN.

r. — .]—ONTARIO MINING CO. v. SEYBOLD (1900), 31 O. R. 386; 32 O. R. 301.—CAN.

Sect. 1.—Surrendered revenues arising from Crown lands: Sub-sect. 6, A., B., C., D. & E. Sect. 2:

be minded or desirous to determine the demise, & of such their mind & desire should cause one calendar month's notice in writing under their hands to be given to the lessee, the lease at the expiration of such notice should cease, determine, & be absolutely void:—*Held*: the lease was determined by a notice signed by two only out of the three comrs. under the Crown Lands Act, 1829 (c. 50), s. 92.—*COOMBES v. DUTTON* (1839), 5 M. & W. 469; 8 L. J. Ex. 278; 151 E. R. 198.

867. — Agreement by Commissioners to grant—Whether specifically enforceable.—*NURSE v. SEYMOUR* (LORD), No. 864, *ante*.

868. — From the Crown—Need not be stamped.—*PETRIE v. LAMONT*, No. 829, *ante*.

Position of Commissioners of Woods & Forests.—*See* Sub-sect. 5, *ante*.

B. Land Registration and Transfer.

869. Escheated land—Legal estate in does not vest in Crown—Under Land Transfer Act, 1897 (c. 65).—Notwithstanding Land Transfer Act, 1897 (c. 65), s. 1, a grant to the nominee of the Crown as administrator to the estate of a person dying intestate & without known relatives, should go, as before the Act, to the personalty only, without making any mention of any real estate to which the deceased may have been entitled at the time of death.—*In the Goods of HARTLEY*, [1899] P. 40; 68 L. J. P. 16; 47 W. R. 287.

Annotation:—*Distd. Talbot v. Jevvers*, [1911] Ch. 363.

870. — — — — ——*In the Goods of BALL* (1902), 47 Sol. Jo. 129.

See, further, CROWN PRACTICE; REAL PROPERTY & CHATTELS REAL.

C. Royal Forests.

871. Whether subject can own a forest.—A subject may have a forest, but cannot have a justice seat. He may have a swanmark etc., & the other etc., & a commission to execute them.—

C's CASE (circa 1630), Het. 60; 124 E. R. 342.

Refd. *Bury St. Edmunds Corp'n. v. Evans* (1739), 2 Com. 643.

872. — — — — ——*R. v. BRIGGS*, No. 134, *ante*.

873. — — — — ——*Quo warranto* for claiming to have a forest & divers liberties. Richard I. being seised of the manors of C. & D. by letters patent, granted them to R. with all their appurtenances, & plans of an exemplification of those letters patent; R. died without issue & W. his brother was his heir to whom King John confirmed the manors, with the same words in effect, & he conveyed etc. to the Earl of S. who enfeoffed etc. his father B.:—*Held*: the original patent of Richard I. did not contain words that would pass a forest.

At the time of the Conquest deer & other wild beasts belonged to the King; but William the Conqueror, licenced his subjects to impark their land; but that did not extend to a forest, so no subject can have a forest; if he did he would be a tyrant, seeing that the law of the forest would be as he pleased, for the charter of the forest does not extend to the forest of the subject & accordingly the subject would have more power than the King himself (MONTAGUE, J.).—*R. v. BRIDGES* (1620), Palm. 60, 87; 81 E. R. 978, 991.

Annotation:—*Refd. R. v. Trinity House* (1662), 1 Keb. 331.

Whether general words in royal grant sufficient to pass forest.—*See* Part XIX., Sect. 3, sub-sect. 3, B., *ante*.

874. Ownership of Crown—Necessity for proof.]

—In a conviction for stealing deer in the King's forest, it is not necessary to show in what capacity the King is seised of the forest, for he is presumed to hold all his property in right of the Crown.—*R. v. SMITH* (1702), 7 Mod. Rep. 77; 87 E. R. 1106.

Annotation:—*Refd. Meath v. Winchester* (1836), 10 Bl. N. S. 330.

875. Epping Forest—Prohibition of waste—Form of order.—By 35 & 36 Vict. c. 95, s. 5, the comrs. were authorised to make orders prohibiting, until the expiration of the session of Parliament next after their final report, any inclosures of land not made before the Act of 1871, & for the prevention of any waste, injury, or destruction of vert, herbage, trees, etc., in or upon any land within the forest subject in their judgment to any forestal or common rights. The comrs. made an order, that until the expiration of the session of Parliament next after their final report all persons be & are hereby prohibited from committing any waste, etc., in or upon the waste lands in the forest within the manor of Theydon Bois including enclosures of waste lands made within twenty years next preceding Aug. 21, 1871, all which lands are distinguished, on a plan annexed, by the colour green. Deft. was the occupier, as tenant, of a piece of land, part of the above waste lands, which was enclosed some time since 1851, & was part of the land coloured green on the plan, & persons claimed right of pasturage over all the waste lands. The order was served upon the deft., & he afterwards committed waste by digging marl & clay, etc.; upon which an indictment was preferred against him for disobeying the order:—*Held*: the order was good; & disobedience to it was a misdemeanor.—*R. v. WALKER* (1875), L. R. 10 Q. B. 355; 44 L. J. M. C. 169; 33 L. T. 167; 40 J. P. 230; 13 Cox. C. C. 91.

Annotations:—*Mentd. Lascelles v. Onslow* (1877), 41 J. P. 436; *Dale's Case, Enraght's Case* (1881), 6 Q. B. D. 376; *Willingale v. Norris*, [1909] 1 K. B. 57; *Wiffen v. Bailey & Romford U. D. C.* (1914), 78 J. P. 187.

876. — Prosecution for malicious damage by commoner—Leave of forest commissioners.—C., a commoner of Epping Forest, being aggrieved with certain encroachments, threatened to destroy fences, & he at once destroyed notice boards put up on the common by the owners of the forest. An injunction was obtained against him for the future, & as to the notice boards, he was summoned under The Malicious Damage Act, 1861 (c. 97), s. 52, & was convicted:—*Held*: (1) one of the convicting justices was not disqualified merely because he had made an affidavit in the action for injunction; (2) no leave was required from the Forest Comrs. to prosecute C.—*R. v. ALCOCK* (1873), 42 J. P. 311.

Halnault Forest.—*See* COMMONS & RIGHTS OF COMMONS, No. 443, *ante*.

Effect of disafforestation.—*See* COMMONS & RIGHTS OF COMMONS, p. 24, *ante*.

Estovers.—*See* COMMONS & RIGHTS OF COMMONS, pp. 17–19, *ante*.

Right of common in forest.—*See* COMMONS & RIGHTS OF COMMONS, pp. 22–24, *ante*.

Right of lopwood.—*See* COMMONS & RIGHTS OF COMMONS, p. 23, Nos. 271, 272, *ante*.

Trees generally.—*See* AGRICULTURE, Vol. II., pp. 61 *et seq.*

D. Copyholds.

See COPYHOLDS.

E. Evidence.

See, generally, EVIDENCE.

Evidence of boundaries generally.—*See* BOUNDARIES, Vol. VII., pp. 311 *et seq.*

877. Extent of Crown land—Produced from

Exchequer—Necessity for production of commission.]
—*Rowe v. Brenton*, No. 321, *ante*.

878. —Produced from office of Land Revenue Record—To prove title of Crown.]—Documents deposited in the office of her Majesty's Land Revenue Records & Inrolments, under the Crown Lands Act, 1832 (c. 1) may be proved by examined copies, in a suit brought to establish the title of the Crown, or its lessee, to lands to which such documents relate, & that although the original purport to be the rental of a former grantee of the Crown. Expired leases by the Crown of lands or mines, tendered in evidence as acts of ownership by the Crown, are so proveable by examined copies, although the originals may not have been enrolled within six months after their execution, under The Crown Lands Act, 1829 (c. 50), s. 63.

An ancient extent of Crown lands, found in the Office of Land Revenue Records, & purporting to have been made by the steward of the Crown lands, is evidence of the title of the Crown to lands therein mentioned, & stated to have been purchased by the Crown of a subject.

Where an entire manor or other district has been in charge to the Crown within sixty years, acts done in different parts of it by different persons, such as the erection & occupation of lime kilns for burning limestone found within the district, & of cottages for the purpose of such occupation, & the sale of the lime so produced, do not amount to such an adverse possession as to displace the title of the Crown to the district, although they may have been continued for above sixty years.—*DOE d. WILLIAM IV. v. ROBERTS* (1844), 13 M. & W. 520; 14 L. J. Ex. 274; 4 L. T. O. S. 174; 153 E. R. 217.

879. Survey of manor—On presentment of tenants—In Duchy of Lancaster—To prove extent & rights of manor.]—To prove the extents & rights of a manor, which had formerly been parcel of the Duchy of Lancaster, a document produced from the Duchy Office was tendered in evidence purporting to be a survey of the manor, made in 1591 while the manor belonged to the Duchy, by the deputy-surveyor of the Duchy, founded on the presentment of the tenants of the manor, at a ct. of survey, & it appeared that Queen Elizabeth had paid the expenses of the survey:—*Held*: it was inadmissible, either as a document made under public authority or as evidence of reputation.

—*EVANS v. TAYLOR* (1838), 7 Ad. El. 617; 3 Nev. & P. K. B. 174; 7 L. J. Q. B. 3; 112 E. R. 602.

Annotations:—*Consd.* *Beaufort v. Smith* (1849), 4 Exch. 450; *Daniel v. Wilkin* (1852), 7 Exch. 429; *Mercer v. Denne*, [1905] 2 Ch. 538.

880. In Duchy of Cornwall—To prove boundaries & customs of manor.]—A document purporting to be a survey of a manor made while it was part of the possessions of the Duchy of Cornwall, & coming out of the proper custody, is admissible as evidence of the boundaries & customs of the manor.—*SMITH v. BROWNLOW (EARL)* (1870), L. R. 9 Eq. 241; 21 L. T. 739; 34 J. P. 293; 18 W. R. 271.

Annotations:—*Consd.* *Evans v. Merthyr Tydfil U. C.*, [1899] 1 Ch. 241. *Mentd.* *Betts v. Thompson* (1870), 23 L. T. 427; *Warrick v. Queen's College, Oxford* (1870), L. R. 10 Eq. 105; *London Sewers Comm. v. Glasco* (1871), 25 L. T. 614; *De la Warr v. Miles* (1881), 17 Ch. D. 535.

881. Grant & survey of manor—Formerly belonging to Crown—Produced for augmentation officer—Whether evidence against lord.]—A bill will lie against the lord by one copyholder, on behalf of himself & the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder, not suing on behalf

of all, cannot maintain such a bill. Where a manor formerly belonged to the Crown, a grant & survey recorded in the Augmentation Office is not evidence for the tenants against the lord.—*PHILLIPS v. HUDSON* (1867), 2 Ch. App. 243; 36 L. J. Ch. 301; 16 L. T. 221; 15 W. R. 370, L. C. *Annotations*:—*Distd.* *Evans v. Merthyr Tydfil U. C.*, [1899] 1 Ch. 241. *Refd.* *Mercer v. Denne*, [1905] 2 Ch. 538.

882. Expired leases—Proved by examined copies—Originals not duly enrolled.]—*DOE d. WILLIAM IV. v. ROBERTS*, No. 878, *ante*.

883. Enrolled documents—Proved by examined copies.]—*DOE d. WILLIAM IV. v. ROBERTS*, No. 878, *ante*.

SECT. 2.—SURRENDERED REVENUES ARISING FROM PREROGATIVE RIGHTS.

SUB-SECT. 1.—BONA VACANTIA GENERALLY.

See, generally, DESCENT & DISTRIBUTION.

Not lost property—Rights of finder.]—*See BAILMENT*, Vol. III., pp. 64 *et seq.*

884. Property of revolted colony.]—Bank stock was purchased by the govt. of M. before the American war, & vested in trustees for the discharge of certain bills. After the peace upon a bill under an assignment by the new State of part of the stock, as a compensation to mtgees. of lands, that were confiscated, the fund, subject to that assignment, was claimed by the new State; & there being no claim under the bills, the whole was claimed by the surviving trustee beneficially: also by the proprietary under the old government; & a specific lien was insisted on in respect of losses by confiscation, occasioned by the refusal of the trustees to transfer:—*Held*: (1) there was no lien; (2) the new State could take only such rights of the old as were within their jurisdiction, the claims of the State & in respect of the confiscations, were the subject of treaty, not of municipal jurisdiction; (3) the fund, no object of the trust existing, must be at the disposal of the Crown.—*BARCLAY v. RUSSELL* (1797), 3 Ves. 421; 30 E. R. 1087, L. C.

Annotations:—*As to* (2) *Distd.* *Dolder v. Bank of England* (1805), 10 Ves. 352. *Consd.* *Dolder v. Huntingfield* (1805), 11 Ves. 283; *Peru Republic v. Dreyfus* (1888), 38 Ch. D. 348. *As to* (3) *Consd.* *Dolder v. Bank of England* (1805), 10 Ves. 352; *Peru Republic v. Dreyfus* (1888), 38 Ch. D. 348. *Refd.* *Hullett v. Spain* (1828), 2 Bl. N. S. 31; *Barrow v. Wadkin* (1857), 24 Beav. 1; *Re Higginson & Dean, Ex p. A.-G.*, [1899] 1 Q. B. 325; *Re Bond, Panes v. A.-G.* (1900), 82 L. T. 612. *Generally, Mentd.* *Brunswick v. Hanover* (1844), 13 L. J. Ch. 107; *Austria v. Day & Kossuth* (1861), 4 L. T. 494; *Esquimaux & Nanaimo Ry. v. Wilson*, [1920] A. C. 358.

On dissolution of company.]—*See COMPANIES*.

On dissolution of corporation.]—*See CORPORATIONS*.

Personally vested in executors—No next of kin.]—*See DESCENT & DISTRIBUTION*.

Undisposed of residue vested in executors.]—*See EXECUTORS & ADMINISTRATORS*.

Escheat of copyholds.]—*See COPYHOLDS*.

SUB-SECT. 2.—PERSONAL ESTATE ON INTESTACY AND FAILURE OF BENEFICIARIES.

See, generally, DESCENT & DISTRIBUTION.

As regards charitable bequests.]—*See CHARITIES* Vol. VIII., pp. 383–385.

On dissolution of companies.]—*See COMPANIES*.

On dissolution of corporations.]—*See CORPORATIONS*.

Right of Crown to grant of administration.]—*See EXECUTORS & ADMINISTRATORS*.

Sect. 2.—Surrendered revenues arising from prerogative rights: Sub-sects. 3, 4, 5, 6, 7 & 8. Sect. 3: Sub-sect. 1, A.

SUB-SECT. 3.—WRECK.

See, generally, SHIPPING & NAVIGATION; WATERS & WATERCOURSES.

What is wreck.]—*See ADMIRALTY, Vol. I., pp. 153–155, Nos. 614–616, 622–625.*

Jurisdiction of Court of Admiralty—As to salvage of property.]—*See ADMIRALTY, Vol. I., pp. 106, 107, 152, 153, Nos. 90, 93, 593–613.*

—As to unclaimed wreck.]—*See ADMIRALTY, Vol. I., pp. 153–155, Nos. 614–629.*

Grant of.]—*See Nos. 723, 724, ante, &, generally, WATERS & WATERCOURSES.*

885. Nature & extent of right of Crown].—Trespass for taking goods which were wreck & cast upon land within the manor & fee of H. which manor & fee, with wreck of the sea within the manor & fee, had by letters patent been granted by the Crown in fee to the father of plff. whose heir he was. Upon special verdict it appeared that parcel of the goods were wrecked & cast upon the shore within the manor, between the high & low water marks, & that the rest of the goods were floating between the high & low water marks:—*Held*: (1) the King should have *flotsam & jetsam & lagan*, when the ship perished or the owners of the goods were not known; (2) a man might have *flotsam & jetsam* by the King's grant, & *flotsam* within high water & low water mark by prescription; (3) Stat. West. 1, c. 4, is but a declaration of the common law, & its provisos as to wreck extend to *flotsam, jetsam, & lagan*. The Act de Praer. Regis, *quod Rex hab. wrec. maris per tot. reg.* is but a declaration of the common law, & notwithstanding it a man may prescribe to have a wreck; (4) by rule of the common law, where no man can claim property in any goods, the King should have them by his prerogative; (5) the King should have wreck, as he should have great fish, etc., because they are *nullius in bonis*, or as he should have *animalia vagantia sive vacantia, scil. estrays*, because none claims the property, & franchise might be granted of such wreck of sea & cattle estraying, conies, hares, partridges, & other savage beasts found in the grantee's soil, fee warrens, & demesne lands.—**CONSTABLE'S CASE** (1601), 5 Co. Rep. 106 a; 77 E. R. 218.

Annotations:—As to (1) Reidd. Dunwich Corpn. v. Sterry (1831), 1 B. & Ad. 831. As to (2) Reidd. Prideaux v. Warne (1673), Freem. K. B. 355; R. v. Forty-nine Casks of Brandy (1836), 3 Hag. Adm. 257; R. v. Two Casks of Tallow (1837), 3 Hag. Adm. 294. As to (3) Reidd. R. & Waller v. Hanger (1615), 3 Bulst. 1; Baldwin v. Elphinstone (1775), 2 Wm. Bl. 1037; Dunwich Corpn. v. Sterry (1831), 1 B. & Ad. 831. As to (4) Reidd. Dunwich Corpn. v. Sterry (1831), 1 B. & Ad. 831. As to (5) Consd. R. v. Wood (1849), 13 L. T. 548. Reidd. Dunwich Corpn. v. Sterry (1831), 1 B. & Ad. 831; R. v. Thurhorn (1849), T. & M. 67. Generally, Mentd. Admiralty Case (1609), 13 Co. Rep. 51; Gold v. Death (1615), Cro. Jac. 381; Onslow v. Horne (1771), 3 Wils. 177; R. v. G. W. Ry. (1842), 3 Q. B. 333; Beaufort v. Swansea Corpn. (1849), 3 Exch. 413; Cargo Ex. Schiller (1877), 2 P. D. 145; Penryn Corpn. v. Holm (1877), 37 L. T. 133; The Gas Float Whitton, [1896] P. 42; The Olympic, [1913] P. 92.

886. —.]—By the ancient common law, all property stranded belongs to the King: after a year & a day it belong to him entirely; & during

that time it is vested in him for protection until the owner can be found. In many cases lords of manors are grantees of the Crown of those royalties & privileges which may be established by the grants themselves, or by immemorial custom; but the grantees cannot stand on higher ground than the King, nor can their grants avail against the general principle of law to which I have adverted. Property of the description of wreck, may by the general law be acquired beneficially for the Crown. It is therefore very properly, in the first instance, placed in the custody of the Admlty.: the proctor of the Admlty. interposes for its protection, until a claim is given; but as soon as a lawful owner appears, he withdraws his claim; the right of the Crown to the property is then gone; the ship & goods are restored, & the charges of the Admlty. are paid. The disbursements of the officers of the Crown are made for the preservation of the property; when that is claimed, they are entitled to be indemnified (**LORD STOWELL**).—**AUGUSTA (OR EUGENIE)** (1822), 1 Hag. Adm. 16.

Annotations:—Reidd. Dunwich Corpn. v. Sterry (1831), 1 B. & Ad. 831; R. v. Forty-nine Casks of Brandy (1836), 3 Hag. Adm. 257.

Rights of lord of manor to.]—*See COPYHOLDS.*

887. Wreck of the sea is land revenue.]—*R. v. FORTY-NINE CASKS OF BRANDY, No. 653, ante.*

SUB-SECT. 4.—TREASURE TROVE.

888. General rule.]—The Crown is *prima facie* entitled to treasure trove, & it is not necessary that an inquest should be held for the purpose of informing the Crown as to its rights; but its title may be displaced by a grant to a subject of the franchise of treasure trove.—**A.-G. v. MOORE**, [1893] 1 Ch. 676; 62 L. J. Ch. 607; 68 L. T. 574; 41 W. R. 294; 9 T. L. R. 144; 37 Sol. Jo. 132; 3 R. 213. *Annotation:—Mentd. A.-G. v. Albany Hotel Co., [1896] 2 Ch. 696.*

889. —.]—*A.-G. v. BRITISH MUSEUM TRUSTEES, No. 693, ante.*

Inquests on treasure trove.]—*See CORONERS.*

Concealment of treasure trove.]—*See CRIMINAL LAW & PROCEDURE.*

Grant of treasure trove.]—*See No. 693, ante.*

SUB-SECT. 5.—WAIFS.

890. Not incident to a leet — Appurtenant to grant from King.]—Waifs & strays are not necessarily incident to a leet but they may be appurtenant to it by grant from the King; for the original prerogative is in the Crown, & comes from thence to the subject at the pleasure of the King.—**J. v. TEWKESBURY (ABBOT)** (1493), Y. B. 8 Hen. 7, fo. 1, pl. 1.

Annotations:—Reidd. R. v. Stafferton & Brown (1611), 1 Bulst. 54; Legat's Case (1612), 10 Co. Rep. 109 a; R. v. Kemp (1695), 12 Mod. Rep. 77. Mentd. Wrottesley v. Adams (1559), 1 Plowd. 189; Griesley's Case (1588), 8 Co. Rep. 38 a; Luttrell's Case (1601), 4 Co. Rep. 84 b; Gee v. Freedland (1625), Cro. Car. 47; Swyft v. Eyres (1639), Cro. Car. 546; R. v. Trinity House (1662), 1 Keb. 331; R. v. Huggins (1730), 2 Stra. 883; Hanbury v. Jenkins (1901), 70 L. J. Ch. 730.

PART XXI. SECT. 2, SUB-SECT. 3.

885 i. Nature & extent of right of Crown.]—The officers of Excise & Customs have the right of custody of all stranded vessels, & the goods on board of such vessels, for behoof of the owners thereof. But they have no right to interfere with those holding the appointment of vice-admiral from the Crown, in regard to the exclusive custody of wrecks, & goods going under

the denomination of jetsam, flotsam, & lagan.—**CUSTOMS & EXCISE COMRS. v. DUNDAS (LORD)** (1812), 17 Fac. Coll. 38.—**SCOT.**

885 ii. —.]—By 12 Anne, c. 18, ss. 1 & 2, the custody of the goods saved from vessels stranded or run on shore, & not claimed within twelve months, is given to the officers of Customs. By s. 9, the right of the Crown to

wrecks is reserved. Where a vessel, without any living creature on board, had been driven against a precipitous cliff, & the timbers & cargo washed on shore at some distance:—*Held*: this was not to be considered as the case of a vessel stranded or run ashore, but that it was a wreck, & the goods belonged to the donatory of the Crown.—**BREADALBANE v. SMITH** (1850), 12 Dunl. (Ct. of Sess.) 602.—**SCOT.**

891. What are.]—FOXLEY'S CASE, No. 892, *post*.

892. —.]—If a man steals goods & brings them into a manor & there leaves them, in a house or in the custody of any one, or hides them, & afterwards flies, these goods are not waif. Waif is where the felon in pursuit waives the goods, or from fear of being apprehended flies & waives the goods. If the thief in his flight waives goods they are forfeited, if the felon on fresh suit is not attainted at the suit of the owner. Waif, estray, treasure, trove, wreck, etc. which may be gained by usage without record may be prescribed for.—FOXLEY'S CASE (1600), 5 Co. Rep. 109 a; 77 E. R. 224; *sub nom.* FOXLEY v. ANNESLEY, Cro. Eliz. 693; Moore, K. B. 572.

Annotations :—*Refd.* Strata Mercella Case (1591), 9 Co. Rep. 24 a; Daw v. Swayne (1669), 1 Mod. Rep. 4. *Mentd.* Searle v. Williams (1618), Hob. 288; R. v. Polwart (1841), 1 Q. B. 818; Thomas v. R. (1874), 44 L. J. Q. B. 9.

893. —.]—Goods waived are those which are stolen, which, the felon being pursued, for danger of apprehension waives & flies.—DICKSON'S CASE (*circa* 1633), Het. 64; 124 E. R. 346.

Seizure of, by lord of manor.]—See COPYHOLDS.

SUB-SECT. 6.—ESTRAYS.

See, generally, COPYHOLDS.

894. General rule.]—If any man's cattle stray into the King's manor: so, if they stray into the manor of any other lord, who has title to estrays by prescription, or grant, & continue there for a year & a day being proclaimed at the next markets & churches without challenge, the property is vested in the lord.—ANON. (1365), Y. B. 39 Edw. 3, fo. 3, pl. 13.

Annotations :—*Refd.* Anon. (1571), 3 Dyer, 317 b; Pleydell v. Gosmoore (1622), Hut. 67. *Mentd.* St. Albans Corp'n. v. Dobbins (1672), Freem. K. B. 36.

895. —.]—An estray belongs to the King of common right.—HASLEWOODS CASE (1591), Owen, 13; 74 E. R. 864.

896. —.]—CONSTABLE'S CASE, No. 885, *ante*.

897. —.]—The reason of estrays was, because when there is none that can make title to the thing, the law gives it to the King, if the owner doth not claim it within a year & a day.—TAYLOR & JAMES' CASE (1607), Godb. 150; 78 E. R. 91.

Annotation :—*Refd.* Henly v. Welch (1706), 11 Mod. Rep. 89.

898. Not incident to a leet.]—J. v. TEWKESBURY (ABBOT), No. 890, *ante*.

899. What may be—Swan.]—CASE OF SWANS, No. 901, *post*.

900. User of estray.]—Trespass for taking away a gelding *pretii* five pounds is good on a general demurrer. In trespass for taking & carrying away a gelding, if deft. justify as for an estray, a replication that deft. used the gelding is not a departure; for he is thereby rendered a trespasser *ab initio*. A stray horse taken *damage feasant* cannot be used.—BAGSHAW v. GOWARD (1607), Cro. Jac. 147; Yelv. 96; 79 E. R. 129.

Annotations :—*Refd.* Lawton v. Ward (1696), 1 Ld. Raym. 75; Vapour v. Edwards (1701), 12 Mod. Rep. 658; Gates v. Bayley (1766), 2 Wils. 313; Dye v. Leatherdale & Simpson (1769), 3 Wils. 20; Atkinson v. Teasdale (1772), 2 Wm. Bl. 817. *Mentd.* R. v. Cotton (1751), Park. 112; Sayre v. Rochford (1777), 2 Wm. Bl. 1165; Clark v. Gilbert (1835), 2 Scott, 520.

Recovery of estrays.]—See ANIMALS, Vol. II., p. 222, Nos. 149–153.

Damage feasant.]—See DISTRESS.

SUB-SECT. 7.—FISHERIES AND ROYAL FISH.

See, generally, FISHERIES; WATER & WATER COURSES.

901. What are royal fish—Whales & sturgeons.]

—A prescription to have all wild swans, which are *feræ naturæ*, & not marked, building their nests, breeding, & frequently within a particular creek, is not good. All white swans not marked, having gained their natural liberty, & swimming in an open & common river, may be seised to the King's use by his prerogative. A swan is a royal fowl, & whales & sturgeons are royal fish. A swan may be an estray.—CASE OF SWANS (1592), 7 Co. Rep. 15 b; 77 E. R. 435.

Annotations :—*Mentd.* Lyster v. Home (1639), Cro. Car. 544; Davies v. Powell (1738), Wils. 46; Hannam v. Mockett (1824), 4 Dow. & Ry. K. B. 518; R. v. Robinson (1859), 8 Cox, C. C. 115; Blades v. Higgs (1865), 11 H. L. Cas. 621.

902. —.]—Royal fish found & taken within the precincts, limits, liberties, or jurisdiction of the Cinque Ports, or their members, belong to the Lord Warden. The right of the Sovereign to royal fish, by which appellation whale & sturgeon are characterised, is a right as clearly established as any of the prerogatives of the Crown. A whale, found on the shore, or caught near the coasts, of Great Britain, is to be considered not only as being, but as having always been, the property of the Crown; property, indeed, so inherent in the Crown, that by a species of legal fiction, it is to be restored to the King as its rightful owner, *veterem ad dominum debere reverti*. Although the whale vest in the Crown in virtue of its prerogative, yet the Sovereign may transfer this ancient perquisite to another person.—CINQUE PORTS (LORD WARDEN) v. R. (1831), 2 Hag. Adm. 438; 2 State Tr. N. S. App. 1014.

Annotations :—*Refd.* The Gas Float Whitton, [1895] P. 301. *Mentd.* R. v. Forty-nine Casks of Brandy (1836), 3 Hag. Adm. 257.

903. — Great fish.]—CONSTABLE'S CASE, No. 885, *ante*.

904. Rights of Sovereign to royal fish—Whale found on shore or caught near coasts of Great Britain.]—CINQUE PORTS (LORD WARDEN) v. R., No. 902, *ante*.

Grant of.]—See Nos. 769, 770, 901, 902, *ante*.

SUB-SECT. 8.—ROYAL SWANS.

905. General rule.]—CASE OF SWANS, No. 901, *ante*.

SECT. 3.—REVENUES OF HEREDITARY NATURE RETAINED BY THE CROWN.

SUB-SECT. 1.—REVENUES OF THE DUCHY AND COUNTY PALATINE OF LANCASTER.

A. Title to the Duchy.

906. General rule—Privileges of King as Duke of Lancaster—Not distinguishable from prerogatives as King of England.]—ALCOCK v. COOKE, No. 612, *ante*.

907. Advowson in right of Duchy—Crown not dispossessed by usurpation.]—The Crown shall not be dispossessed by usurpation of an advowson in right of the Duchy of Lancaster.—R. v. YORK (ARCHBP.) & BUCK (1591), Cro. Eliz. 240; 78 E. R. 496; *sub nom.* R. & YORK'S (BP.) CASE, 1 Leon. 226.

Annotations :—*Consd.* Alcock v. Cooke (1829), 5 Bing. 340. *Refd.* Dyke v. Walford (1846), 5 Moo. P. C. C. 434. *Mentd.* R. v. Archdall (1838), 2 J. P. 486.

Bona vacantia.]—See DESCENT & DISTRIBUTION.

B. Distinction between the Duchy and the County Palatine.

Royal grants generally, see Part XIX., *ante*.

908. Whether Seal of Duchy necessary to grant

Sect. 3.—Revenues of hereditary nature retained by the Crown: Sub-sect. 1, B. & C.; sub-sect. 2, A.,

—Of fair—Within possessions of Duchy—Outside County Palatine.]—(1) The grant of a fair within the possessions of the Duchy, but outside the County Palatine, of Lancaster, by letters patent under the great seal is good; (2) an office, parcel of the possessions of the Duchy, must be granted under the Seal of the Duchy; (3) the grant of a ward within the Duchy under the Great Seal is not good; (4) corpns. cannot be made within the Duchy & out of the County Palatine by the Duchy Seal but they can be made by the King within the County Palatine by the Duchy Seal, because the Duke of Lancaster had *jura regalia*.

Possessions ought to pass under the Duchy Seal but Royal Franchises, such as a Fair, out of the County Palatine & within the Duchy ought to pass by the Great Seal.—*ASTILL v. CLARKE* (1698), 2 Lut. 1233; 1 Ld. Raym. 341; 125 E. R. 684.

See, further, MARKETS & FAIRS.

909. — Of office—Parcel of Duchy.]—*ASTILL v. CLARKE*, No. 908, *ante*.

910. — Of ward—Within Duchy.]—*ASTILL v. CLARKE*, No. 908, *ante*.

911. — Of lease—Of forfeited lands in County Palatine—Forfeiture accruing jure coronae.]—Lands lying in the County Palatine of Lancaster, became forfeited for being granted to superstitious uses, & afterwards A. obtained a lease thereof under the Great Seal; this was a good lease, & need not be under the Duchy Seal. The forfeiture accruing to the King *jure coronae*, & not as Duke of Lancaster; & the estate therefore being no part of the possessions of the Duchy when the lease was made.—*WOOLLASTON v. A.-G.* (1715), 5 Bro. Parl. Cas. 1; 2 E. R. 494, II. 1.

912. What may be created by Duchy Seal—Not corporations—Within Duchy—Out of County Palatine.]—*ASTILL v. CLARKE*, No. 908, *ante*.

See, further, CORPORATIONS.

C. Management of Duchy Lands and Revenue.

913. Leases by King of Duchy lands—Not voidable for nonage of King.]—Leases made by the King of lands of the Duchy of Lancaster are not voidable for the nonage of the King, inasmuch as they pass from his person as King, & not as duke, for in the title of King the name of duke is merged.—*ANON.* (1561), 2 Dyer, 209 b; 73 E. R. 462.

SUB-SECT. 2. — REVENUES OF THE DUCHY OF CORNWALL.

A. Title to the Duchy.

914. Instrument creating Duchy—Charter made by authority of Parliament.]—*THE PRINCE'S CASE*, No. 33, *ante*.

915. — What granted by—Stannaries of Cornwall & Devon.]—The charter 11 Edw. 3, Mar. 17, 1337, granted to Prince Edward, the first Duke of Cornwall, the Stannaries of Cornwall & Devon.—*VICE v. THOMAS* (1842), Smirkes Rep. App., pp. 20, 21.

*Annotations:—**Refd.* Gaved v. Martyn (1865), 19 C. B. N. S. 732. *Mentd.* Haigh v. Jaggard (1845), 2 Coll. 231; Rogers v. Brenton (1847), 10 Q. B. 26; Talbot v. Hope Scott (1858), 4 K. & J. 96.

916. — Rights of Crown in foreshore of Cornwall—Not merely foreshore attached to manors.]—The charter of 11 Edw. 3, as interpreted by 21 & 22 Vict. c. 109, conveyed to the Duke of

Cornwall all the rights of the Crown in the foreshore of the county of Cornwall, & not merely the foreshore attached to the manors granted by the charter.—*PENRYN CORPN. v. HOLM* (1877), 2 Ex. D. 328; 46 L. J. Q. B. 506; 37 L. T. 133; 25 W. R. 498.

See, further, WATERS & WATERCOURSES.

Devolution of Duchy.]—*See* Part IV., Sect. 4, sub-sect. 1, *ante*.

917. Estate of Duchy vested in Duke—In Crown when no Duke—Peculiar interest of Crown.]—*ROWE v. BRENTON*, No. 321, *ante*.

B. General Powers of Management.

918. By King when no Duke in existence—Effect of birth of Duke—On leases made.]—If the King let the land, the lease is void when the Prince is born. But if he present to an advowson, the clerk continues.—*ATKINS v. MOUNTAGUE* (1671), 1 Cas. in Ch. 214; 22 E. R. 768.

919. — On presentation to advowson.]—*ATKINS v. MOUNTAGUE*, No. 918, *ante*.

920. Duke not bound—By laches or prescription.]—The Prince of Wales has a prerogative to protect the Duke of Cornwall from the Statutes of limitation running against them. The Duchy is an estate which by virtue of a charter given, is deemed to have the effect of an Act of Parliament, is vested in the Crown, purged from all disseisins or laches incurred by any preceding Dukes of Cornwall.—*A.-G. v. PLYMOUTH CORPN.* (1754), Wight. 134; 145 E. R. 1202.

*Annotation:—**Refd.* *A.-G. to Prince of Wales v. Crossman* (1866), L. R. 1 Exch. 381.

921. Right of Duke—To file English information for intrusion—On land parcel of the Duchy.]—The Prince of Wales may file an English information of intrusion by his A.-G., for lands parcel of the Duchy of Cornwall.—*A.-G. TO PRINCE OF WALES v. ST. AUBYN* (1811), Wight. 167; 145 E. R. 1215.

*Annotations:—**Consd.* *A.-G. v. Barker & Hodgson* (1872), 26 L. T. 34. *Refd.* *A.-G. to Prince of Wales v. Crossman* (1866), L. R. 1 Exch. 381; *A.-G. v. Constable* (1879), 27 W. R. 661. *Mentd.* *Bennett v. Neale* (1811), Wight. 324; *A.-G. v. London Corpn.* (1845), 8 Beav. 270; *Stanley v. Wild*, [1900] 1 Q. B. 256.

922. — To chose his venue.]—An information was filed by the A.-G. to the Prince of Wales, to recover dues payable in Devon to the Prince as Duke of Cornwall, & the venue was laid in M. On an application by deft. to change the venue to D., it appeared that all the witnesses to facts resided there, but that, as the deft. disputed that the dues were payable to the Prince in right of the Duchy, the records of the office of the Duchy in London would have to be produced at the trial:—*Held*: on the above facts, & on the ground that the Crown would have a right to allege an interest in the suit, & to claim a trial at bar, application should be refused. *Semle*: (1) such a suit is in the nature of a transitory action, & the Crown filing the information, would be entitled to lay & keep the venue where it pleased; (2) the Prince of Wales, suing as Duke of Cornwall, would have the same right.—*A.-G. TO PRINCE OF WALES v. CROSSMAN* (1866), L. R. 1 Exch. 381; 4 H. & C. 568; 35 L. J. Ex. 215; 14 L. T. 856; 12 Jur. N. S. 712; 14 W. R. 996.

*Annotation:—**As to* (1) *Consd.* *Dixon v. Farror* (1886), 17 Q. B. D. 658.

— To obtain letters of administration—To intestate dying in Cornwall.]—*See* DESCENT & DISTRIBUTION.

923. Auditor of Duchy—Nature of office.]—*ROWE v. BRENTON*, No. 321, *ante*.

C. Enrolment of Leases.

924. Enrolment of lease by King vacante ducatu or by Duke—*Prima facie* evidence.]—ROWE *v.* BRENTON, No. 321, *ante*.

D. Mining Rights in Assessionable Manors.

See, generally, MINES, MINERALS & QUARRIES.

925. Right of conventional tenants—To renew estate—From seven years to seven years.]—ROWE *v.* BRENTON, No. 321, *ante*.

926. — To minerals—Onus of proof.]—ROWE *v.* BRENTON, No. 321, *ante*.

927. Assessionable Manors Acts, 1844 (c. 105)—Effect of.]—A.-G. *TO* PRINCE OF WALES *v.* COLLOM, No. 338, *ante*.

SECT. 4.—REVENUES OF THE PRINCIPALITY OF SCOTLAND.

See Cases infra.

SECT. 5.—CROWN PRIVATE ESTATES.

928. King bound by statute *De Donis*.]—The King is bound by the stat. *De Donis* as well as a common person. Therefore if a remainder in tail is limited to the King, & for default of issue to the right heirs of A. this is an estate tail in the King, & he shall not be at liberty to take it as a fee-simple conditional, as before the stat. *De Donis*, & so to have power to alien after issue had, but upon failure of issue he in remainder in fee may well enter.—WILLION *v.* BERKLEY (1561), 1 Plowd. 227; 75 E. R. 345.

*Annotations:—*Refd. Heydon's Case (1584), 3 Co. Rep. 7 a; Strata Mercella Case (1591), 9 Co. Rep. 24 a; Anderson's

Case (1597), 7 Co. Rep. 21 a; Fine Levied by the King Tenant in Tail Case (1605), 7 Co. Rep. 32 a; Priddle & Napper's Case (1612), 11 Co. Rep. 8 b; Sutton Hospital Case (1612), 10 Co. Rep. 1 a; Whistler's Case (1613), 10 Co. Rep. 63 a; Bankers Case (1695), Skin. 601. *Mentd.* Sadler's Case (1588), 4 Co. Rep. 54 b; Alton Woods' Case (1600), 1 Co. Rep. 26 b; Ecclesiastical Persons Case (1601), 5 Co. Rep. 14 a; Atkins *v.* Longvile (1604), Cro. Jac. 50; Prince's Case (1606), 8 Co. Rep. 1 a; Rutland's Case (1606), 6 Co. Rep. 52 b; Calvin's Case (1609), 7 Co. Rep. 1 a; Turnor's Case (1610), 8 Co. Rep. 132 a; Peytoe's Case (1611), 9 Co. Rep. 77 b; Seymour's Case (1612), 10 Co. Rep. 95 b; Magdalen College Case (1616), 11 Co. Rep. 66 b; Winchcombe *v.* Winchester & Pulleston (1616), Hob. 165; R. *v.* Hampden, Ship Money Case (1637), 3 State Tr. 826; Butt's Case (1660), 7 Co. Rep. 23 a; Wiseman *v.* Cotton (1662), T. Raym. 76; R. *v.* London (Bp.) & Lancaster (1693), 1 Show. 441; Banbury *v.* Wood (1703), 1 Salk. 5; A.-G. *v.* Allgood (1743), Park. 1; R. *v.* Berkley & Bragge (1754), 1 Keny. 80; Wolferstan *v.* Lincoln & Whitehead (1763), 2 Wils. 174; Doe *d.* Hayne *v.* Redfern (1810), 12 East, 96; Holloway *v.* Berkeley (1826), 6 B. & C. 2; Meath *v.* Winchester (1836), 3 Bing. N. C. 183; A.-G. *v.* Donaldson (1842), 10 M. & W. 117; Crofts *v.* Middleton (1856), 27 L. T. O. S. 114; Rustomjee *v.* R. (1876), 1 Q. B. D. 487.

929. When King tenant in tail—Right to bar estate tail.]—The King being tenant in tail by a gift made to some of his ancestors being subjects, may by fine levied on a grant & render bar the estate tail: but after the render made it seems necessary to have letters patent to grant to the conusee by express words, that he may enter into the land. Where the King claims in respect of his natural capacity as heir of the body of a subject *per formam doni*, he shall be bound by an Act of Parliament. But where he claims in his Royal & politic capacity, a general Act shall not bind him, unless he be expressly named, except in special cases.—CASE OF A FINE (1604), 7 Co. Rep. 32 a; 77 E. R. 459.

*Annotation:—*Refd. R. *v.* London (Bp.) & Lancaster (1693), 1 Show. 441.

PART XXI. SECT. 4.

a. Gift relating to lands of Principality—By King—When Prince—Must be made as Prince.]—A gift of non-entry, relative to the Principality, was contended to be null, because given by the King, whereas the lands were holden of the Prince. Deft. answered that it was given when the King himself was Prince. Pltf. replied that the King should have designed himself Prince in the gift & given it as Prince:—*Held*: the gift was null.—JOHNSTON *v.* RICCARTON (1608), Mor. Dict. 11685.—SCOT.

t. ——— Must be as admin-

istrator to Prince—Must mention that lands are of Principality where no Prince existent.]—Lands pertaining to the Principality cannot be disposed by the King, there being a Prince, except by the King as administrator to the Prince. Where there is no Prince, there is no necessity to dispoise, but as King, but the disposition should mention that the lands pertained & were of the Principality.—HAMILTON *v.* BARGANY VASSALS (1626), Mor. Dict. 6622, 11686.—SCOT.

a. Rights of King when no Prince existent.]—P. having obtained the gift

of the marriage of the Laird of L. by holding lands of the King as Steward & Prince of Scotland, pursued declaration for the avail of the marriage. Deft. alleged *absolutor* on the ground that no marriage was due, the Prince being the King's vassal & subject. It was answered that as there was no Prince existent, the Principality belonged to the King & all the casualties thereof fell to the King *proprio jure*:—*Held*: the King had right to the simple marriage holden of him as Prince while there was no Prince existent.—PURVES *v.* LUSS (LAIRD) (1680), Mor. Dict. 8542.—SCOT.

CONSTRUCTION OF DEEDS.

See DEEDS AND OTHER INSTRUMENTS.

CONSULAR COURTS AND CONSULAR OFFICERS.

See CONFLICT OF LAWS ; CONSTITUTIONAL LAW.

CONTAGIOUS DISEASES.

See ANIMALS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

END OF VOL. XI.

